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The Constitution of the United States.

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

Abbreviations

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

C. C. P. Code of Civil Procedure (1868)
C. S. Consolidated Statutes of North Carolina (1919, 1924)
Code. The Code of North Carolina (1883)
R. C. Revised Code of North Carolina (1854)
R. S. Revised Statutes of North Carolina (1837)
Rev. Revisal of 1905
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Division II. Courts and Civil Procedure.
Division III. Criminal Law and Procedure.
Division IV. Motor Vehicles.
Division V. Commercial Law.

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**Art. 1. Probate Jurisdiction.**

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

**Character of Duties.**—The powers and jurisdiction exercised by the clerk pursuant to this section are not those of a servant or ministerial officer or exercised as and for the superior court, but those of an independent tribunal of original jurisdiction. Edwards v. Cobb, 95 N. C. 4, followed in In Re Bowman's Estate, 121 C. 320, 188 S. E. 860, and cases cited.

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

**Jurisdiction Exclusive.**—Jurisdiction to appoint an administrator of a deceased person, who has died intestate, and to issue letters for the administration of his estate and to issue letters for the administration of his estate as and for the heir at law, are conferred by this section exclusively upon the clerk of the Superior Court of the county in which decedent was domiciled at or immediately previous to his death. Bank v. Commissioners of Yancey, 195 N. C. 673, 680, 681, 143 S. E. 325, and cases cited.

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

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

Clerk May Vacate Order Allowing Will to Probate.—The clerk of the superior court, in his probate jurisdiction, has the power to vacate a previous order admitting a will to probate in common form on motion aptly made when it is clearly made to appear that the order of probate was improvidently granted, or that the court had been imposed upon and misled as to the essential and true conditions of the case. In re Smith's Will, 218 N. C. 161, 10 S. E. (2d) 677.

Collateral Attack.—When the clerk under this section has general jurisdiction of the subject matter of the inquiry, a decree appointing an executor or administrator may not be collaterally attacked. Batchelor v. Overton, 158 N. C. 395, 74 S. E. 20; Fann v. North Carolina R. Co., 155 N. C. 136, 71 S. E. 81; Tyler v. Blades Lumber Co., 188 N. C. 268, 124 S. E. 365. But where jurisdictional facts were lacking, it can be so attacked. Reynolds v. Lloyd Cotton Mills, 177 N. C. 412, 99 S. E. 240, and cases cited. And see Vance v. Southern R. Co., 138 N. C. 460, 462, 50 S. E. 860, where the court, after finding that jurisdiction is presumed, declares: "We do not mean to say that the validity of the letters cannot be questioned collaterally, the existence of such assets and their proper situs being jurisdictional matter."

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

A clerk has jurisdiction to appoint an administrator where the affidavit of the applicant presumes the death of the decedent from his absence of seven years and the lack of communication from him. The order and appointment can only be avoided by showing the person not to be in fact dead. Chamblee v. Security Nat. Bank, 211 N. C. 48, 188 S. E. 637.

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

The burden of proof to show jurisdictional facts rests upon the person applying for letters. Reynolds v. Lloyd Cotton Mills, 177 N. C. 412, 99 S. E. 240.
§ 28-2

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

In General.—Where the facts stated in this subsection exist, a grant in any county other than that prescribed by the subsection is absolutely void. Johnson v. Corpening, 39 N. C. 216; Collins v. Turner, 4 N. C. 547.

Domicile.—Reynolds v. Southern Mills, 177 N. C. 412, 92 S. E. 240, contains an excellent discussion of "domicile" as distinguished from "residence," "inhabiting," etc.

Change of County Lines.—The county referred to in this subsection is the county at the time of the death of the decedent, and not the one subsequently formed by a change of county lines. Cannon v. Southern Power Co., 173 N. C. 530, 92 S. E. 353.

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

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

Assets.—If the assets are bona notabilia (chattels or goods of sufficient value to be accounted for) they are sufficient to convey jurisdiction to the clerk. Hyman v. Gaskins, 27 N. C. 267. The value of chattels sufficient to be accounted for has varied at different times, but was finally established at five pounds in 1603. The mere bringing of assets into the jurisdiction is immaterial. Shields v. Union Cent. Life Ins. Co., 119 N. C. 380, 25 S. E. 951.


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

Provided, that in all cases where the clerk of the superior court is interested in an estate, the judge of the superior court resident in the district or the judge of the superior court holding the courts of the county by regular or special assignment shall have jurisdiction to take proof of wills and grant letters testamentary, letters of administration with the will annexed and letters of administration in cases of intestacy, to audit and approve the accounts of executors and administrators, to make orders and to do any and all things in connection with the administration of estates which the clerk of the superior court might or could have done, had he not been interested in the estate. (Rev., s. 16; Code, s. 1374; C. C. P., s. 433; R. C., c. 46, s. 1; 1868-9, c. 113, s. 115; 1951, c. 165; 1945, c. 543; C. S. 1.)

Cross References.—As to jurisdiction when clerk is disqualified, see § 31-12 and note, and also §§ 2-17 through 2-23.

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

The 1943 amendment substituted, in subsection 2, the words "places of residence" for the words "his fixed place of domicile." In General.—Where decedents were not domiciled in this state, and died intestate in Henderson county, leaving assets in the state, the clerk of the superior court of Henderson county had jurisdiction in said county to grant letters of administration. In re Franks, 220 N. C. 176, 180, 16 S. E. (2d) 504.

Death by Wrongful Act—The place where a non-resident is killed in this state the cause of action for death by wrongful act is sufficient under this section as a basis for the grant of letters in the county where the injury and death occurred. Vance v. Southern R. Co., 138 N. C. 460.

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

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

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

Claim under Fraudulent Conveyance.—One who sets up a claim to goods of an intestate under a fraudulent conveyance, and thereby injures the sale of them, does not render himself an executor de son tort. Barnard v. Gregory, 14 N. C. 223. No such person can remove executors and administrators, see §§ 28-32 and note.

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

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

The 1943 amendment substituted, in subsection 2, the words "places of residence" for the words "his fixed place of domicile."
for which there is a colorable right will not make a wrong-

Bailee, etc., of Fraudulent Donees.—If a fraudulent donee
of an executor of his own wrong, but it is the dis-
position, or possession and occupation of the effects. Bailey
v. Miller, 27 N. C. 444.

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

§ 28-5. Form of letters.—All letters must be is-
ued in the name of the state, and tested in the
amed of the clerk of the superior court, signed
ed by him, and sealed with his seal of office,
and shall have attached thereto copies of the sec-
section of this chapter requiring an inventory to be
filed within three months, and of the section re-
quiring annual accounts to be filed. (Rev., s. 36;
Code, ss. 1399, 2173; C. C. P., ss. 471, 478; 1871-9,
c. 467; C. S. 5.)

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

Art. 3. Right to Administer.

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

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

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

Right to Renounce and Nominate Another for Appointment Is Recognized.—There is no express provision requir-
ing the clerk to recognize the right of one belonging to a
preferred class to renounce his right to qualify and at the
same time nominate another for appointment in his stead,
but this construction has been uniformly applied by the
court. Little v. Berry, 94 N. C. 433.

Cross Reference.—For appointment of widow under twenty-
two, see note to § 28-5, par. 1.

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

1. To the husband or widow, except as here-
inafter provided.

Cross Reference.—For appointment of widow under twenty-
two, see note to § 28-5, par. 1.

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

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

Right Not Absolute or Exclusive.—The right of the next of
kin to administer is not absolute and not exclusive, and
if the next of kin does not apply for letters of ad-
ministration or fail to give bond, some other person may

Nominee of Next of Kin.—The nominee of deceased's
nearest of kin will be appointed administrator, if a fit and
suitable person, as against those of lesser degree of kin
in the same class, the next of kin renouncing the right files a personal application for

Next of Kin Best Qualified.—The next of kin of a de-
ceased person, after the widow, the right, among themselves, of administration; but this right is not vested
in one more than another, and the degree of propinquity
does not give a legal priority. The court should select from
the class, the person best qualified to take care of the

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

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

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

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

Creditor Postponed to Next of Kin.—If administration can-
not be granted to the nearest of kin owing to some in-
capacity, it shall be granted to the next after him, qualifi-
ced to act, and the creditor shall be postponed, if such next
of kin claims the right to administer within the time pre-

Assignee after Death Not a Creditor.—An assignment of
debts of a person after his death does not make the assignee
such a creditor as to entitle him to administer the estate


4. To any other person legally competent.

(Rev., s. 3; Code, s. 1376; C. C. P., s. 456; R.
C. c. 46, ss. 2, 3; 1868-9, c. 113, s. 115; C. S. 6.)

Cross References.—As to corporation acting as executor of
administration, see §§ 59-113 and 55-117. As to who may
act in the event the executor fails to apply to have the will
proved, see § 31-13. As to public administrator, see § 28-20.

Possessor of Insurance Policy.—The possession of a
policy of life insurance authorizes the possessor to ad-
minister on the estate of the assured, a nonresident. Page

§ 28-7. Husband to administer wife's estate;
right in surplus.—If any married woman dies
wholly or partially intestate, the surviving hus-
band shall be entitled to administer on her personal
estate, and shall hold the same, subject to the claims
of her creditors and others having rightful de-
mands against her, to his own use, except as here-
inafter provided. If the husband dies after his
wife, but before administering, his executor or ad-
ministrator or assignee shall receive the personal
property of the said wife, as a part of the estate
of the husband, subject as aforesaid, and except as
provided by law. (Rev., s. 4; Code, s. 1479;
1871-9, c. 103, s. 32; C. S. 7.)

Exclusive Right to Administrator.—The statute of distribu-
tion does not apply to the estate of femme covert dying in-
testate, and the husband is entitled to administer for his
own benefit. Any other person administering has only con-
sidered as a trustee for the husband with respect to the
residue after payment of debts. Hoppis v. Eskridge, 37
N. C. 34.

Wife Intestate or Testate.—A husband has right to ad-
minister the estate of wife, whether she dies intestate or has
left a will and named an executor. In re Meyer's
Estate, 113 N. C. 545, 19 S. E. 669.

Transfer of Right.—He may transfer this right to an-
other by appointment, or may cause another to be as-
sociated with him. And the right is not affected by the fil-
ing and probating in common form of a writing signed
being the will of the wife. In re Meyer's Estate, 113 N.
C. 545, 19 S. E. 669.

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§ 28-7. Husband to administer wife's estate; right in surplus.—If any married woman dies wholly or partially intestate, the surviving husband shall be entitled to administer on her personal estate, and shall hold the same, subject to the claims of her creditors and others having rightful demands against her, to his own use, except as hereinafter provided. If the husband dies after his wife, but before administering, his executor or administrator or assignee shall receive the personal property of the said wife, as a part of the estate of the husband, subject as aforesaid, and except as provided by law. (Rev., s. 4; Code, s. 1479; 1871-9, c. 103, s. 32; C. S. 7.)

Exclusive Right to Administrator.—The statute of distribution does not apply to the estate of femme covert dying intestate, and the husband is entitled to administer for his own benefit. Any other person administering has only considered as a trustee for the husband with respect to the residue after payment of debts. Hoppis v. Eskridge, 37 N. C. 34.

Wife Intestate or Testate.—A husband has right to administer the estate of wife, whether she dies intestate or has left a will and named an executor. In re Meyer's Estate, 113 N. C. 545, 19 S. E. 669.

Transfer of Right.—He may transfer this right to another by appointment, or may cause another to be associated with him. And the right is not affected by the filing and probating in common form of a writing signed being the will of the wife. In re Meyer's Estate, 113 N. C. 545, 19 S. E. 669.
Realty under Equitable Conversion.—Where a wife devised real property under circumstances by which the doctrine of equitable conversion obtained, a court has power to hold that the property is vested in the husband, if he continues to occupy the same. Equitable conversion is reduced to personalty, her husband as personalty, subject to demands of creditors. McLver v. McKinney, 184 N. C. 393, 59 S. E. 2d 345, 133 S. E. 2d 345; Bank of America v. Lockhart, 181 N. C. 527, 13 S. E. 2d 27.

Death of Husband before Administering.—If the husband dies after his wife, without having administered, there is no authority to appoint an administrator upon her estate. In such case the representative of the husband is not entitled to the wife’s estate. Wooten v. Wooten, 123 N. C. 219, 31 S. E. 491.

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

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

Husband’s Administrator as against Wife’s Administrator.—Where a legacy is given to a trustee for the use of a minor, the mother and father, surviving the same, are the personal representative of the husband (the husband surviving the wife, but dying before receiving the legacy in his wife’s favor) and the protector of the legacy. bakery of the wife’s administrator. Coleman v. Hallowell, 54 N. C. 204.

Husband Entitled to Annuity Payable to Wife.—Where the beneficiary of an annuity dies intestate before the death of the husband, the husband is entitled to the annuity. In re Shuford’s Will, 164 N. C. 133, 80 S. E. 420.

Intestate Succession.—Insured named his wife as beneficiary in policies on his life. His wife predeceased him. There were no children born to the marriage. Upon the wife’s death the husband was entitled to the wife’s vested interest in the policies, even before reducing same to possession by administration, the provision of this section not having been modified by § 28-149, par. 8, in cases in which there are no surviving children; and upon the husband’s death, the wife’s heirs who were entitled to the distribution of the proceeds of the policies. Wilson v. Williams, 215 N. C. 407, 2 S. E. (2d) 39.

Husband Becoming Non Compos Mentis.—Where a husband has qualified as the administrator of his deceased wife but removed on account of his since becoming non compos mentis, the administrator of the wife, de bonis non, and equitable conversion is reduced to personalty, her husband as personalty, subject to demands of creditors. Mclver v. McKinney, 184 N. C. 393, 59 S. E. 2d 345, 133 S. E. 2d 345; Bank of America v. Lockhart, 181 N. C. 527, 13 S. E. 2d 27.

Appointee of Nonresident Kin.—But a nonresident next of kin may appoint a resident, and it is within the power as well as the duty of the court to grant administration to the appointee. Smith v. Munroe, 23 N. C. 345; Ritchie v. Mc Austin, 21 N. C. 367.

3. Has been convicted of a felony.

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

Itinerant as Incompetent.—Under this provision a person who can not write or read, and has no experience in keeping accounts or in settling estates, is "incompetent." Stephenson v. Stephenson, 49 N. C. 672.

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

Collateral Attack for Mere Irregularity.—When, in disregard of the requirements of this subsection, letters are issued to a foreign executor, this is a mere irregularity and can not be set aside. In re Estate of Wallace, 197 N. C. 334, 148 S. E. 2d 521.

§ 28-9. Effect of disqualification of person entitled. Where an executor named in the will, or any person having a prior right to administer, is under the disqualification of nonage, or is temporarily absent from the state, such person is entitled to six months, after coming of age or after his return to the state, in which to make application for letters testamentary, or letters of administration. (Rev., s. 6; Code, ss. 1377, 2162; C. C. P., s. 457; C. S. 8.)

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

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

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

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

Editor’s Note.—Until the revision of 1905, this subsection disqualified "an alien who is a nonresident of this state." And prior to 1888 there was no disqualification imposed upon aliens. The law was amended in 1888 to disqualify aliens, and in 1905 it was amended so that the nonresident administrator took the oath and gave the bond required by law, he was not included in the disqualifications of this section. See Moore v. Eure, 101 N. C. 11, 67 S. E. 2d 27.

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

Nonresident Disqualified as Administrator.—A nonresident cannot be appointed an administrator; nor, having been appointed in the state of his intestate’s residence, can he sue in the courts of this state. Hall v. Southern R. Co., 131 N. C. 240, 44 S. E. 2d 879; In re Estate of Banks, 213 N. C. 395, 74 S. E. 2d 879.

Public administrator cannot be removed at the instance of nonresidents who have no right of appointment as administrator in this state, nor having the right to administer upon the estate in this state. Boynton v. Heath, 158 N. C. 488, 74 S. E. 470.

Appointee of Nonresident Kin.—But a nonresident next of kin may appoint a resident, and it is within the power as well as the duty of the court to grant administration to the appointee. Smith v. Munroe, 23 N. C. 345; Ritchie v. Mc Austin, 21 N. C. 367.

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

Service Required to a Foreign Executor.—If those entitled to administration apply for letters at any time prior to the appointment of a public administrator, even though six months’ period has elapsed, they will have priority to administer under the disqualification of age.

During widow’s minority, grant her the administration. Wallis v. Wallis, 60 N. C. 78.

§ 28-10. Divorce a vinculo or felonious slaying is forfeiture.—When a marriage is dissolved a vinculo, the parties respectively, or when either party is convicted of the felonious slaying of the other, or of being accessory before the fact of such felonious slaying, the party so convicted shall thereby lose all his or her right to administer on the estate of the other, and to a distributive share in the personal property of the other, and every right and estate in the personal estate of the other. (Rev., s. 7; Code, s. 1480; H. B. 248, c. 35, 243, 256, 260; C. C. P., ss. 452, 460; R. C. c. 46, s. 12; C. S. 9.)

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

Editor’s Note.—In Owens v. Owens, 100 N. C. 240, 5 S. E. 794, it was held that a widow: convicted as accessory before the fact to her husband’s murder and confined in prison is entitled to dower. But this rule has in terms been abrogated by the provisions of this section, as to the right of the wife to administer and obtain her distributive share. Where a husband has taken out a policy of life insurance on his own life with his wife as beneficiary and has feloniously killed his wife and then himself, under this section and §§ 28-149 and 52-19, his heirs may not claim under him the proceeds of the policy since the law will not allow a man or those claiming under him to benefit by his own
wrong, and the proceeds of the policy are descendable to the next of kin of the wife and not to his heirs at law. Parker v. Potter, 200 N. C. 348, 157 S. E. 68.

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

Cross Reference.—See § 52-30.

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

Cross Reference.—See § 52-28.

§ 28-13. Executor may renounce.—Any person appointed an executor may renounce the office by a writing signed by him, and on the same being filed in the superior court, it shall be made a record and filed. (Rev., s. 10; Code, s. 2163; C. C. 1860, s. 450; C. S. 13.)

Cross Reference.—As to resignation of executor or administrator, see § 52-9 et seq.

Common Law and Present Rule.—At common law an administrator or executor who has qualified and entered upon the performance of his duties had no right to resign his office at his own convenience. Nor can he resign now except for causes specified in the statute or for equivalent causes. McIntyre v. Proctor, 145 N. C. 288, 59 S. E. 29; Washington v. Bl unt, 43 N. C. 253.

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

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

A court of probate may accept this renunciation at any time before the executor intermeddled with the effects of the testator, even after he has proved the will. Mitchell v. Adams, 21 N. C. 298.

The same rule applies to an executor of an executor under a prior will. Mitchell v. Adams, 21 N. C. 298.

But after probate an executor cannot renounce at his own pleasure, and must do so by leave of the court. Mitchell v. Adams, 22 N. C. 532.

Powers of Administrator c. t. a.—After renunciation of the executor, the administrator with the will annexed is competent to exercise his (executor's) powers under the will. Saunders v. Saunders, 108 N. C. 327, 12 S. E. 669.

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

Renunciation of Executor.—A renouncing executor may retrace his renunciation at any time before administration granted, and then administer. Any intermeddling with the estate before qualifying is evidence of such retraction. Da Cal, 4 N. C. 61.

Renunciation by Some of Several.—Where there are several persons of the same class entitled to administer renunciation by some of them does not affect the rights of those not renouncing to administer. In re Jones' Estate, 177 N. C. 340, 135 S. E. 653.

Right of Reinstatement.—There are decisions that an executor who has renounced can, under some circumstances, come in and qualify. See Davis v. Inscoe, 84 N. C. 396, 401; Wood v. Sparks, 18 N. C. 385. But there is no case in which he has come in after the lapse of the formalities of this statute and afterwards has qualified, certainly not after the lapse of twenty years. Ryder v. Oates, 173 N. C. 569, 92 S. E. 508.

§ 28-14. Renunciation of prior right required.—When any person applies for administration, and any other person has prior right thereto, a written renunciation of the person or persons having such prior right must be produced and filed with the clerk. (Rev., s. 11; Code, s. 1378; C. C. P., s. 450; C. S. 149.)

Expression of Intent Insufficient.—The mere expressed intent of such person entitled to administration by prior right that he would not have anything to do with the administration is no valid renunciation. Williams v. Neville, 108 N. C. 559, 562, 13 S. E. 240.

§ 28-15. Failure to apply as renunciation.—If any person, entitled to letter of administration, fails or refuses to apply for such letters within thirty days after the death of the intestate, the clerk, on application of any party interested, shall issue a citation to such person to show cause, within twenty days after service of the citation, why he should not be deemed to have renounced. If, within the time named in the citation, he neglects to answer or to show cause, he shall be deemed to have renounced his right to administer, and the clerk must enter an order accordingly, and proceed to grant letters to some other person. If no person entitled to administration applies for letters within six months after the death of the intestate, then the clerk may, in his discretion, deem all prior rights renounced and appoint some suitable person to administer such estate. (Rev., s. 12; Code, s. 1380; C. P., s. 460(a); 1888-9, c. 203; C. S. 15.)

Cross Reference.—See note to § 28-30.

In General.—The true intent and meaning of this and the prior sections of this chapter is that the person entitled to administration may have six months after the death of the intestate to assert their rights and comply with the law; and a party wishing to quicken their diligence within that time must apply by citation (the party renouncing) may not by obtaining letters within the six months, deprive the party primarily entitled to administration should such party apply for letters before the expiration of six months from his death, then the clerk may, in his discretion, deem prior rights renounced and appoint some suitable person to administer such estate. (In re Jones' Estate, 177 N. C. 337, 145, 98 S. E. 827.)

Applicable to Intestacy Only. —The provisions of this section contemplate the cases of intestacy. Hence in cases of testamentary where no executor is appointed in the will, the rights of the parties to administer are governed by section 28-6, without reference to the six months limitation contained in this section. In re Jones' Estate, 177 N. C. 337, 145, 98 S. E. 827.

Renunciation Presumed after Six Months.—After the expiration of six months from the death of the decedent, those entitled to prior rights having failed to apply, all rights of preference may be treated as renounced, and a suitable person to administer upon the estate may be appointed. Hill v. Auch, 172 N. C. 727 N. C. 727, 98 S. E. 104.

Appointment Not Revoked after Six Months.—If the next of kin, in answer to citation, name his appointee, and such person, after appointment, fails to qualify, then, though six months have elapsed, the clerk was authorized to appoint another. Williams v. Neville, 108 N. C. 559, 562, 13 S. E. 240.

Appointment Not Revoked after Six Months.—If the parties who have precedence to administer fail to apply within six months from the death of the deceased, an appointment by the clerk of a proper person after that period will not be revoked. Withrow v. DePriest, 119 N. C. 541, 123 S. E. 270.

Failure to Apply within Six Months.—Public Administrator.—Though it is the duty of the public administrator to apply after six months, if, before his appointment at any time, [9]
§ 28-16. Person named as executor failing to qualify or renounce.—If any person appointed an executor does not qualify or renounce within sixty days after the will is admitted to probate, the clerk of the superior court, on the application of any other executor named in the same will, or any party interested, shall issue a citation to such person to show cause why he should not be deemed to have renounced. If, upon service of the citation, he does not qualify or renounce within such time, not exceeding thirty days, as is allowed in the citation, an order must be entered by the clerk decreeing that such person has renounced his appointment as executor.

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

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

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

Sale by One of Joint Executors.—If one of the joint executors fails to qualify, a sale of lands by the one qualifying is sufficient to pass the estate, without its appearing necessary for the said sale by the clerk of the superior court, and the other executor or executors shall have qualified before the clerk of the court. (Rev., s. 19; Code, s. 1393; 1868-9, c. 113, ss. 2, 5; C. S. 17.)

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

Property Right.—His office is a property right which can not be revoked unless he fails to perform the duties of his office and obedience to all lawful orders of the clerk or other court touching the administration of the several estates that may come into his hands and such bonds, if executed by individual sureties, shall be renewed every two years. Whenever the aggregate value of the personal property belonging to the several estates in the hands of the public administrator exceeds one-half of his bond, if the bond is signed by personal sureties, or three-fourths of his bond, if the bond shall be executed by a duly authorized surety company, the clerk shall require him to enlarge his bond in an amount so as to cover all at times at least double the aggregate of the assets of the estates in the hands of said public administrator if the bond is signed by personal sureties or one and one-third times the assets if the bond shall be executed by a duly authorized surety company. If the personal property of any decedent is insufficient to pay his debts and the charges of administration and it becomes necessary for the said public administrator to apply for the sale of real estate for assets, upon the signing of a judgment ordering the said sale by the clerk of the superior court, or any other court, the clerk shall include the value of the real estate proposed to be sold in the aggregate value of the property belonging to the several estates in the hands of the public administrator. Whenever the aggregate value of the personal property and the real estate that the said administrator has been authorized to sell exceeds one-half of his bond, if the bond is executed by personal surety, or three-fourths of his bond if the bond shall be executed by a duly authorized surety company, the clerk shall require him to enlarge his bond as hereinbefore provided as though the aggregate consisted only of personal property. (Rev., s. 320; Code, ss. 1390, 1391, 1392; 1868-9, c. 113, ss. 2, 3, 4; 1915, c. 216; 1941, c. 243; C. S. 19.)

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

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

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

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

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

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

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

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

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

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

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

[ 10 ]


Due Qualification Prerequisite. — A public administrator acquires no rights or interest to administer an estate until he is qualified to act, the clerk of the superior court having no power to issue administrative appointment without the requisite qualifications of the person applying for appointment. In re Bailey's Will, 182 N. C. 104, 188 S. E. 202.

Prior Right of Others after Six Months. — While the expiration of the six months prior rights to administration may be deemed renounced and a public administrator appointed, yet even after lapse of six months, if he is not as yet appointed, persons of prior right to administration may be appointed in preference to him. In re Bailey's Will, 182 N. C. 104, 188 S. E. 202.

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

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

Powers of Administrator with the Will Annexed. — An administrator cum testamento annexo has all the rights, powers, and is subject to the same duties as if he had been named as executor. Smathers v. Moody, 112 N. C. 797, 17 S. E. 532.

Appointment When There is Executor. — An administrator cum testamento annexo cannot be appointed where there is an executor qualified to act, the clerk of the superior court having no power to issue administrative appointment without the requisite qualifications of the person applying for appointment. Smith v. Sprunt, 191 N. C. 108, 131 S. E. 332.

Waiver of Right to Appointment. — Where a legatee entitled to preferential appointment as administrator c. t. a. has waived his right to be appointed administrator c. t. a., but waits until after the death of the administrator appointed more than a year after testator's death before asserting his right and renouncing in favor of a third person, the legatee has waived his right and his nominee not entitled to appointment as against the nominee of the surviving sisters of testator. In re Estate of Smith, 210 N. C. 622, 188 S. E. 202. See § 28-23 and the note thereto.

§ 28-22. Qualifications and bond.—Administrators with the will annexed shall have the same qualifications and give the same bond as other administrators; but the executor of an executor shall not be entitled to qualify as executor of the first testator. (Rev., s. 15; Code, s. 2167; C. C. P., s. 454; 1905, c. 286; C. S. 23.)

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

Administrator, d. b. n., c. t. a., Not on Same Footing with Executor in Respect of Trusts.—Where a testator named a public administrator de bonis non cum testamento annexo, although clothed with the power, and required to execute the will, according to its legal effect as if he were executor, does not stand upon the same footing in respect to the trust property and required to execute the will as an executor does, and not from the will simply, but from the statute (this section) and he would not be treated as an executor in another state, because his authority is conferred by the law, and not by the will. Grant v. Reese, 94 N. C. 730, 730.

Duties and Liability of Administrator, c. t. a.—Ancillary Administration.—Where a testator died domiciled in this State, leaving debts due by parties in Virginia, the administrator de bonis non cum testamento annexo, and the duties and powers on the bond, are not liable for return to such notes on the inventory in this State and in Virginia. Grant v. Reese, 94 N. C. 730.

Personal Power of Administrator de bonis non cum testamento annexo, and the powers conferred upon the executor by the will are personal to and discretionary with the executor and become extinct at his death they can not be judicially proofed. Where the powers conferred upon the executor by the will are personal to and discretionary with the executor and become extinct at his death they can not be judicially proofed. Under a will directing the executor therein named to continue his trusteeship as long as the executor should think it profitable, and such of the profits as the executor should think it profitable to retain for the support of testator's wife and children to be paid to the wife; also, to invest six thousand dollars, bequeathed by testator to his children, and to have entire control of testator's business, to continue or discontinue it all, or any department of it, at any time he might find it not yielding a reasonable profit, 11.
and out of the profits pay to testator's wife, from time to time, such amounts as he might consider actually necessary for her support and the support of the children: Held, that upon the death of the executor and the appointment of an administrator, the trusts therein became extinct at his death. Creech v. Grainger, 106 N. C. 213, 10 S. E. 1032.

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

Same—Recovery of Lands Held in Trust.—An administrator cum testamento annexo, the latter became entitled to the possession of the land, and can recover the same from those withholding it. Smathers v. Moody, 112 N. C. 791, 17 S. E. 532.

Will Presumed Executed in Contemplation of Section.—It will be presumed that a will will be executed in contemplation of section 128-25 of the Code of 1886, providing that an administrator c. t. a. succeeds to all the rights, powers and duties of the executor. Wachovia Bank, et al., v. King Drug Co., 217 N. C. 502, 11 S. E. 2d 593.

Power to Sell Real Estate.—Administrator c. t. a. may exercise all powers of sale granted the executors by the will regardless of whether they are given the executor virtuose officii or nominatim, unless the language of the will definitely limits the exercise of the power of sale to the person named executor or unless the executor is made the donee of a special trust, given by reason only of peculiar circumstances indicating death of such person, any reason, a delay is necessarily produced in the admission of a will to probate, or in granting letters of administration with the will annexed, the powers of such collector shall cease, but any suit brought by the collector may be continued by his successor, the executor or the administrator, in his own name.

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

§ 28-27. Powers of collectors.—Every collector has authority to collect the personal property, preserve and secure the same, and collect the debts and credits of the decedent, and for these purposes he may commence and maintain or defend suits, and he may sell, under the direction of the clerk, any or all of the property, rights and credits of the decedent under his control, and the collector may be continued by his successor, the executor or the administrator, in his own name. Such collector must, on demand, deliver and account.—When letters testamentary, letters of administration or letters of administration with the will annexed are granted, the powers of such collector shall cease, but any suit brought by the collector may be continued by his successor, the executor or the administrator, in his own name. Such collector must, on demand, deliver to the executor or administrator all the property, rights and credits of the decedent under his control, and render an account, on oath, to the clerk of all his proceedings. Such delivery and account may be enforced by citation, order or attachment. (Rev., 23; Code, 1386; C. C. P., 466; R. C., c. 46, s. 1084-9; C. C. P., 466; C. S., 7; 1868-9, c. 113, s. 115; 1924, c. 43; S. C. 27.)

Allowance of Counsel Fee.—A collector who resists the claim of the executor is not entitled to an allowance for
§ 28-29. Facts to be shown on applying for administration.—On application for letters of administration, the clerk must ascertain by affidavit of the applicant or otherwise—

1. The death of the decedent and his intestacy.

2. Administration upon the estate of a living man and a decree for the sale of his lands are void for lack of jurisdiction.

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

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

§ 28-30. Right to contest application for letters; proceedings.—Any person interested in the estate may, on complaint filed and notice to the applicant, contest the right of such applicant to letters of administration, and on any issue of fact joined, or matter of law arising on the pleadings, the cause may be transferred to the superior court for trial, or an appeal be taken, as in other special proceedings. (Rev. s. 27; Code, s. 1382; C. C. L., s. 146; C. S. 29.)

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

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

Clerk Exercises Discretion.—The exigencies of administration require the power vested in the clerk of the court removing executors or administrators of an estate, has exercised his discretion in removing it to the clerk, the exercise of this discretion is not appealable to the Supreme Court. Murrill v. Sandlin, 86 N. C. 54.

Clerk Exercises Discretion.—The exigencies of administration require the power vested in the court removing executors or administrators of an estate, has exercised his discretion in removing it to the clerk, the exercise of this discretion is not appealable to the Supreme Court. Murrill v. Sandlin, 86 N. C. 54.

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

Affirmation of Original Jurisdiction.—The clerk under this section has original and primary jurisdiction of a probate judge to revoke letters, subject to review upon appeal, by either clerk, and this section may vest in issues of fact to be tried by a jury in the superior court. In re Will of Gulley, 186 N. C. 78, 118 S. E. 839.

Clerk Exercises Discretion.—The exigencies of administration require the power vested in the clerk of the court removing executors or administrators of an estate, has exercised his discretion in removing it to the clerk, the exercise of this discretion is not appealable to the Supreme Court. Murrill v. Sandlin, 86 N. C. 54.
It is not required that he transfer the cause to the superior court for the trial of the issue. In re Battle, supra.

Necessity of Order to Show Cause. — The clerk cannot appoint a successor, (when the will has named more than one executor), or remove the executor, without a hearing based on notice to show cause why he should not be removed. In re Palmer's Will, 117 N. C. 133, 134, 23 S. E. 568. Nor can he remove a public administrator without such notice. Trotter v. Mitchell, 115 N. C. 190, 20 S. E. 386.

The procedure to remove an executor or administrator for default or misconduct is by order issued by the clerk to the executor or administrator to show cause, and in such proceeding the respondent must be given notice and an opportunity to be heard, with right of appearance. Edwards v. McLawhorn, 218 N. C. 543, 11 S. E. (2d) 563.

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

Failure to Discharge Duties — Ground of Removal. — Where the executor becomes bankrupt and is the owner of no property, and has neglected for six years to file an inventory or return of any sort, and has failed to convert the personal property into money, upon application of the creditors he may be required to give bond or, in default, be removed, Barnes v. Brown, 79 N. C. 401; for failure to make statement of account, Armstrong v. Stone, 77 N. C. 362.

Insolvency in Lifetime of Testator. — But an executor who becomes insolvent after the testator's death, and has neglected for six years to file an inventory or return of any sort, and has failed to convert the personal property into money, upon petition of the residuary legatee alleging failure of the executor to account to the estate for rents and profits, and settling of the estate in his hands, is not such evidence of bad faith or fraudulent concealment, a claim of which it must have been intended that the amount of bond should depend upon the application and examination of the principal named in it, unless the clerk preferred to examine another person. Williams v. Neville, 108 N. C. 559, 565, 66 S. E. 390.

Upon the examination of the applicant, the clerk may value the property at a higher figure than he had previously done. Williams v. Neville, 108 N. C. 559, 565, 66 S. E. 390.

Effect of Failure to Give Proper Bond. — The mere fact that the bond of the representative is not justified before or approved by the court, does not render the bond invalid, nor void, or necessarily voidable. The provisions of this section requiring bond are directory and not essential to the appointment. It is only in the exercise of their jurisdictional functions that the clerks must observe these provisions as a condition precedent to the validity of their acts. The only effect of noncompliance with these requirements is that the representative may be made to give a new proper bond required by statute. See In re Knowles' Estate, 148 N. C. 461, 62 S. E. 549.

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

Pleading and Procedure. — The application to remove an executor may be made by any person, with or without interest of creditors or beneficiaries, upon petition or formal complaint, setting forth the grounds of application supported by affidavit. The allegations thus made may be met by a demurrer in a proper case, or by answer. Edwards v. Cobb, 95 N. C. 4, 5.

Filing of “Final Report” Does Not Create Vacancy. — The filing of a “final report” by an executor does not create a vacancy or title to administer the estate; and pending any suit or proceeding between parties respecting such revocation, the clerk is authorized to make such interlocutory order as, without injury to the rights and remedies of creditors, may tend to the better securing of the estate. Rev., s. 32; Code, s. 1521; 1866-9, c. 113, s. 82; 92, C. S. 32.

Order to Make Return and Settlement. — The removed administrator is ordered to make a complete and immediate return and settlement of the estate in his hands. Until that is done he is within the jurisdiction of the court. In re Brinson, 73 N. C. 278. See also Long v. Weeks, 71 N. C. 166. Where an executor was removed and an administrator de bonis non appointed.

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

Clerk Cannot Appoint until Vacancy Exists. — Since a person discharging an executor's duties without authority to represent the estate until his death, resignation or until he has been removed or the letters testamentary revoked in accordance with statutory procedure, the appointment of an administrator to make the settlement of the residuary legatee alleging failure of the executor to account to the estate for rents and profits, is void, the clerk being without jurisdiction to make the appointment. Edwards v. McLawhorn, 218 N. C. 543, 11 S. E. (2d) 563.

Amount of Bond Dependent on What. — The framers of the section contemplated that the amount of bond should depend upon the application and examination of the principal named in it, unless the clerk preferred to examine another person. Williams v. Neville, 108 N. C. 559, 565, 66 S. E. 390.

Effect of Failure to Give Proper Bond. — The mere fact that the bond of the representative is not justified before or approved by the court, does not render the bond invalid, nor void, or necessarily voidable. The provisions of this section requiring bond are directory and not essential to the appointment. It is only in the exercise of their jurisdictional functions that the clerks must observe these provisions as a condition precedent to the validity of their acts. The only effect of noncompliance with these requirements is that the representative may be made to give a new proper bond required by statute. See In re Knowles' Estate, 148 N. C. 461, 62 S. E. 549.

Good faith and the exercise of ordinary care and reasonable diligence are all that is required of executors and administrators, and covered by their bond. Moore v. Plotner, 57 N. C. 543, 547; Smith v. Patton, 131 N. C. 396, 42 S. E. 849; Atkinson v. Whitehead, 66 N. C. 296.

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

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


When a foreign executor was regularly appointed and qualified his failure to give the bond specified by this section is only an irregularity and not an invalidity, and may be remedied by appointment by order of the court. Overtorn, 158 N. C. 395, 74 S. E. 20.


§ 28-34. Bond; approval; condition; penalty. — Every executor from whom a bond is required by law, and every administrator and collector, before letters are issued, must give a bond payable to the state, with two or more sufficient sureties, to be justified before and approved by the clerk, conditioned that such executor, administrator or collector shall faithfully execute the trust reposed in him and obey all lawful orders of the clerk or other court touching the administration of the estate committed to him. Where such bond is executed by personal sureties, the penalty of such bond must be, at least, double the value of all the personal property of the deceased, but where such bond shall be executed by a duly authorized surety company, the penalty in such bond may be fixed at not less than one and one-fourth times the value of all the personal property of the deceased. The value of said personal property shall be determined by the clerk by examination of the oath, of the applicant or of some other competent person. If the personal property of any decedent is insufficient to pay his debts and
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the charges of administration, and it becomes necessary for his executor or administrator to apply for the sale of real estate for assets, and the bond previously given is now demanded. But where both of the real and personal estate of the deceased, such executor (if bond is required of him by law) or administrator shall, before or at the time of filing his petition for such sale, give another bond payable and conditioned as the one above prescribed and with like security, in double the value of the real estate for the sale of which application is made, provided, however, that where such bond shall be executed by a duly authorized surety company, the penalty of said bond need not exceed one and one-fourth times the value of said real estate. (Rev., s. 1388; 1870-1, c. 93; C. C. P., s. 465; 1935, c. 356; C. S. 1935, § 28-35)

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

Editor's Note.—The amendment of 1925 changed the penalty of the bond as formerly prescribed by the second sentence and added the proviso appearing at the end of the section.

Action May Be Brought on Bond to Recover Amount Due Estate.—Where an administrator, who has not fully administered the estate of his intestate, has died or has been removed from his office, an action may be maintained against any of his personal representatives or against him, as the case may be, and the surety on his bond, to recover the amount due by him to the estate of his intestate, by one who has been duly appointed and has duly qualified as administrator d. b. n. of his intestate. Tuluurt v. Hol-lar, 102 N. C. 405, 9 S. E. 430. The failure to account for and to pay such amount is a breach of the statutory bond. State v. Dunn, 206 N. C. 373, 374, 173 S. E. 906. Applied in State v. Purvis, 208 N. C. 227, 180 S. E. 38.


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

Bankrupt Executor.—When an executor who is no owner of property has become bankrupt and has failed to file an inventory or return, the court (now the clerk) upon application of creditors may require him to give bond or in default remove him. Barnes v. Brown, 79 N. C. 401. But his inventory or return may require him to give bond or enter into bond. (Rev., s. 28; Code, s. 1515; R. C. c. 16, ss. 12, 13; C. S. 34.)

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

§ 28-37. No bond in certain cases of executor with power to convey.—Where a citizen or subject of a foreign country, or of any other state of the United States, by will sufficient according to the laws of this state, and duly probated and recorded in the proper county, devises real property situated in this state, the executor acting under the will, if he has not intermeddled with the property devised in the will, and if no letters of administration in this state on the estate have been issued subsequent to the probate of the will, may, after the expiration of one year from the testator's death, give bond in double the value of the property devised, and he shall then be entitled to all the rights, powers and privileges of a resident executor. (1909, c. 901; 1925, c. 284; C. S. 36.)

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

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

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

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

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

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

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

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

Editor’s Note.—See 1 N. C. L. R. 315.

§ 28-41. Oath before notary; curative statute.—In all cases prior to January the first, one thousand nine hundred and twenty-two, in which any foreign executor qualified or attempted to qualify as such executor by taking and subscribing the oath or affirmation required by law, before a notary public of this or any other state or territory of the United States, instead of taking and subscribing said oath or affirmation before the clerk, and having in all other respects complied with the laws of North Carolina prescribed for and pertaining to the qualification and appointment of foreign executors, such qualification and the letters testamentary issued in all such cases are hereby validated and made legal and binding. In all cases mentioned in this section, wherein such foreign executor has entered upon the discharge of the duties of his trust, he has performed any duty or exercised the powers and authority of such office regularly and according to law, except for the defect in the qualification and issuance of letters testamentary, then all such acts of any such foreign executor are validated and are declared to be legal and binding. (1925, c. 19.)

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

Only Good Faith Guaranteed.—Bonds of administrators, executors, guardians, etc., guarantee only good faith. Smith v. Patterson, 102 N. C. 290, 291, 9 S. E. 707; Moore v. Eure, 101 N. C. 11, 7 S. E. 471.

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

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

But the surety is subject to the requirements of the state's name may be obviated by a motion to amend. Wilson v. Pearson, 102 N. C. 290, 291, 7 S. E. 707. Amendment will be allowed even in the Supreme Court. Grant v. Rogers, 94 N. C. 725.


Breach Not Merged in Judgment.—A judgment for damages cannot merge the cause of action. The latter is satisfied only by actual payment. Wilson v. Pearson, 102 N. C. 290, 291, 7 S. E. 707.

Action against Sureties.—An action can be maintained on an administration bond against the sureties before obtaining judgment against the administrator. Chairman of Court v. Moore, 6 N. C. 22; Williams v. Hicks, 5 N. C. 437; Strickland v. Murphy, 23 N. C. 745; Bratton v. Davidson, 79 N. C. 423.

What Constitutes Breach of Bond.—Bonds of administrators, executors, etc., guarantee good faith and reasonable care. Smith v. Patton, 131 N. C. 395, 42 S. E. 849; Moore v. Eure, 101 N. C. 11, 7 S. E. 471; Atkinson v. Whitehead, 66 N. C. 266; Smyre v. Badger, 92 N. C. 706. Executors or administrators may have a right to refuse to pay a claim until the same is established by judgment. Gill v. Davenport, 81 N. C. 311, c. 1614.

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

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

Where an administrator fails to exhibit in court his final account at the end of two years from his qualification, the estate assessed against his intestate as guardian, it is an improper disbursement and his bond is liable therefor. Worthy v. Brower, 93 N. C. 344. So also where he pays inferior debts. Id.

An act of administrator done with the concurrence of the creditor will not entitle the latter to charge the former with a devastavit. Cain v. Hawkins, 50 N. C. 142.

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Breach of bond here defined as an act of administrator done with the concurrence of the creditor will not entitle the latter to charge the former with a devastavit. Cain v. Hawkins, 50 N. C. 142.

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

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

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

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

Action—By Whom Brought.—The action on the bond of the removed representative must be brought by the administrator de bonis non, and not by the next of kin. Tulburt v. Hollar, 102 N. C. 406, 9 S. E. 410.


§ 28-45. When new bond or new sureties required.—If complaint be made on affidavit to the clerk of the superior court that the surety on any bond of an executor, administrator or collector is insufficient, or that one or more of such sureties is or is about to become a nonresident of this state, or that the bond is inadequate in amount, the clerk must issue an order requiring the principal in the bond to show cause why he should not give a new bond, or further security, as the case may be. On the return of the order duly executed, if the objections in the complaint are found valid, the clerk shall make an order requiring the party to give further surety or a new bond in a larger amount within a reasonable time. (Rev., s. 32; Code, s. 1518; 1868-9, c. 113, s. 90; 1927, c. 62, s. 90.)

Mortgage Instead of Bond.—An administrator who is also the heir of the intestate cannot satisfy the requirement of an additional bond or security by mortgaging lands of his intestate, as such lands are already liable for the debts. In re Sellars, 118 N. C. 573, 24 S. E. 490.

§ 28-46. On failure to give new bond, letters re-2—2

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

Notice to Show Cause Essential.—A judgment removing a public administrator or collector, pursuant to the clause in the bond, without notice to show cause, is not only irregular but void. Trotter v. Mitchell, 115 N. C. 190, 20 S. E. 386.

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


Art. 9. Notice to Creditors.

§ 28-47. Advertisement for claims.—Every executor, administrator and collector, within twenty days after the granting of letters, shall notify all persons having claims against the decedent to the same in such manner and to such extent as may be just. And if the principal in the bond gives new or additional security, to the satisfaction of the clerk, within such reasonable time as may be required, the clerk may make an order releasing the surety from liability on the bond for any subsequent act, default or misconduct of the principal. (Rev., s. 39; Code, ss. 1421, 1422; 1868-9, c. 113, s. 29; 1881, c. 278, s. 2; C. S. 45.)

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

Cost of Claim.—The last sentence of this section formerly provided "The cost of publishing in a paper shall in no case exceed two dollars and fifty cents". This provision was enacted by the Revisal of 1905, and appeared in all codes since that time. Section 1-596, which provides in substance that payment for legal advertising shall not be in excess of the local commercial rate of the newspaper selected, was enacted by F. L. 1919, c. 45, and had the effect of repealing the two dollar and fifty cent provision in view of the fact that section 1-596 was enacted by the General Assembly of 1919 and it was provided by C. S. 915 that "all papers and any other means of advertising the publication of the general assembly shall be deemed to repeal any conflicting provisions contained in the Consolidated Statutes." Therefore, the provisions of section 1-596 control the publication cost.

Time of Presenting Claims.—Before distribution of the estate to the next of kin, it is the duty of the administrator or collector to pay the debts of the estate, provided such debts may have made in good faith. Mallard v. Patterson, 192 N. C. 255, 13 S. E. 93.

Advertisement Essential to Bar Claims.—The mere lapse of time does not bar the creditor's claims against the estate. Only where the advertisement provided under this section has been made does the statute of limitation begin to run. Love v. Ingram, 104 N. C. 600, 10 S. E. 77. But see, Morissette v. Britton, 127 N. C. 57, 37 S. E. 474; Love v. Ingram, supra. But see, Morissette v. Hill, supra.

Cited, in Park View Hospital Ass'n v. Peoples Bank, etc., Co. 211 N. C. 244, 189 S. E. 706.

§ 28-48. Proof of advertisement.—A copy of the advertisement directed to be posted or published
in pursuance of § 28-47, with an affidavit, taken before some person authorized to administer oaths, of the proprietor, editor or foreman of the newspaper wherein the same appeared, to the effect that such notice was published for six weeks in said newspaper, or an affidavit stating that such notices were posted, shall be filed in the office of the clerk by the executor, administrator or collector. The affidavit or affidavit shall be deemed a record of the court, and a copy thereof, duly certified by the clerk, shall be received as conclusive evidence of the fact of publication in all the courts of this state. (Rev., s. 40; Code, s. 1423; 1868-9, c. 113, s. 31; C. S. 46.)

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

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

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

Art. 10. Inventory.

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

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

Statement of Doubtful Debts.—Where an executor returns an inventory of debts without stating that some of the debts are doubtful, he will be held responsible for them, unless he can show that there were set offs against them, or that the debtors were insolvent. Graham v. Davidson, 22 N. C. 155. But where he inventories them as "doubtful", prima facie he will not be chargeable with them. Coan v. S. E. Ed. Co., 44 N. C. 490, s. 8; W. C. 289.

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

Barred of Commissions.—Failure to file an inventory coupled with acts of gross negligence and want of care in the conduct of the estate, will disbar the personal representative of his right to commissions. Grant v. Reese, 94 N. C. 720; Stonestreet v. Frost, 125 N. C. 640, 31 S. E. 636.

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

May Be Compelled to Account or File Inventory.—If the personal representative has failed to file his inventory or his accounts, he can be compelled to do so upon application to the superior court. Atkinson v. Ricks, 140 N. C. 418, 51 S. E. 230.

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

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

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

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

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

Clerk Has Power to Remove even Independent of Statute.—The clerk has power of removal for the failure of the administrator to discharge the duties of his office as prescribed by law and even when invoking the aid of statute the power of removal is inherent in the office at common law, and must of necessity be so to prevent a failure of justice. Taylor v. Biddle, 71 N. C. 1, 5.

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

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

§ 28-53. Trustees in wills to file inventories and accounts.—Trustees appointed in any will admitted to probate in this state, into whose hands assets come under the provisions of the will, shall file in the office of the clerk of the county where the will is probated inventories of the assets and annual and final accounts thereof, such as are required of executors and administrators. The power of the clerk to enforce the filing and his duties in respect to audit and record shall be the same as in such cases. This section shall not apply to any will in which a different provi-
Art. 11. Assets.

§ 28-54. Distinction between legal and equitable assets abolished.—The distinction between legal and equitable assets is abolished. All assets, whether real or personal, that accrue after the death of a deceased, and all assets shall be applied in the discharge of debts in the manner prescribed by this chapter. (Rev., s. 45; Code, s. 1406; 1868-9, c. 113, s. 14; C. S. 53.)

What Constitutes Assets — Rents Liable for Debts.—The rents on devised land may be subject to the personal representative to the payment of the debts of deceased. (Rev., s. 50; Code, s. 1404; 1868-9, c. 113, s. 15; C. S. 54.)

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

Same — All Chattels Assets.—All the chattels of an intestate are assets, if the administrator by reasonable diligence might have possessed himself, of them. Gray v. Swain, 9 N. C. 1.

Same—Pension for Pension Not Asset.—A warrant for a pension issued after death of pensioner does not become a part of his assets, but must be returned to the state for cancellation. In re Smith, 130 N. C. 41 S. E. 858.

Same—Lands as Assets.—Land is not an asset until it is sold and the proceeds received by the personal representative. Wilson v. Bynum, 92 N. C. 718; Fike v. Green, 64 N. C. 375; Dugger v. Wool, 65 N. C. 379; Hawkins v. Carpenter, 89 N. C. 603.


§ 28-55. Trust estate in personalty.—If there are not sufficient real and personal assets of the deceased to satisfy all the debts and liabilities of deceased, together with the costs and charges of administration, the personal representative shall have the right to sue for and recover any and all personal property which the deceased may in any wise have transferred or conveyed with intent to hinder, delay, or defraud his creditors, and any money or property so recovered shall constitute assets of the estate in the hands of the personal representative for the payment of debts. But if the fraudulent alienee of deceased has sold the property or estate so fraudulently acquired by him to a bona fide purchaser for value without notice of the fraud, then such fraudulent alienee shall be liable to the personal representative for the value of the property and estate so acquired and disposed of. If the whole recovery from any fraudulent alienee of a decedent shall not be necessary for the payment of the debts of decedent and the costs and charges of administration of his estate, the surplus shall be returned to such fraudulent alienee or his assigns. (Rev., s. 50; C. S. 57.)

Cross References.—As to recover, see § 39-15 et seq.

§ 28-56. Crops ungathered at death.—The crops of every deceased person, remaining ungathered at his death, shall, in all cases, belong to the executor, administrator or collector, as part of the personal assets, and shall not pass to the widow with the land assigned as dower; nor to the devisee by virtue of any devise of the land, unless such intent be manifest and specified in the will. (Rev., s. 47; Code, s. 1408-9; 1868-9, c. 113, s. 11; C. S. 53.)


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

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

Cross References.—As to assignments to § 28-57.


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

Appendix to Executor whether He Acts or Not.—This section applies to any executor who acts as well as to one who does not act under the appointment. Moore v. Miller, 62 N. C. 339.
§ 28-61. Joint liability of heirs, etc., for debts.—
All persons succeeding to the real or personal property of a decedent, by inheritance, devise, bequest or distribution, shall be liable jointly, but not separately, for the debts of such decedent. (Rev., s. 52; Code, s. 1528; 1868-9, c. 113, s. 99; C. S. 50.)

Editor's Note. — Not only persons succeeding to the property of the deceased are jointly liable (to the proper extent) for the payment of the debts, but also third persons to whom the debt was讓人ted. See § 28-93. Persons liable for debts to observe priorities. — Every person who is liable for the debts of a decedent must observe the same preferences in the payment thereof as are established in this chapter; nor shall the commencement of an action by a creditor give his debt any preference over others. (Rev., s. 55; Code, s. 1531; 1868-9, c. 113, s. 101; C. S. 61.)

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

§ 28-62. Persons liable for debts to observe priorities.—Every person who is liable for the debts of a decedent must observe the same preferences in the payment thereof as are established in this chapter; nor shall the commencement of an action by a creditor give his debt any preference over others. (Rev., s. 55; Code, s. 1531; 1868-9, c. 113, s. 101; C. S. 61.)

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

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

§ 28-64. Persons liable for debts to observe priorities.—Every person who is liable for the debts of a decedent must observe the same preferences in the payment thereof as are established in this chapter; nor shall the commencement of an action by a creditor give his debt any preference over others. (Rev., s. 55; Code, s. 1531; 1868-9, c. 113, s. 101; C. S. 61.)

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

§ 28-65. Existence of other debts of prior or equal class.—The defendants in such action may show that there are unsatisfied debts of a prior class or of the same class with that in suit. If it appears that the value of the property acquired by them does not exceed the debts of a prior class, judgment must be rendered in their favor. If it appears that the value of the property acquired by them exceeds the amount of debts which are entitled to a preference over the debt in suit, the whole amount which the plaintiff shall recover is only such a portion of the excess as is a just proportion to the other debts of the same class with that in suit. (Rev., s. 56; Code, s. 1532; 1868-9, c. 113, s. 101; C. S. 63.)

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

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

§ 28-67. Compelling contribution among heirs, etc.—The remedy to compel contribution shall be by petition or action in the superior court or before the judge in term time against the personal representatives, devisees, legatees, and heirs also of the decedent if any part of the real estate be undivided, within two years after probate of the will, and setting forth the facts which entitle the party to relief; and the costs shall be within the
discretion of the court. (Rev., s. 58; Code, s. 5808.)

Section an Exception to Certain Rule.—The remedy given by this section is an exception to the rule that in actions for devisees, and heirs to whom undevised land has descended. It has no application to contributions among common who claim by descent. Wharton v. Wilkerson, 92 N. C. 408, 414.

§ 28-68. Payment to clerk of sums not exceeding $300 due and owing intestates.—Where any person dies intestate and at the time of his or her death there is a sum of money owing to the said intestate not in excess of three hundred dollars, such sum may be paid into the hands of the clerk of the superior court, whose receipt for same shall be a full and complete release and discharge for such debt or debts, and the said clerk of the superior court is authorized and empowered to pay out such sum or sums in the following manner: First, for satisfaction of widow's year's allowance, after same has been assigned in accordance with law, if such be claimed; second, for payment of funeral expenses, and if there be any surplus the same to be disposed of as is now provided by law. This section shall apply to the counties of Randolph, Guilford, Edgecombe, Cabarrus, Iredell, Moore, Johnston, Rutherford, Stanly, Davidson, Currituck, Yadkin, Alexander, Stokes, Clay, Greene, Wayne, Franklin, Macon, Beaufort, Swain, Haywood, Caldwell, Burke, Gates, Rockingham, Graham, Lee, Person, Catawba, Davie, Tarrell, Perquimans, Transylvania, Duplin, Hyde, Pender, Surry, Alamance, Lincoln, Granville, Chowan, Hoke, Vance, Montgomery, Durham, Wake, Hartnett, Buncombe, Union, Onslow, Nash, Halifax, Hertford, Mecklenburg, Robeson, Orange, Pasquotank, McDowell, Rowan, New Hanover, Martin, Forsyth, Polk, Warren, Caswell, Yancey, Wilkes, and Lenoir counties.

Editor's Note.—The purpose of this section is to expedi the settlement of a decedent's estate by permitting the representative to discover assets of the estate through and upon the authority of the probate court without hav ing to resort, independently, to the rather slow and expensiv process of claim and delivery proceedings. As the section seems to provide only for the situation where a party "admits" that the property held belongs to the dec edent's estate and refuses for an inadequate reason to give it up, it would seem that the representative would still have to utilize claim and delivery proceedings in the case where the party in possession of the property denies that it belongs to the estate of the deceased. It is doubtful that the section would, by inference, authorize the clerk to try the title to such property. 15 N. C. Law Rev., 352.
Art. 13. Sales of Personal Property.

§ 28-73. Executor or administrator may sell without court order.—Every executor and administrator shall have power in his discretion and without court order.—Every executor and administrator shall have power in his discretion and without court order. (Rev., s. 63; Code, s. 1408; 1868-9, c. 113, s. 16; C. S. 66.)

For Application of Proceeds Purchaser Not Responsible.—A purchaser of personalty from the personal representative does not, by virtue of the latter's absolute power to dispose of the personalty, have to see to the proper application of the purchase price. This, even though the decedent has created a particular separate fund for the payment of his debts. But if the purchase be tainted with collusion, he will be held responsible for its proper application. Tyrrell v. Armistead, 41 N. C. 74; Cox v. First Nat. Bank, 119 N. C. 40, 305, 26 S. E. 22; Odell v. House, 16 N. C. 422, 427.

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

§ 28-75. Terms and notice of public sale.—All public sales of personal property by executors, administrators or collectors shall be made on credit or for cash after twenty days' notification posted at the court house and four public places in the county. The purchaser gets good title, unless he purchased mala fide and for the purpose of devastavit. Polk v. Robinson, 41 N. C. 235; Wilson v. Doster, 42 N. C. 231. Where he receives from the personal representative of the decedent the transaction is presumably mala fide. Hendrick v. Ginley, 114 N. C. 543, 546, 19 S. E. 598; Dancy v. Duncan, 96 N. C. 111, 117, 1 S. E. 455; Wilson v. Doster, supra; Latham v. Moore, 39 N. C. 167.

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

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

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

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

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

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

Editor's Note.—The 1925 Act repealed the former law and substituted in lieu thereof the first, second, and third paragraphs. The 1939 Act added the last paragraph. See also 4 N. C. L. Eng., § 28-76.

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

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

Editors note.—The 1925 Act repealed the former law and substituted in lieu thereof the first, second, and third paragraphs. The 1939 Act added the last paragraph. See also 4 N. C. L. Eng., § 28-76.

Effect of Section upon Discretion of Judge and Clerk.—The provisions of this section do not take away from the clerk or judge on appeal, the sound discretionary power of determining whether a public or a private sale would best subserve the interests of the parties, or prevent them from selling at a private sale in proper cases. The section is permissive and not mandatory upon them. In re Brown's Estate, 185 N. C. 398, 117 S. E. 291; Felton v. Felton, 213 N. C. 194, 195 S. E. 531.

Editors note.—The 1925 Act repealed the former law and substituted in lieu thereof the first, second, and third paragraphs. The 1939 Act added the last paragraph. See also 4 N. C. L. Eng., § 28-76.

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Editors note.—The 1925 Act repealed the former law and substituted in lieu thereof the first, second, and third paragraphs. The 1939 Act added the last paragraph. See also 4 N. C. L. Eng., § 28-76.

Refusal to Confirm.—In an appeal upon refusal to confirm the sale under this section, the presumption is that there was sufficient evidence to sustain the findings of fact upon which the refusal is based. In re Brown's Estate, 185 N. C. 128, 117 S. E. 291.
§ 28-77. Confirmation required on objection of interested party.—When any person interested, either as creditor or legatee, on the day of sale objects to the confirmation of any sale made by the personal representative, the court, after the report of the sale, shall name a time for the confirmation, and the court shall hold a hearing thereon. See Alexander v. Atlantic, et al., Co., 144 N. C. 83, 56 S. E. 697.

The proviso as to the hours designated was added by the Public Laws of 1927, Art. 14, Sales of Real Property.

§ 28-78. Hours of public sale; penalty.—All public sales or rentings provided for in this chapter shall be between the hours of ten o'clock a. m. and four o'clock p. m. of the day on which the sale or renting is to be made, except that in towns or cities of more than five thousand inhabitants public sales of goods, wares, and merchandise may be continued until the hour of ten o'clock at night. Provided, a certain hour for such sales shall be named and the sale shall begin within one hour after the time fixed, unless postponed as provided by law, or delayed by other sales; and every executor, administrator or collector who otherwise makes any sale or renting shall forfeit and pay two hundred dollars to any person suing for the same. (Rev., s. 66; Code, s. 1411; 1868-9, c. 113, s. 21; C. S. 71.)

§ 28-79. Confirmation required on objection of interested party.—When any person interested, either as creditor or legatee, on the day of sale objects to the confirmation of any sale made by the personal representative, the court, after the report of the sale, shall name a time for the confirmation, and the court shall hold a hearing thereon. See Alexander v. Atlantic, et al., Co., 144 N. C. 83, 56 S. E. 697.

The proviso as to the hours designated was added by the Public Laws of 1927, Art. 14, Sales of Real Property.
the widow from claiming her dower right by metes and bounds in her husband's land: Provided, further, if the person entitled to said dower shall not claim the same by metes and bounds in her husband's lands, or elect to receive the income from one-third of the net proceeds of said sale, within the time allowed by law for filing pleadings in such special proceeding, such person shall be presumed to have elected to receive such dower interest in cash as provided in this section.

Where land is sold as provided in this section, and in lieu of paying cash therefor the purchaser executes a note or mortgage payable to the order of the decedent, there shall be paid to the widow from claiming her dower right by metes and bounds in the husband's lands, or elect to receive the income in such special proceeding, such person shall be entitled to receive the income within the time allowed by law for filing pleadings in such special proceeding, such person shall be presumed to have elected to receive such dower interest in cash as provided in this section.

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

Editor's Note.—The 1937 amendment inserted that part of the third sentence of the third paragraph beginning with the words: "Provided, further, if..."

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

The provisions relating to the widow's dower were inserted by the Public Laws of 1923, ch. 393, s. 5.

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

The 1945 amendment rewrote the second sentence of the first paragraph and inserted the second paragraph.
If the personality has been wasted by the representative, his successor must first resort to his bond before proceeding against the lands. Lilly v. Wooley, 94 N. C. 412; Cifflin v. Saunders, 67 N. C. 241; and the jurisdiction of the clerk is thereby suspended, and real property of the decedent remained subject to sale, to Sell Realty.—As long as the estate remained unsettled, limitation bars the right and duty of the personal representative to sell lands to make assets to pay the debts of the estate without showing its actual application is sufficient. Clement v. Cozart, 107 N. C. 695, 12 S. E. 254. Though not shown, where the former is insolvent, his bond lost, and sureties unknown. Brittain v. Dickson, 104 N. C. 547, 10 S. E. 701; Brittain v. Pritchard, 88 N. C. 445; Clement v. Cozart, 107 N. C. 695, 697, 12 S. E. 704.

695, 697, 12. S. E. 254.

Clements v. Cozart, 107 N. C., 695, 12 S. E. 254. Though not shown, where the former is insolvent, his bond lost, and sureties unknown. Brittain v. Dickson, 104 N. C. 547, 10 S. E. 701; Brittain v. Pritchard, 88 N. C. 445; Clement v. Cozart, 107 N. C. 695, 697, 12 S. E. 704.

§ 28-81

When Application Filed.—The application may be filed at any time after the administrator ascertains that there is an insufficiency of assets, even before he can possibly support the personal representative, or file the application of it to the debtor. Blount v. Pritchard, 88 N. C. 445.

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

Compulsory Sale by Judgment Creditor.—After the docking of the judgment, the judgment debtor conveyed the property. After the death of the judgment debtor, execution was issued, and the judgment creditor instituted this action to compel the sheriff to sell the land under the execution, to arrive at the debts to which the judgment debtor was not warranted by law, and the sale thereof would be void. Flynn v. Runley, 212 N. C. 25, 192 S. E. 808.

The Federal District Court has jurisdiction of a bill in equity by the United States to subject to payment a judgment land situated in this state which had descended to the heirs of the judgment debtor, there being no personal assets. United States v. Mudd, 254 Fed. 872.

Nature of Proceedings.—A proceeding to sell the land under this section is a special proceeding before the clerk.
§ 28-82. When representatives authorized to rent, borrow or mortgage.—Such executor, administrator or collector, in lieu of asking for an order to determine the whole matter. Baker v. Carter, 127 N. C. 92, 94, 37 S. E. 81.


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

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

The said executor or administrator shall not mortgage the property of said estate for a term of years in excess of the term fixed by the court in its decree. The word "mortgage" wherever used herein, shall be construed to include "deeds of trust." (Acts 1913, c. 49, s. 1; 1927, c. 225, s. 1; C. S. 75.)

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

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

A judicial sale of real property of a decedent hereafter made under order of a court of competent jurisdiction for partition shall be valid as to creditors, executors, administrators and collectors of such decedent irrespective of the time made. If such sale is made within two years of death of such decedent or before the estate shall have been fully administered, the personal representative of such decedent must be joined as plaintiff or made a party defendant. The court shall in the order of confirmation of any sale made within two years of the death of a decedent set aside such part of the proceeds of sale representing the interest of such decedent for application upon the debts, if any, of the decedent by requiring payment of the same into the hands of such personal representative or of the court itself, to be held by such personal representative or the court subject to claims of creditors for a period of two years from date of death of decedent, or until such estate is fully administered. Personal representatives shall be allowed commissions on only so much of said proceeds of sale, so coming into
their hands, as may be necessary to discharge the trusts of creditors. (Rev., s. 70; Code, s. 1449; 1868-9, c. 118, s. 105; 1925, c. 355; 1939, c. 106; 1943, c. 411, 763; C. S. 746.)

Editor's Note.—The amendment of 1935 made the limitation begin to run from the date of the decedent's death rather than from the grant of letters and added the proviso to the first sentence. The 1941 amendment inserted the second sentence of the first paragraph. For comment on the 1939 amendatory act, see 17 N. C. L. Rev. 359.

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

The second 1941 amendment added the second paragraph.

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

Only Purchaser without Notice Protected. — Prior to 1869, a purchaser from the heirs after 2 years of the grant of letters, even though he have notice of the existence of the debt, is protected by the words of Section 28-81 supra.

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

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

Conveyances of real property within two years from the grant of letters, are sufficient to discharge the debts of the decedent, and personal representatives, and as to them, only in the case the personal assets are insufficient to pay the debts and costs of administration; they are, therefore, never entitled to operate to the prejudice of creditors. Goodwin v. Buckner, 201 N. C. 78, 81, 159 S. E. 1. See also, Cox v. Wright, 218 N. C. 342, 11 S. E. (2d) 258.

Voidable Merely. — A conveyance to a purchaser not for value is not, under this section, ipso facto void, but at the mercy of the grantor, i. e., may be rescinded and the conveyance set aside.

Mortgage after Two Years Followed by Sale Is Valid. — Where an heir executed a deed of trust more than two years after the grant of letters and the same was foreclosed, and the purchaser at the sale transferred title to a bona fide purchaser who had no actual knowledge that the property was liable to foreclosure by administration on account of the death of the decedent, the estate, it was held that the fact that it appeared from the records that the estate had not been settled does not amount to notice that the granting party was not in possession of title and the purchaser was a bona fide purchaser without notice, and the land is not subject to sale. Johnson v. Barefoot, 238 N. C. 706, 182 S. E. 477.

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

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

To What Purchaser without Notice Protected. — The purchaser for value contemplated by this section is, with respect to consideration paid by him, to be assimilated to a purchaser for value under the statute of 12 Eliz., viz: he need not have paid all of the purchase money. The test of "purchaser for value" is not the same under this section with the test in certain equity cases where the purchaser is required to prove that he paid the price in money or other value, as, when the same has been paid in money or otherwise, he need only prove he receives notice. Arrington v. Arrington, 114 N. C. 151, 166, 19 S. E. 351. Hence even a purchaser upon credit is "purchaser for value." "Arrington v. Arrington, supra; Beasley v. Bray, 98 N. C. 266, 3 S. E. 497.

Deed of trust creditor is a purchaser for value within the meaning of this section. Francis v. Reeves, 137 N. C. 269, 277 S. E. 258.

A deed conveying the timber on the land descended falls within the purview of this section. Camp Mfg. Co. v. Linwood, 132 N. C. 158, 43 S. E. 472.

Admissibility of Evidence.—In proceeding for partition, defendants claimed sole seizin. The evidence tended to show that defendants' grantor owned an undivided interest in the locus in quo as tenant in common with her brother. The defendants' grantor was the sole heir at law of her brother and executed deed to defendants purporting to convey the entire tract of land less than two months after her brother's death. Plaintiff introduced in evidence testimony of the brother's administrator that he had sold the brother's interest in the land to make assets to pay debts of the estate, and offered in evidence court records of the summons, pleadings, judgments, and decrees, executed by the commissioner to plaintiff in the proceeding to sell lands to make assets, and the judgment in plaintiff's favor with interest thereon, and the filing of the petition for the sale of the land by the administrator, and the inability of defendants to dispose of their interest. Held: the evidence is admissible to show that the brother's administrator had sold the interest in the land to make assets to pay debts of the estate, and to show the judgment in plaintiff's favor.

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

Conveyance by deemse in fraud of creditors. The real estate subject to sale under this chapter shall include all the deemed may have conveyed with intent to defraud his creditors, and all rights of entry and rights of action and all other rights and interest in lands, tenements and hereditaments which he may devise, or by law would descend to his heirs: Provided, that lands so fraudulently conveyed shall not be taken from any one who purchased them for a valuable consideration and without a knowledge of the fraud.

CROSS REFERENCES.—As to personalty see § 28-59; as to fraudulent conveyances, see § 39-15 et seq.

Conveyance Must Be by the Deceased. — Where a heir executed a deed of trust more than two years after grant of letters and the same was foreclosed, and the proceeds of the land the same as the other creditors. Held: that the land could not be sold for the payment of A's debts. Rhem v. Hall, 218 N. C. 786, 182 S. E. 477.

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

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

Conveyance Must Be in Fraud of Creditors. — Under this section lands conveyed cannot be sold unless it can be shown that they were conveyed in fraud of his creditors. McCaskill v. Graham, 121 N. C. 150, 28 S. E. 264.

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

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

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

1. The amount of debts outstanding against the estate.

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

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

4. The names, ages and residences, if known, of the devisees and heirs at law of the decedent. (Rev., s. 77; Code, s. 1437; 1868-9, c. 113, s. 43; C. S. 75.)

The Purpose of Requisites in Application.—The personal estate, when divided, is the primary fund, and land is the secondary fund for the payment of debts, and the design of the act giving authority to the personal representative to sell and administer on the proceeds of lands in the requisites to its debts and the value and application of the personal estate, is that it may be seen that the personal estate is insufficient to pay the debts. If a petition be drawn in accordance with these requirements so as to show the insufficiency of the personal fund, the necessity of resorting to the real estate to supply the deficiency will then be apparent. Shields v. McDowell, 82 N. C. 137, 138; Neighbors v. Evans, 210 N. C. 570, 187 S. E. 796. See also, Barkley v. Thomas, 220 N. C. 341, 346, 17 S. E. (2d) 482.

As the purpose of this section is to enable the court to see whether a sale is necessary, a petition which simply states that the personal estate "is wholly insufficient to pay the debts," without setting forth the value of the personal estate, is defective. McNeill v. McBryde, 112 N. C. 408, 411, 16 S. E. 541. A petition which simply states that the personal estate "is insufficient to pay the debts," is defective. "The courts do not decide upon facts, but only as far as can be ascertained," for these quoted words used in this section, according to grammatical construction qualify each of the sub-divisions of this section. Clement v. Cozart, 107 N. C. 695, 697, 12 S. E. 254; Shields v. McDowell, 82 N. C. 151.

Burden of proof that the conveyance was fair and for a
full consideration is upon the grantee. Webb v. Atkinson, 122 N. C. 683, 689, 29 S. E. 940.

Contemplation of the sale of real estate as the only means of satisfying the claims of the creditors of a deceased debtor in which he may have conveyed in fraud of creditors, is subject to sale. Mannix v. Ihrig, 76 N. C. 299; Waugh v. Blevins, 68 N. C. 167.

Only Debtor's Interest Subject to Sale.—Under this section the personal representative of a deceased debtor in which he may have conveyed in fraud of creditors, is subject to sale. Heck v. Williams, 79 N. C. 437; Egerton v. Jones, 107 N. C. 264, 290, 12 S. E. 7.

A petition which sets forth the deeds of the former administrator was sued on and exhausted. Monger v. Kelly, 115 N. C. 254, 20 S. E. 374. But see Lilly v. Wolley, 94 N. C. 412; Clement v. Cozart, 107 N. C. 695, 697, 12 S. E. 254, which declare that such bond must have been exhausted.

Allegation that the assets of the decedent are insufficient to pay the debts, and that a sale of property fraudulently conveyed is necessary, is held sufficient. Sullivan v. Field, 112 N. C. 519, 16 S. E. 735.

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

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

§ 28-87. Heirs and devisees necessary parties.—No order to sell real estate shall be granted till the heirs or devisees of the decedent have been made parties to the proceeding, by service of summons, either personally or by publication, as required by law: Provided, that in any proceedings for the sale of land to make assets, when there are heirs of said decedent, or there may be heirs of said decedent whose names and residences are unknown, and it is desired to make all unknown heirs of said decedent parties to said proceedings, and the personal representative shall make such representation in his petition, then all unknown heirs of the said decedent shall be made parties defendant in the said action, as unknown heirs of said decedent naming him, and thus denominated and under this name all said unknown heirs shall be served with summons by publication as now regularly provided by law for the service of summons by publication in the Superior Court, and upon such service being had, the court shall appoint some discreet person as guardian ad litem, for said unknown heirs, and summons shall issue to him as such. Said guardian ad litem shall file answer for said unknown heirs, and defend for them, and he may be paid such sum as the court may fix, to be paid as other costs out of the estate. Upon the filing of the answer by said guardian ad litem, all said unknown heirs shall be before the court for the purposes of the action to the same extent as if each had been served with summons, and any claim that they may make to said real estate so sold shall be transferred to the funds in the hands of the personal representative to the same extent as other distributees of said estate and no further. This proviso shall apply to ac-
tions now pending, and all proceedings to sell land for assets heretofore had, where unknown heirs have been summoned by publication, are hereby validated. (Rev., s. 74; Code, s. 1438, 1868-9, c. 113, s. 44; Ex. Sess. 1924, c. 3, s. 1; C. S. 80.)

Cross Reference.—As to joinder of beneficiary when the executor or administrator institutes an action, see § 1-58. Ed. 2009. 2

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

Issue as to Title.—Where the order of sale is granted without determining an issue of title raised under this section, the order is void, and the title of the purchaser with notice of such issue is voidable. Perry v. Peterson, 98 N. C. 167, 37 S. E. 299; Stancil v. Gay, 92 N. C. 462; Harrison v. Harrison, 106 N. C. 282, 11 S. E. 356.

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

§ 28-89. Upon issues joined, transferred to term.—When an issue of law or fact is joined between parties, the course of the proceeding shall be as prescribed in such cases for other special proceedings. (Rev., s. 78; Code, s. 1440; 1868-9, c. 113, s. 47; C. S. 82.)

Issue of Law Submitted to Judge.—Where a demurrer is filed to the petition before the clerk, the issue of law thereby raised must, under this section, be certified to the Judge at chambers. Then the judge must transmit his decision thereon to the clerk; it is error for him to direct an order of sale after overruling the demurrer. Jones v. Hemphill, 77 N. C. 42.
of § 1-404 shall not apply. Upon the coming in of the report of the sale and the confirmation thereof, title shall be made by such person, and at such time as the court may prescribe, and in all cases where the persons in possession have been made parties to the proceeding, the court may grant an order for possession. (Rev., s. 80; Code, s. 1444; 1868-9, c. 113, s. 49; 1917, c. 127, s. 1; 1935, c. 72; C. S. 85.

Editor's Note.—The 1935 amendment inserted the next to the last sentence of the section relating to the nonapplicability of this section to sales in which payment is not an arbitrable rent, but a sound legal discretion. Tillett v. Aydlett, 90 N. C. 551; Tillett v. Aydlett, 93 N. C. 15.

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

Confirmation Necessary.—Before a purchaser at a judicial sale can be held to his bid, the sale must be confirmed by the court, and then in the same proceedings a rule issued to show cause why he should not be compelled to comply with the terms of the order of sale. Tillett v. Aydlett, 93 N. C. 15.

Confirmation.—After the confirmation of the sale, the bid may be rejected in the sound discretion of the court at any time before confirmation. Harrell v. Blythe, 140 N. C. 415, 53 S. E. 232.

Confirmation of the sale is a condition precedent to the exercise of the executor's right to convey title. Joyce v. Futrell, 136 N. C. 301, 47 S. E. 694.

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

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

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

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

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

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

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

Resale.—In a special proceeding by an administrator to sell land to make assets to pay debts whether the bid be required under this section of the decree of sale, § 45-28, or motion be made by a party interested in the proceeds for an order of resale under this section only, it is clear that a private sale is open to either course for ten days from the date and report of sale. During that period the bidder acquires no right of possession or title. He is merely a preferred bidder. Howard v. Ray, 222 N. C. 710, 24 S. E. (2d) 559.

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

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

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

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


§ 28-95. Specifically devised reality; contribution. —If, upon the hearing of any petition for the sale of real estate to pay debts, under this chapter, the court decrees a sale of any part that may have been specifically devised, the devisee shall be entitled to contribution from other devisees, according to the principles of equity in regard to contribution among legatees. And the children and issue provided for in this chapter shall be regarded as specific devisees in such contribu-
§ 28-96. Under power in will, sales public or private.—Sales of real property made pursuant to authority given by will, unless the will otherwise directs, may be public or private, and on such terms as, in the opinion of the executor, are most advantageous to those interested therein. (Rev., s. 84; Code, s. 1503; 1868-9, c. 113, s. 75; C. S. 89.)

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

Effect of Section on Common Law Rule.—At common law an executor had no control over realty, and hence a power conferred upon him by the will to sell the realty did not pass upon his death to the administrator d. b. n. c. t. a. But this section has changed the common law rule in this respect. C. S. 91.)

Sale by Administrator d. b. n. c. t. a.—The case of an administration with the will annexed where no executors were appointed is (at present) both within the letter and the spirit of this section. Hence where a testator empowers his executor to sell lands, but fails to designate any executor, the administrator d. b. n. c. t. a. can, under this section exercise that right. Hester v. Hester, 37 N. C. 330, 332.

Upon the death or removal of the executors named in the will, the administrator c. t. a. succeeds to all rights, powers and duties of the executors, and he may exercise all powers, duties and responsibilities of the executor, without regard to whether they are given the executor virtute officii or nominativum, unless the language of the will definitely limits the exercise of the power of sale to the person named executor or executors. Clark v. Waddell, 72 N. C. 233; 9 S. E. 932.

§ 28-98. Death of vendor under contract; representative to convey.—When any deceased person has bona fide sold any lands, and has given a bond or other written contract to the purchaser to convey the same, and the bond or other written contract has been duly proved and registered in the county where the lands are situated, if within the state, or, if not in the state, shall be proved before the clerk of the superior court and registered in the county where the obligee lives or obligor died, his executor, administrator or collector may execute a deed to the purchaser conveying such estate as shall be specified in the bond or other written contract; and such deed shall convey the title as fully as if it had been executed by the deceased obligor. Provided, that no deed shall be made but upon payment of the price, if the condition of the bond or other written contract is, (Rev., s. 83; Code, s. 1492; 1868-9, c. 113, s. 65; 1874-5, c. 251; 1876, c. 494.)

Editor's Note.—Before the enactment of this section, the heirs of the vendor were the proper persons on whom the purchaser had the right to call for the conveyance. See Earle v. McDougal, 12 N. C. 16. Osborne v. McMillan, 30 N. C. 109; Twitty v. Lovelace, 97 N. C. 54, 2 S. E. 661.

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

Registration and Payment Prerequisites.—Unless the contract for the sale of the lands, bond or other written contract to convey the same, and the bond or other written contract has been duly proved and registered and the purchase money has been paid in full, no deed conveying the lands shall be made. Taylor v. Hargrove, 101 N. C. 145, 7 S. E. 647.

§ 28-99. Title in representative for estate; he or she may sell and convey.—In the case of a deceased person holding title to real property, the representative thereof has the same rights to convey the estate as if the deceased person had held title to the estate. Cited in Anderson v. Bridgers, 209 N. C. 456, 184 S. E. 78.

§ 28-100. Rights of heirs in estate of deceased.—In an action brought by the personal representative of an obligor in a bond for title to subject the bond to the payment of the purchase money, the heirs of the obligor are necessary parties. But if the bond referred to in this section is proved and registered and the section has been complied with, in proceedings for the sale of such land, the presence of the heirs is perhaps not necessary. Grubb v. Lookahill, 100 N. C. 271, 6 S. B. 390.

Bilateral Contracts Contemplated.—This section contemplates only contracts of a bilateral nature. Hence where the optionee of a bilateral contract has exercised the option the representative has, under this section, no power to convey; and the optionee's remedy is against the heir or the devisee. Noten v. Dennis Simmons Co., 174 N. C. 68, 93 S. E. 456.

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

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


§ 28-99. Title in representative for estate; he or successor to convey.—When land is conveyed to a personal representative for the benefit of the estate he represents, he may sell and convey same upon such terms as he may deem just and for the advantage of said estate; which shall be public, after due advertisement, as for judicial sales, unless the conveyance is made to the party entitled to the proceeds. If such land is not conveyed by such personal representative during his
life or term of office, his successor may sell and convey such land as if the title had been made to him: Provided, If the predecessor has contracted in writing to sell said lands, but fails to convey same, his successor in office may so upon payment of the purchase price. (Rev., s. 71; 1905, c. 342; C. S. 92.)

§ 28-100. Sales of realty devised upon contingent remainder, executory devise or other limitation validated.—In all cases where real property devised upon contingent remainder, executory devise, or other limitation, shall have been sold and conveyed for a fair price in good faith by the executor named in said will, or by an administrator with the will annexed, for the purpose of making assets with which to pay the debts of said estate, under the mistaken belief that said will authorized such sale, and the proceeds of such sale shall have been applied to the payment of the indebtedness of such estate, and it shall be made to appear in any action brought by the purchaser of said land, or those claiming under such purchaser, that such executor, or other personal representative would have been entitled in a proper proceeding brought for that purpose to an order of court to sell said land for the purpose of making assets with which to pay the indebtedness of such estate, then such sale so made by such executor, or other representative, shall be valid and binding upon all such contingent remaindermen, executory devises, or other persons, who would have taken such property under said will upon the contingency or contingencies therein mentioned, notwithstanding said sale shall have been made by such executor or other personal representative without obtaining such order of the court. And in any such action instituted by the purchaser of such land, or those claiming under him, for the purpose of removing a cloud from the title thereto all contingent remaindermen, executory devises, or other persons entitled to claim under any limitation in said will, or may, go to minors, or persons under disability, or to sales of lands made under the circumstances narrated in § 28-100, or any action brought for the purpose of making assets with which to pay the indebtedness of the said estate and the cost of the administration thereof, and represented therein in the manner hereinafter provided: Provided, however, that this law shall not apply to any sale of land made in which the executor or other personal representative shall have been either directly or indirectly the purchaser thereof. (1923, c. 70, s. 1; C. S. 92(a.).)

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

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

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

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

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

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

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

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

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

§ 28-103. Validation of certain bona fide sales of real estate to pay debts made without order of court.—In all cases where sales of real estate have been made by administrators of deceased persons, in good faith and upon a valuable consideration, to obtain assets to pay debts of the estate, and deeds have been executed by such administrators to the purchasers, who have paid the purchase price thereof, and no action has been taken by the heirs of such deceased persons to annul such sales by litigation or otherwise, such sales are hereby validated. The recitals contained in such a deed that the sale was made under order or license of the court for the purpose of obtaining assets to pay debts of the estate and that the proceeds of sale of said land have been applied to the payment
of the necessary indebtedness of the estate and the cost of administration thereof shall be presumed to be prima facie correct: Provided, however, that this section shall not apply to any sale of land in which the administrator of such deceased person shall have been directly or indirectly the purchaser thereof, and nothing herein shall prevent such sale from being impeached for fraud.

This section shall only apply to sales by administrators made prior to January 1, 1920. (1931, c. 146; 1933, c. 31.)

Editor's Note.—This Act became effective March 21, 1931.

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

A deed of trust executed to secure a debt which by law had a specific lien on property, as provided by the first class, has priority over the payment of taxes provided for in the fifth subdivision of the statute. Farmville Oil, etc., Co. v. Bourne, 205 N. C. 337, 339, 171 S. E. 568.

Second class. Funeral expenses.

Editor's Note.—The burial expenses, from the nature of things, are not an indebtedness of the deceased, for they accrue after his death; nor are they cost of administration. Yet from necessity they are chargeable upon the assets of the estate, and to establish the order of payment between claimants to such expense, and to determine the settlement of his estate. These have heretofore been considered as a duty of the representative. The intention of the Legislature is that the assets of a decedent shall be administered, as far as may be done, in accordance with the priorities fixed by its terms, as to come within the first class mentioned in the statute. Stewart v. Dear, 205 N. C. 37, 38, 169 S. E. 804.

Section Construed to Favor Bankruptcy Rule.—Upon the scope of this section for administering the estate of a person deceased or to modify the statutory direction as to the order of priority of classes, this section provides for the administration of the assets of the representative for the benefit of all the creditors. Atkinson v. Ricks, 140 N. C. 418, 421, 53 S. E. 229. As stated in 9 N. C. L. Rev. 404, the preamble of the Act indicates that it is to apply where no order of court was obtained or where the court proceedings authorizing and confirming the sales have been lost without being recorded. As to its constitutionality against the charge of disturbing vested rights, see Charlotte Consol. Const. v. Brockenhourb, 187 N. C. 65, 121 S. E. 7. As to validation of sales of real estate devised upon limitation made prior to January 1, 1925, see §§ 28-100 to 28-102.

This section shall only apply to sales by administrators of the estate of a person deceased or to modify the statutory direction as to the order of priority of classes, this section provides for the administration of the assets of the representative for the benefit of all the creditors.

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§ 28-106. No preference within class.—No executor, administrator or collector shall give to any debt any preference whatever, either by paying it out of its class or by paying thereon more than a pro rata proportion in its class. (Rev., c. 87; Code, ss. 1417, 1418; 1868-9, c. 113, s. 24; 1941, c. 271; C. S. 93.)


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

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

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

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

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

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

Indorsing or Accounting.—The indorsement or accounting of any estate to any person before any proceeding against such estate, shall not, in any subsequent proceeding, be necessary as an evidence of due diligence, if agreed to by the parties in the proceeding.
such cases payments thus made shall be deemed and held valid in law, and shall be allowed to such executor or administrator in all suits by creditors of the estate seeking to charge such executor or administrator with assets of the estate or with devastavit thereof, without regard to the dignity of the debt thus paid, or on which such suit may be brought. (Rev., s. 96; Code, s. 1496; 1869-70, c. 150; C. S. 95.)

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

§ 28-108. Debts due representative not preferred.—No property or assets of the decedent shall be held valid in law, and shall be allowed to such creditor as against other creditors of the same class; but such debt must be established upon the same proof and paid in like manner and order as required by law in case of other debts. (Rev., s. 89; Code, s. 1420; 1868-9, c. 113, s. 28; C. S. 96.)

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

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

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

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

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

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

Finding as Judgment.—The finding of arbitrators under this section, if not settled by the parties, is a finding of fact and is subject to review in the superior court. In re Reynolds' Estate, 221 N. C. 449, 20 S. E. (2d) 348.

Only those having a pecuniary interest in the estate may be heard to impeach the result for fraud or collusion. Lasitter v. Upchurch, 107 N. C. 411, 12 S. E. 63.

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

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

Thus, while § 28-105 classifies funeral expenses as a debt of the estate, the amount due therefor cannot be regarded as a debt which is referred to the arbitrators, and where the funeral expenses of the decedent are paid by the executrix, the payment is not an offset. In re Shutt, 214 N. C. 684, 200 S. E. 372.

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

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

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

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

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

A party asserting the right as assignee of an insurance policy to retain the proceeds thereof for obligations he contracted were forced by the assignment, may be barred, under this section, from asserting such right after the lapse of more than six months as against the administrator of the deceased insured in the administrator's action to recover the proceeds of the policy. Holbrook v. Hargrove, 181 N. C. 250, 184 S. E. 366.

Counterclaim Barred.—A claim barred under this section was [35 3]
can not be pleaded even by way of counterclaim, in an action against the executor, administrator, or collector. [16x547]shall any costs be recovered in such action chargeable for any assets that he may have paid in satisfaction of any debts, legacies or distributive shares before such action was commenced; nor shall any costs be recovered in such action against the executor, administrator, or collector. (Rev., s. 94; Code, s. 1428; 1868-9, c. 113, s. 37; C. S. 101.)

§ 28-113. If claim not presented in twelve months, representative discharged as to assets paid. [16x574]in section 28-47 had not been given. Morrisey v. Hill, 143 N. C. 593, 55 S. E. 691.

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

The purpose of this section is to relieve administrators, executors and collectors from liability for assets they may pay or distribute to a person or persons entitled to have the same as to claims not presented within the prescribed time, and as well to facilitate and encourage the prompt settlement of the estates of deceased persons. Mallard v. Richmond, 51 N. E. 383, 35 S. E. 675.

Administrator May Hold Funds for Twelve Month Period. [17x528](Rev., s. 94; Code, s. 1428; 1868-9, c. 113, s. 37; C. S. 101.)

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


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

§ 28-115. When costs against representative allowed. [17x348]account, if he approve the same, he must endorse his approval thereon, which shall be deemed prima facie evidence of correctness. (Rev., s. 99; Code, s. 1399; C. C. P., s. 478; 1871-2, c. 46; C. S. 105.)

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

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

Prima Facie Evidence Only. —The sworn account referred to in this section is only prima facie evidence. It is not conclusive as against any person adversely interested. The statute merely shifts the burden of proof. Allen v. Royston, 107 N. C. 278, 282, 10 S. E. 566; In re Hege, 205 N. C. 655, 172 S. E. 345; Brady v. Pfaff, 210 N. C. 808, 186 S. E. 340.

A report showing all debts paid except a mortgage in default, if presented, constitute a final account, since the duties and obligations of administration continue until all debts are paid or all assets exhausted under this section. Creech v. Wilder, 212 N. C. 162, 193 S. E. 291.

Recorded Account Is Competent Evidence in Collateral Suit. The account required by this section must be recorded as required in § 2-42. Such account therefore is not hearsay but is competent evidence in a collateral suit. Bridgers v. Turner, 127 N. C. 57, 59, 57 S. E. 630; In re Hege, 205 N. C. 655, 172 S. E. 345; Brady v. Pfaff, 210 N. C. 808, 186 S. E. 340.

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

Duty of Clerk to Accept Executive's Annual Account. — Where property is devised or bequeathed by a will, upon certain trusts, and the testator does not appoint a trustee, it is the duty of the executor, to carry out the provisions of the will. It is error for the clerk to refuse to accept an annual account tendered by the executor for a year more than two years after the executor qualified but during the life of the trust estate. In re Wachovia Bank, etc., Co., [35]
§ 28-118. Clerk may compel account.—If any executor, administrator or collector omits to account, as directed in § 28-117, or renders an insufficient and unsatisfactory account, the clerk shall forthwith order such executor, administrator or collector to render a full and satisfactory account, as required by law, within twenty days after service of the order. Upon return of the order, duly served, if such executor, administrator or collector fails to or refuses to exhibit such account, the clerk may issue an attachment against him for a contempt and commit him till he exhibit such account, and may likewise remove him from office. And the sheriffs of the several counties to whom a process is directed under the provisions of this section shall serve the same without demanding their fees in advance. (Rev., s. 100; Code, s. 1400; C. C. P., s. 479; 1933, c. 99; C. S. 106.)

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

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

Applied in In re Hege, 205 N. C. 265, 172 S. E. 345.

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

Independent of this section receipts of living persons are not strictly legal evidence to show a full administration. Costen v. McDowell, 107 N. C. 546, 549, 12 S. E. 432; Drake v. Drake, 82 N. C. 443, 445.

§ 28-120. Gravestones authorized.—It is lawful for executors and administrators to provide suitable gravestones to mark the graves of their testators or intestates, and to pay for the cost of erecting the same, and the cost thereof shall be paid as funeral expenses and credited as such in final accounts. The cost thereof shall be in the sound discretion of the executor or administrator, having due regard to the value of the estate and to the interests of creditors and needs of the widow and distributees of the estate. Where the executor or administrator desires to spend more than one hundred dollars for such purpose he shall file his petition before the clerk of the court, and such order as will be made by the court shall specify the amount to be expended for such purpose. Provided, however, that if the net estate is of a value in excess of fifteen thousand dollars ($15,000), the executor or administrator may, in his discretion, expend not more than five hundred dollars ($500) for this purpose without securing the order of court required herein. (Rev., s. 102; 1905, c. 444; 1923, c. 4; 1941, c. 102; C. S. 108.)

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

The 1941 amendment added the proviso at the end of the section. For comment on this amendment, see 19 N. C. Law Rev. 236.

Scope of Section.—This section was held inapplicable where executors, in obedience to testimonial instructions, expended more than $100 for a gravestone when the court appeared to be solvent, but in fact it was insolvent. In re Estate of Bost, 211 N. C. 440, 190 S. E. 736.

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

Jurisdiction.—Formerly the probate court had jurisdiction to make the representative account. Rowland v. Thompson, 63 N. C. 110, 112. Under this section the clerk of the superior Court has jurisdiction. McNeill v. Hodges, 105 N. C. 52, 54, 11 S. E. 356.

When Section Not Applicable.—This statutory requirement is not applicable where the last possessor of the executor by death shall not be able to perform within two years from his qualification. In re Wachovia Bank, etc., Co., 210 N. C. 385, 390, 186 S. E. 510. See § 28-192.

Review of Order to File Final Account and Turn Over Assets.—Where the clerk orders an executor to file final account and turn over the assets of the trust estate to itself as trustee, which order is made as a matter of law upon facts not and not as a matter of discretion, the order is reviewable by the Superior Court upon appeal. In re Wachovia Bank, etc., Co., 210 N. C. 385, 186 S. E. 510. Ex Parte Proceeding No Estoppel.—The order, if the clerk, whether under this or under § 28-117, is an ex parte proceeding, and does not work an estoppel upon the parties as a judgment in inter partes proceedings would. In this respect this section is established in the same way as before the enactment of this section when the receipts of living persons were not strictly legal evidence to show a full administration. Costen v. McDowell, 107 N. C. 546, 549, 12 S. E. 432; Drake v. Drake, 82 N. C. 443, 445.

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

Auditing a Judicial Act.—The phrase "audit an account" [37]
Creditor's proceeding for accounting.—Any creditor of a deceased person may, within the times prescribed by law, prosecute a special proceeding or a civil action before the judge in his representative capacity to compel him to an account of his administration, and to pay the creditors what may be payable to them respectively. (Rev., s. 104; Code, s. 1448; 1871-2, c. 213; 1876-7, c. 241, s. 6; C. S. 110.)

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

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

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

Summons and Complaints Necessary.—Special proceedings under this section must be by summons and complaint. Id.

Enjoining Creditor.—A creditor who chooses not to come in, and resorts to an independent action, may be enjoined by the court for any such action taken by the creditor in the main suit. Dobson v. Simonton, 93 N. C. 268, 270.

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

Nature of Creditor's Suit.—The mere filing by a creditor of a claim with the clerk gives him a standing in the court, and is all that is required of him unless the claim is contested. Isler v. Moore, 91 N. C. 376, 379.

Nature of Superior Court's Jurisdiction.—Under this section the Superior Court has original jurisdiction over proceedings instituted against the representative. Bratton v. Davidson, 77 N. C. 423.

Correlation of Sec. 28-111 to This Section.—The proceedings authorized by section 28-111 are between a creditor and the representative, and have no application to situations arising under the provisions of this section, or in the administration into the hands of the court. Dunn v. Beaman, 126 N. C. 766, 36 S. E. 172.
§ 28-123. Rules which govern creditor's proceeding.—The special proceeding shall be governed by the rules of practice prescribed for special proceedings, except so far as the same are modified by this chapter. (Rev., s. 105; Code, s. 1449; 1871-2, c. 213, s. 2; C. S. 111.)

Cross Reference.—For general statutes governing procedure in special proceedings see § 1-393 et seq. § 1-391 et seq.

Summary and Complaint.—As the proceedings under the preceding section are not ex parte proceedings, within the contemplation of section 1-400, but are adverse within the meaning of section 1-394, except so far as the same are modified by this chapter, the proceedings are commenced by summons and complaint. Isler v. Murphy, 76 N. C. 52, 53.

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

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

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

§ 28-125. Clerk to advertise for creditors.—On issuing the summons, the clerk shall advertise for all creditors of the deceased to appear before him on or before the return day and file the evidences of their claims. (Rev., s. 107; Code, s. 1451; 1871-2, c. 213, s. 4; C. S. 114.)

Failure to Publish Assignable on Appeal.—Failure to publish as required by this and the succeeding section, is an error which may be assigned by the representative in an appeal from a judgment of the clerk to the Superior Court in terms of the act of which this section is a part, except on this ground has been taken before the clerk. Hester v. Lawrence, 102 N. C. 319, 8 S. E. 915.

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

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

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

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

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

Advertised Both Published and Posted.—The advertisement under this section must be both published in a newspaper, and posted at the court house door. Hester v. Lawrence, 102 N. C. 319, 8 S. E. 915.

§ 28-127. Creditors to file claims and appoint agent.—The creditors of the deceased on or before the required day shall file with the clerk the evidences of their demands, and every creditor on filing such claim shall endorse thereon or otherwise name some person or place within the town in which the court is held, upon whom or where notices in the cause may be served or left; otherwise he shall be deemed to have notice of all motions, orders and proceedings in the cause filed or made in the clerk's office. (Rev., s. 109; Code, s. 1453; 1871-2, c. 213, s. 6; C. S. 115.)

§ 28-128. Proof of claims.—If the evidence of the demand is other than a judgment, or some writing signed by the deceased, it shall be accompanied by the oath of the creditor, or, if he be nonresident or infirm or absent, or in any other proper case, of some witness of the transaction, or of some agent of the deceased, that to the best of his knowledge and belief the claim is just, and that all due credits have been given. (Rev., s. 110; Code, s. 1454; 1871-2, c. 213, s. 7; C. S. 116.)

§ 28-129. Representative to file claim; notice to creditors.—On the day fixed for the appearance of the personal representative shall on oath give to the clerk a list of all claims against the deceased of which he has received notice or has any knowledge, with the names and residences of the claimants to the best of his knowledge and belief; and if any person so named has failed to file evidence of his claim, the clerk shall immediately cause a notice requiring him to do so to be served on him, which may be done by posting the same, directed to him at his usual address. (Rev., s. 111; Code, s. 1455; 1871-2, c. 213, s. 8; C. S. 117.)

§ 28-130. Clerk to exhibit to representative claims filed.—On the day fixed for the appearance of the personal representative, the clerk shall exhibit to him a list of all the claims filed in his office, with the evidences thereof. (Rev., s. 112; Code, s. 1456; 1871-2, c. 213, s. 9; C. S. 118.)

§ 28-131. If representative denies claim, creditor notified.—Within five days thereafter the personal representative shall state in writing on said list, or on a separate paper, which of said claims he disputes in whole or in part. The clerk shall then notify the creditor, as above provided, that his claim is disputed, and the creditor shall thereupon file the claim in the clerk's office, and the proceeding on his said claim, and the pleadings shall be as in other cases. (Rev., s. 113; Code, s. 1457; 1871-2, c. 215, s. 10; C. S. 119.)

Each Complaint Distinct Proceeding.—Where, under this section, the claims of two or more creditors have been disputed and the issue joined upon the complaints sent to the superior court in pursuance of the succeeding section, the complaint of each creditor constitutes a distinct proceeding to be proceeded separately so as to "let each tub stand on its own bottom." Graham v. Tate, 77 N. C. 120, 124.

§ 28-132. Issues joined; cause sent to superior court.—If the issues joined be of law, the clerk shall send the papers to the judge of the superior court for trial, as is provided for by the chapter on Civil Procedure in like cases. If the issue shall be of fact, the clerk shall send so much of the record

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as may be necessary to the next term of the super-
ior court for trial. (Rev., s. 114; Code, s. 1458; 1871-2, c. 213, s. 11; C. S. 120.)

Title of the Proceeding.—When, under this section, issues
upon several complaints have been sent to the superior court,
attorney the title of the cause should be in the name of the
creditors who instituted the special proceedings, it is
proper to make a further title setting out the name of the
creditor upon whose complaint the issues are raised.

Graham v. Tate, 77 N. C. 129, 124.

For example: x, (the original creditor) v. y, (administr-
ator). Issues on the complaint of x. In this way the com-
plaint of the several creditors will be kept separate and un-
necessary confusion avoided.

§ 28-133. When representative personally liable for
costs.—If any personal representative denies the liabil-
ity of his deceased upon any claim evid-
ced as is provided in this chapter, and the issue
is finally decided against him, the costs of the trial
shall be paid by him personally, and not allowed
out of the estate, unless it appears that he had
reasonable cause to contest the claim and did so
bona fide. (Rev., s. 115; Code, s. 1459; 1871-2, c.
213, s. 12; C. S. 121.)

Cross Reference.—See annotation under § 28-115.

Correlation of This and Section 28-122.—This section ap-
plies to cases where the administrator unreasonably denies
a claim filed under section 28-122. Valentine v. Britton, 127
N. C. 57, 59, 37 S. E. 74.

§ 28-134. Court may permit representative to
appear after return day.—If the personal
representative fails to appear on the return day,
the clerk or judge of the superior court may per-
mit him afterward to appear and plead on such terms
as may be just. (Rev., s. 116; Code, s. 1460; 1871-2, c.
213, s. 13; C. S. 122.)

§ 28-135. Clerk to state account.—Immediately
after the return day the clerk or judge shall pro-
cceed to hear such evidence as shall be brought
before him, and to state an account of the deal-
ings of the personal representative with the es-
teate of his deceased according to the course of his
court. (Rev., s. 117; Code, s. 1461; 1871-2, c. 213,
s. 14; C. S. 123.)

§ 28-136. Exception to report; final report and
judgment.—After the clerk has stated the account
and prepared his report, he shall notify all the
parties to examine and except to the same. Any
party may then except to the same in whole or in
part. The clerk shall then pass on the exceptions
and prepare and sign his final report and judg-
ment, of which the parties shall have notice. (Rev.,
s. 118; Code, s. 1462; 1871-2, c. 213, s. 15; C. S.
124.)

Applied in In re Estate of Bost, 211 N. C. 440, 190 S. E. 756.

§ 28-137. Appeal from judgment; security for
costs.—Any party may appeal from a final judg-
ment of the clerk to the judge of the superior court
in term time, on giving an undertaking with
surety, or making a deposit, to pay all costs which
shall be recovered against him. If any creditor
appeals and gives such security, his appeal shall be
deemed an appeal by all who are damaged by the
judgment, and no other creditor shall be required
to give any undertaking. (Rev., s. 119; Code,
s. 1464; 1871-2, c. 213, s. 17; C. S. 125.)

Applied in In re Estate of Bost, 211 N. C. 440, 190 S. E. 756.

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

§ 28-139. Prior creditors not affected by appeal
may docket judgments.—If the exceptions and
questions, from the decision on which the appeal
is taken, affect only the creditors in one or more
classes, the creditors in the prior classes by the
leave of the clerk, or of the judge of the superior
court, may docket their judgments and issue exec-
ution thereon. (Rev., s. 121; Code, s. 1466; 1871-
2, c. 213, s. 19; C. S. 127.)

§ 28-140. Judgment where assets sufficient to
pay a class.—If upon taking the account it is
admitted, or is found, without appeal, that the de-
fendant has assets sufficient, after the deduction
of all proper costs and charges, to pay all the claims
which have been presented of any one or more of
the classes, the clerk shall give judgment in favor
of the creditors whose debts of such classes have
been admitted, or adjudged by any competent
court; and if any claim in any preferred class is in
litigation, the amount of such claim, with the
probable cost of the litigation, shall be left in the
hands of the personal representative, and not car-
rried to the credit of any subsequent class until
the litigation is ended. (Rev., s. 122; Code, s.
1467; 1871-2, c. 213, s. 20; C. S. 128.)

§ 28-141. Judgment where assets insufficient to
pay a class.—If the assets are insufficient to pay
in full all the claims of any class, the amounts
thereof having been found or admitted as aforesaid,
the clerk may adjudge payment of a certain part
of such claims, proportionate to the assets appli-
cable to debts of that class. (Rev., s. 123;
Code, s. 1468; 1871-2, c. 213, s. 21; C. S. 129.)

§ 28-142. Contents of judgment; execution.—All
judgments given by a judge or clerk of the su-
perior court against a personal representative for
any claim against his deceased shall declare—

1. The certain amount of the creditor’s de-
mand.

2. The amount of assets which the personal
representative has applicable to such demand.

Execution may issue only for this last sum with
interest and costs. (Rev., s. 124; Code, s. 1469;
1871-2, c. 213, s. 22; C. S. 130.)

§ 28-143. When judgment to fix with assets.—
No judgment of any court against a personal rep-
resentative shall fix him with assets, except a judg-
ment of the judge or clerk, rendered as aforesaid,
or the judgment of some appellate court rendered
upon an appeal from such judgment. All other
judgments shall be held merely to ascertain the
debt, unless the personal representative by plead-
ing expressly admits assets. (Rev., s. 125; Code,
s. 1470; 1871-2, c. 213, s. 23; C. S. 131.)

A judgment against an executor or administrator in
his representative capacity merely establishes the debt sued on and
does not constitute a lien upon the lands of the estate,
in the absence of a stipulation in the judgment to the con-
trary, until leave of court is granted for execution for fail-
ure of the representative to pay the ratable part of such
An absolute judgment against the representative neither
fixes the defendant with assets nor disturbs the order of
administration. It merely ascertains the debt sued on. Dunn
v. Barnes, 73 N. C. 273, 277.

Where a warranty deed was not registered until several
years after the death of the grantor, during which time several judgments were obtained against the personal representative of the grantor, and the grantee in the deed sold same after the judgments had been docketed to a purchaser for value by warranty deed, it was held that under the provisions of this and §§ 28-144 and 28-148 the judgments did not constitute a lien on the land in violation of the warranty against encumbrances. Tucker v. almond, 209 N. C. 233, 183 S. E. 407.


§ 28-144. Form and effect of execution.—All executions issued upon the order or judgment of the judge or clerk or of any appellate court against any personal representative rendered as aforesaid, shall run against the goods and chattels of the deceased, and if none, then against the goods and chattels, lands and tenements of the representative. And all such judgments docketed in any county shall be a lien on the property for which execution is adjudged as fully as if it were against him personally. (Rev., s. 126; Code, s. 1471; 1871-2, c. 213, s. 24; C. S. 132.)

§ 28-145. Report is evidence of assets only at date.—The account and report and adjudication by the judge, clerk or any appellate court shall not be evidence as to the assets except on the day to which such adjudication relates. (Rev., s. 127; Code, s. 1472; 1871-2, c. 213, s. 25; C. S. 133.)

§ 28-146. Creditor giving security may show subsequent assets.—Any creditor may afterwards, on filing an affidavit by himself or his agent that he believes that assets have come to the hands of the personal representative since that day, and on giving an undertaking, with surety, or making a deposit for the costs of the personal representative, sue out a summons against him alleging subsequent assets, and the proceedings thereon shall be as hereinbefore prescribed, so far as the same may be necessary. (Rev., s. 128; Code, s. 1473; 1871-2, c. 213, s. 26; C. S. 134.)

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

In Nature of Bill in Equity.—A suit by the beneficiaries under a will to have the executor account for mismanagement of the estate in the nature of a bill in equity to charge and falsify the executor's account. Thigpen v. Farmers' Banking, etc., Co., 203 N. C. 291, 168 S. E. 720.

Extent of Jurisdiction.—The jurisdiction and the powers of the court in actions of this nature is very comprehensive as to the purposes contemplated by them. Hence the court is vested with all powers, such as the power to grant injunctions, appoint receivers, etc., to effect just and equitable settlement of the controversies. Godwin v. Watford, 107 N. C. 168, 171, 11 S. E. 1051.

Under this section the superior court has jurisdiction to entertain suits brought not only by creditors, but also by any person interested in the proper administration of an estate. It may bring the creditors in as defendants and proceed to recover the estate. It may bring the creditors in as defendants and proceed to recover the estate. It may bring the creditors in as defendants and proceed to recover the estate.

§ 28-148. Proceedings against land, if personal assets fail.—If it appears at any time during, or upon, or after the taking of the account of a personal representative that his personal assets are insufficient to pay the debts of the deceased in full, and that he died seized of real property, it is the duty of the judge or clerk, at the instance of any party, to issue a summons in the name of the personal representative or of the creditors generally, to the heirs, devisees and others in possession of the lands of the deceased, to appear and show cause why said lands should not be sold for assets. Upon the return of the summons the proceeding shall be as is directed in other like cases. (Rev., ss. 130, 131; Code, ss. 1474, 1475; 1871-2, c. 213, ss. 27, 28; C. S. 136.)

Necessity of Summons.—In a case falling under the provisions of this section, it is unnecessary for the clerk herein in the summons referred to in this section where the parties are all in court. Dickey v. Dickey, 118 N. C. 956, 958, 24 S. E. 715.
§ 28-149

**Order of Distribution**—The surplus of the estate, in case of intestacy, shall be distributed in the following manner, except as hereinafter provided.

In General.—At early common law the king took all the personalty and afterwards the crown passed this prerogative to the church, which took all the personalty except the real estate. Afterwards the crown passed this prerogative to the church, which took all the personalty except the real estate. By statute 13 Ed. III. (A. D. 1358) the church was required to appoint an administrator who should be next of blood kin, and this relationship was computed by the civil law, and not by the common law, which was used in computing relationship in the descent of land. Subsequently by statute 21 Henry VIII (A. D. 1530) the administrator was appointed by the ordinary and was required to be the widow or next of kin, or both, who after paying the intestate’s debts and the reasonable parts for the children and personalty to the same extent as in the descent of real property; and where the aunts and uncles of the deceased must take, the children of those who have died may take their personalty in their own right until the statutes of 22-23 and 29 Charles II, which required the surplus to be distributed among the next of kin in the manner provided in two previous statutes which became known as the Statute of distribution.

Under the English statute 22, 23, and 29, Charles II, the mother as well as the father succeeded to all the personal effects of his children who died intestate, and without will or issue, to the exclusion of brothers and sisters of the deceased. And this is the law now in this state.

For an analysis of the classification and the classification of the intestate’s debts and the reasonable parts for the children and personalty to the same extent as in the descent of real property; and where the aunts and uncles of the deceased must take, the children of those who have died may take their personalty in their own right until the statutes of 22-23 and 29 Charles II, which required the surplus to be distributed among the next of kin in the manner provided in two previous statutes which became known as the Statute of distribution.

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mother. If one of the parents is dead at the
the time of the death of the child, the surviving par-
ent shall be entitled to the whole of the estate.
The terms "father" and "mother" shall not ap-
ply to a step-parent, but shall apply to a parent
by adoption: Provided, that a parent, or parents,
who has willfully abandoned the care, custody,
nurture and maintenance of such child to its kin-
dred, relatives or other person, shall forfeit all
and every right to participate in any part of said child's
estate under the provisions of this section.

Editor's Note. — Prior to the amendment of 1915, (Pub.
Laws, 1915, c. 37) this section entitled the father to the whole
of the estate of a deceased child. Hence it was formerly held that the father of a deceased
child in the lifetime of the father, may not recover for
the mutilation of the child's body, Floyd v. Atlantic Coast Line
R. Co., 167 N. C. 55, 83 S. E. 12. By the Public Laws of
1927, c. 231, the proviso to this section was added.

Natural and Adopting Parents. — Natural parents, in case of
adoption, are allowed to prevail over adopting parents in
the distribution of a child's estate. Edwards v. Yearby, 168
N. C. 663, 85 S. E. 19; 5 N. C. L. R. 73.

Right of Divorced Husband to Share in Recovery for
Distributee of Proceeds of War Risk Insurance Policy.
Where the husband has abandoned his wife and infant child, and the wife has obtained a
divorce, and a recovery is had for the wrongful death of the
child by her mother, who has again married, and has qual-
lified as administratrix of her infant child, under the pro-
visions of this clause of this section casting the inherit-
ance upon the father and mother under stated conditions
when both are living, the father is entitled to half the money
recovered by the mother for the wrongful death of their
infant child, though under a separate statute he has lost the
right to its care and custody by a former adjudication of

Right of Action for Mutilation of Child's Dead Body. —
A father's relation to his minor child and the consequent
duties imposed on him by law clothes him with a prefer-
ential right of action over the mother of the child to bring
an action to recover damages for the mutilation of its
death. The provisions of this section do not affect the
result. Stephenson v. Duke University, 202 N. C. 624, 163
S. E. 658.

Distribution of Proceeds for Wrongful Death. —When the
rights of action created by statute for wrongful death does
not constitute an asset of the estate, but belongs to the
beneficiaries designated by this section and § 28-173 as the
beneficiaries of the recovery, the administrator in bringing
the action by the receiver therein, until his wife's administrator
has accounted for his trust or distributed the assets of his
wife, will bar the recovery in an action by the ad-
ministrator of the wife may recover from the husband
notes made payable to the wife and husband in consideration of
the sale of her real property, and that the husband was
entitled only to his distributive share through the adminis-
tration.

9. If a married woman dies intestate, leaving a
husband but no children, the surviving husband
shall be entitled to all the personal estate of which
his wife died intestate. (Rev., s. 132; Code, s.
11477; R. C., s. 64, s. 1; R. S., s. 64, s. 1; 1893, s.
83; 1868-9, s. 113, s. 53; 1913, c. 166; 1915, c.
1921, c. 54; 1927, c. 231; C. S. 7, 137.)

Cross References. — As to inheritance under insurance policy, see § 26-7. As to
to title under insurance policy and his own
insured killed beneficiary, see note to § 28-10. As
to rules of descent, see § 29-1.

§ 28-150. Advancements to be accounted for. —
Children who shall have any estate by the settle-
ment of the intestate, or shall be advanced by him in
his lifetime, shall account with each other for
the same in the distribution of the estate in the
manner as provided by the second rule in the chap-
ter entitled descents, and shall also account for
the same to the widow of the intestate in ascertaining
her child's part of the estate. (Rev., s. 133; Code,
s. 1483; 1868-9, s. 113, s. 54; C. S. 138.)

Advancement Defined. — An advancement is defined to be
equivocable gift in present of money, goods, or
personal, by a parent to a child to enable the latter
to anticipate the inheritance or succession of the property
of the former to the extent of the gift. Thompson v. Smith,
160 N. C. 256, 257, 75 S. E. 1000.

Creatures of Statute Law. — Advancements are the creatures
Adoptions are restricted by this section to gifts from a parent to a child, and ordinarily grandchildren may not be held accountable for gifts to themselves, but must account for sums paid by intestate for her schooling and expenses incurred after she was eighteen or twenty years old, but no charge was made for expenses of rearing the grandchild. Upon the facts found by the referee the charge of advancements was correct. Wolfe v. Galloway, 211 N. C., 361, 190 S. E., 213.

§ 28-152. Illegitimates next of kin to mother and to each other.—Every illegitimate child of the mother dying intestate, or the issue of such illegitimate child deceased, shall be considered among her next of kin, and as such shall be entitled to a share of her personal estate as prescribed in this chapter. Illegitimate children, born of the same mother, shall be considered legitimate as between themselves and their representatives, and their personal estate shall be distributed in the same manner as if they had been born in lawful wedlock. And in case of the death of any such child or his issue, without leaving issue, his estate shall be distributed among his mother and all such persons as would be his next of kin if all such children had been born in lawful wedlock. (Rev., ss. 156, 137; Code, ss. 1486, 1487; 1868-9, c. 113, ss. 57, 59; 110, c. 140.)

Cross References.—As to effects of legitimation, see § 49-11. As to descent of real property to and among illegitimates, see § 29-1, rules 9 and 10.

Editor's Note.—At common law bastards were incapable of creating personal blood flows in their veins; hence, in the absence of other persons lawfully entitled to the property, the property escheated to the lord. They were considered the children of nobody, and consequently could have no interest in, nor were they entitled to, any part of the property of the parent and surrounding circumstances at the time of the gift. The intention of the donor was determined by the express terms of the section. Davis v. Duke, 1 N. C., 526, 527. In this section the words uses the words "advanced by him in his lifetime." It is believed that the construction put upon the statute would still hold true.

But gifts made to the grandchildren are not so required. Davis v. Haywood, 54 N. C., 253; Skinner v. Wyne, 55 N. C., 48.

Return of Advancements as to the Widow.—Before the act of 1794, advancements were not required to be brought into the hotchpot for the benefit of the widow. But since this act, the policy of equality between the widow and the children is acknowledged; the grandchild is accountable for advancement of every kind soever, such child shall cause to be given to the administrator or collector of the estate an inventory, on oath, setting forth therein the particulars by him or her received of the intestate in his or her lifetime. In case any child who had, in the lifetime of the intestate, received a part of said estate, refuses to give such inventory, he shall be considered to have had and received his full share of the deceased's estate, and shall not be entitled to receive any further part or share. (Rev., ss. 134, 135; Code, ss. 1484, 1485; 1868-9, c. 113, ss. 55, 56; C. S. 139.)

Restricted Meaning of Section.—The general words of this section requiring the child to give an inventory of "any personal property of what nature or kind soever" have uniformly been held to have a restricted meaning, in that every gift of personal property by a donor is not necessarily an advancement. Bradsher v. Cannady, 76 N. C., 445, 446. Expenses for Schooling, etc., Properly Charged as Advancements.—Intestate's grandchild, a daughter of intestate's deceased daughter, was charged with advancements for expenses for her schooling and expenses incurred after she was eighteen or twenty years old, but no charge was made for expenses of rearing the grandchild. United States v. Wells, 211 N. C., 361, 190 S. E., 213.

§ 28-153. Children advanced to render inventory; effect of refusal.—Where any parent dies intestate, who had in his or her lifetime given to, or formally been held to have a restricted meaning, in that every gift of personal property by a donor is not necessarily an advancement, Bradsher v. Cannady, 76 N. C., 445, 446. v. Lillard, 107 N. C., 486, 491, 12 S. E., 462.

Advancements by the Mother. — The original statute (1 Rev., ss. 134, 135; Code, ss. 1484, 1485; 1868-9, c. 113, ss. 55, 56; C. S. 139.) advancements were not required to be brought into the hotchpot for the benefit of the widow. But since this act, the policy of equality between the widow and the children is acknowledged; the grandchild is accountable for advancement of every kind soever, such child shall cause to be given to the administrator or collector of the estate an inventory, on oath, setting forth therein the particulars by him or her received of the intestate in his or her lifetime. In case any child who had, in the lifetime of the intestate, received a part of said estate, refuses to give such inventory, he shall be considered to have had and received his full share of the deceased's estate, and shall not be entitled to receive any further part or share. (Rev., ss. 134, 135; Code, ss. 1484, 1485; 1868-9, c. 113, ss. 55, 56; C. S. 139.)

§ 28-154. Allotment to after-born child in real estate. — The share of an after-born child in real estate shall be allotted to him out of any lands not devised, if there is enough for that purpose; and if there is none devised, or not enough, then the whole share, or the deficiency, as the case may be, shall be made up of the lands devised; and so much thereof shall be taken from the several devises according to their respective values, as near as may be convenient, as will make the devisees entitled to their respective distributive shares as such.
in the personal estate shall be paid and delivered to him out of any such estate not bequeathed, if there is enough for that purpose; and if there is none undisposed of, or not enough, then the whole share or the deficiency, as the case may be, shall be made up from the estate bequeathed: and so much shall be taken from the several legacies, according to their respective values, as will make the proper share of such child. (Rev., s. 139; Code, s. 1537; 1868-9, c. 113, s. 109; C. S. 142.)

§ 28-154. Child Not en Ventre Sa Mere.—Before a child can be entitled to a distributive share under the statute of distribution, in general, it must appear that he was either in being or en ventre sa mere at the time of the death of the intestate. Thus a half child of the intestate born ten months and a half after her death is not entitled to a distributive share, though born before distribution. Grant v. Bustin, 21 N. C. 77.

Contributions as of What Time.—Contribution to make up the share of a child born after the execution of his father's will, must be made by the legatees in proportion to their respective interests under the will, dated as of the time when the estate was settled, or should have been settled, by the executor, bearing interest from such time. Johnson v. Chapman, 54 N. C. 130.

§ 28-155. Allotment of personality from proceeds of realty.—If, after undisposed of, or not enough to make up his share of such estate, then the surplus of undisposed land, or as much as be necessary, shall be sold and the proceeds applied to making up his share of personal estate. And if, after satisfaction of the child's share of personal estate out of property undisposed of by the will, there is a surplus of such property, then the surplus thereof shall be applied, as far as it will go, in exoneration of land, both devised and descended; and the same shall be set apart and secured as real estate to such child, if an infant or non compos. (Rev., s. 140; Code, s. 1538; 1868-9, c. 113, s. 110; C. S. 143.)

§ 28-156. Effect of allotment of realty; contribution to equalize burden.—Upon the allotment to such child of any real estate in the manner aforesaid, he shall thenceforth be seized thereof in fee simple; and the court shall give judgment, whereby the devisors and legatees of the devisee and legatee whose lands and legacies more have been taken away than in proportion to the respective values of said lands and legacies, against such of said devisors and legatees of whose lands and legacies a just proportion has not been taken away, for such sums as will make the contribution on the part of each and every of them equitable, and in the ratio of the values of the several devises and legacies. (Rev., s. 141; Code, s. 1539; 1868-9, c. 113, s. 111; C. S. 144.)

Cross Reference.—As to compelling contribution among heirs, see § 28-99.

§ 28-157. After-born child on allotment deemed devisee or legatee.—An after-born child after such decrees shall be considered and deemed in law a legatee and devisee as to his portion, shall be styled as such in all legal proceedings, and shall be liable to all the obligations and duties by law imposed on such: Provided, that all judgments or decrees bona fide obtained against the devisors and legatees previously to the preferring of any petition, and which were binding on or ought to operate upon the lands and chattels devised or bequeathed, shall be carried into execution and effect notwithstanding, and the petitioner shall take his portion completely subject thereto: Provided further, that any suit instituted against the devisors and legatees previously to such petition shall not be abated or abatable thereby nor by the decree thereon, but shall go on as instituted, and the judgment and decree, unless obtained by collusion, be carried into execution; but on the filing of the petition, during the pendency of such suit, the petitioner, by guardian, if an infant, may become a defendant in the suit. (Rev., s. 142; Code, s. 1540; 1868-9, c. 113, s. 112; C. S. 145.)

§ 28-158. Before settlement executor may have claimants' shares in estate ascertained.—In case no petition is filed within two years, as herein prescribed, the executor or administrator with the will annexed, before he shall pay or deliver the legacies in the will given, or before paying to the next of kin of the testator any residue undisposed of by the will, shall call upon the legatees, devisees, heirs and next of kin, and the said after-born child, by petition in the superior court, to distribute their respective claims, and shall pray the court to ascertain the share to which said child shall be entitled, and to apportion the shares and sums to which the legatees, devisees, heirs or next of kin shall severally contribute toward the share to be allotted to said child, and the court shall adjudge and decree accordingly. (Rev., s. 143; Code, s. 1541; 1868-9, c. 113, s. 113; C. S. 146.)

§ 28-159. Legacy or distributive share recoverable after two years.—Legacies and distributive shares may be recovered from an executor, administrator or collector by petition preferred in the superior court, at any time after the lapse of two years from his qualification, unless the executor, administrator or collector shall sooner file his final account for settlement. The suit shall be commenced and the proceeding therein conducted as prescribed in other cases of special proceedings. (Rev., s. 144; Code, s. 1510; 1868-9, c. 113, s. 83; C. S. 147.)

What Court Has Jurisdiction.—Under this section the Probate Court of the Superior Court of the county where an action is brought to the regular term of the Superior Court has exclusive jurisdiction of proceedings for the recovery of legacies and distributive shares. When, however, a specific pecuniary legacy has been given, and has been assented to by the executor, administrator or collector shall severally contribute toward the share to be allotted to said child, and the court shall adjudge and decree accordingly. (Rev., s. 143; Code, s. 1541; 1868-9, c. 113, s. 113; C. S. 146.)

Proof of Assets.—While under this section a petition may be filed before the clerk of the Superior Court for the recovery of a legacy and prosecuted as in other cases of special proceedings unless the personal representative has assented to the legacy or the admission of assets is otherwise made to appear, a recovery can be had only upon proof that assets have either come or should have come into his hands applicable to the payment of the legacy. Unless this is done, judgment in legatee's favor is reversible error. York v. McCall, 160 N. C. 275, 278, 76 S. E. 884.

Jurisdiction in Special Proceeding.—Under this section the clerk of the superior court has original jurisdiction by special proceedings for the recovery of legacies, etc. But where an action is brought for the same to the regular term of the superior court, the defect is cured by the act of 1870, 1871, ch. 105 (Bat. Rev. ch. 17, secs. 425, 426). Bell v. King, 70 N. C. 189.

In special proceeding to remove administratrix, her rights as distributee may not be determined; such rights being determinable only in an action or proceeding in which both she and the administrator are parties. In re Banks' Estate, 213 N. C. 382, 196 S. E. 351.

Injunction or Special Proceeding.—In a special proceeding for the recovery of a legacy, etc. But where an action is brought for the same to the regular term of the superior court, the defect is cured by the act of 1870, 1871, ch. 105 (Bat. Rev. ch. 17, secs. 425, 426). Bell v. King, 70 N. C. 189.


§ 28-160. Payment to clerk after one year discharges representative pro tanto.—It is compe-
tent for any executor, administrator or collector, at any time after twelve months from the date of letters testamentary or of administration, to pay into the office of the clerk of the superior court of the county where such letters were granted, any moneys belonging to the legatees or distributees of the estate of his testator or intestate, and such payment shall have the effect to discharge such executor, administrator or collector and his sureties on his official bond to the extent of the amount so paid. (Rev., s. 145; Code, s. 1543; 1881, c. 305, s. 1; C. S. 148.)

§ 28-161. On payment clerk to sign receipt.—It is the duty of the clerk, in the cases provided for in § 28-160, to receive such money from any executor, administrator or collector, and to execute a receipt for the same under the seal of his office. (Rev., s. 146; Code, s. 1544; 1881, c. 305, s. 3; C. S. 3.)

Cross Reference.—See annotations under § 28-160.

§ 28-162. Recovery of Moneys Paid into Clerk’s Office.—A similar proceeding as provided in sections 28-147 and 28-159 may be maintained against the clerk either by special proceedings or civil action in the superior court in cases where the representative has paid the money in his hands into the office of the clerk under section 28-160. Ex parte Cassidey, 95 N. C. 225, 227.

Editor’s Note.—The provisions of this section are to be considered as realty belonging to the heirs or devisees. Thomas v. Connelly, 104 N. C. 343, 346, 10 S. E. 520.

Deposit of Moneys of Heirs.—The deposit authorized by this section refers to moneys belonging to the legatees or distributees of the estate. It does not refer to funds belonging to the heirs, such as proceeds of realty after payment of debts, which by the terms of sec. 28-58 are considered as realty belonging to the heirs or devisees. Thomas v. Connelly, 104 N. C. 343, 346, 10 S. E. 520.

Recovery of Moneys.—Where funds belonging to a minor are paid into the hands of the clerk of the Superior Court by an administrator under the provisions of this section, during the minority of the administrator and his sureties, in regard thereto, it is not required by §§ 28-160 and 2-46 that the clerk invest the funds, upon interest, unless so directed, the clerk being liable for such funds as an insurer, and the clerk and his sureties are not liable for the amount of interest the funds would have drawn if they had been so invested, but if the funds are actually invested by the clerk he is liable for the interest actually received therefrom. Williams v. Hooks, 199 N. C. 489, 154 S. E. 628.


§ 28-163. Extension of time for final accounts and settlement. — The final account always precedes the settlement, for without it there is no way of telling what is due. Self v. Shugart, 135 N. C. 185, 196, 47 S. E. 484.

Statute of Limitation.—After ten years from the expiration of the two years’ period prescribed by this section, an action for settlement against the personal representative will be barred by the statute of limitation. Edwards v. Lembree, 191 N. C. 229, 131 S. E. 142.

This section gives the personal representative two years to make a final settlement but he may be sued within ten years thereafter. Healey v. Reynolds Tobacco Co., 48 F. Supp. 307, 210.

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

§ 28-163. Extension of time for final accounts when funds are in closed banks.—Where as much as twenty-five per cent of the estate of any decedent is represented in deposits in a bank or trust company in course of liquidation, the personal representative of such decedent shall, in the discretion of the clerk of the superior court, within ninety days after the payment of the final dividend in which to file his final account. The several
§ 28-164. Retention of funds to satisfy claims not due or in litigation.—If, on a final accounting before the judge or clerk, it appears that any claim exists against the estate which is not due, or on which suit is pending, the judge or clerk shall allow a sum sufficient to satisfy such claim, or the proportion to which it may be entitled, to be retained in the hands of the executor, administrator or collector, for the purpose of being applied to the payment when due or when recovered, with the expense of contesting the same. The order allowing such sum to be retained must specify the amount and nature of the claim. (Rev., s. 148; Code, s. 1489; 1868-9, c. 113, s. 90; C. S. 151.)

No Allowance for Contingent Liabilities. — Claims for which an allowance will be made to the representative, within the contemplation of this section, are such claims as are existing and capable of being ascertained and not a mere contingency, and which may never ripen into a cause of action, such as the contingent liability of a surety or co-security on an administration bond. Adams v. Durham, etc., R. Co., 110 N. C. 385, 14 S. E. 857.

§ 28-165. After final account representative may petition for settlement.—An executor, administrator or collector who has filed his final account for settlement, by any time thereafter, file his petition against the parties interested in the due administration of the estate, in the superior court of the county in which he qualified, or before the judge in term time, setting forth the facts, and praying for an account and settlement of the estate committed to his charge. The petition shall be proceeded on in the manner prescribed by law, and, at the final hearing thereof, the judge or clerk may make such order or decree in the premises as shall seem to be just and right. (Rev., s. 150; Code, s. 1325; 1868-9, c. 113, s. 96; C. S. 152.)

Payment of Debt Necessary. — The personal representative should pay all debts before beginning a proceeding under this section. Carlson v. Byers, 93 N. C. 302, 304.

Allegations of Petition.—Where the petition filed under this section does not state that the personal representative has filed a final account or that he has the funds ready in hand for distribution, the petition will be dismissed. Moore v. Rankin, 172 N. C. 599, 603, 90 S. E. 759; Self v. Shugart, 135 N. C. 185, 196, 47 S. E. 464.

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

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

§ 28-166. Payment into court of fund due absent defendant or infant.—When any balance of money or other estate which is due an absent defendant or infant without guardian is found in the hands of an executor, administrator or collector who has preferred his petition for settlement, the court or judge may direct such money or other estate to be paid into court, to be invested upon interest, or otherwise managed under the direction of the judge, for the use of such absent person or infant. (Rev., s. 151; Code, s. 1526; 1868-9, c. 113, s. 97; 1893, c. 317; C. S. 153.)

Cross Reference.—As to the manner of investment of funds in the hands of clerks of court under color of their office, see § 2-54 et seq. It has been suggested in 9 N. C. L. R. 399 that this section is implicitly repealed in part by those sections.

§ 28-167. Procedure where person entitled unheard of for seven years.—When the party entitled to the money has not been heard of for seven years or more, the fund shall be distributed among the next of kin of the absent deceased person as prescribed by statute, in the following manner: An administrator shall be appointed to make a party to a special proceeding in which a verified petition shall be filed setting forth the facts, with names of the parties entitled, and the proceedings conducted as other special proceedings, and the order disposing of the fund shall be approved and confirmed by the judge, either at term or at chambers, (Rev., s. 151; Code, s. 1526; 1868-9, c. 113, s. 97; 1893, c. 317; C. S. 154.)

§ 28-168. Parties to proceeding for settlement.—In all actions and proceedings by administrators or executors for a final settlement of their estates and trusts, whether at the instance of distributaries, legatees or creditors or of themselves, if the personal representative dies or is removed pending such actions or proceedings, the administrator de bonis non or administrator with the will annexed, as the case may be, shall be made party as provided in other cases, or in the discretion of the judge, either at term or at chambers, (Rev., s. 155; Code, s. 1512; C. S. 156.)

§ 28-169. When legacies may be paid in two years.—It is in the power of the judge or court, on petition or action, within two years from the qualification of an executor, administrator or collector, to adjudge the payment in full or partially, of legacies and distributive shares, on such terms as the court deems proper, when there is no necessity for retaining the fund. (Rev., s. 155; Code, s. 1512; C. S. 156.)

Expiration of Two Years Not Prerequisite. — The provision of this section is only a legislative affirmation of the law as it existed before the code. The allowance of two years to the representative is intended as an indulgence; it does not authorize him to defer the settlement until the expiration of that time, without necessity. Clements v. Rogers, 91 N. C. 63, 65.

It follows that in a petition filed under the representative for settlement absence of allegation that two years have elapsed since his qualification is immaterial, where it is alleged that the estate is solvent and that there is no reason why the representative should further retain the fund. Leonard v. Leonard, 107 N. C. 168, 170, 11 S. E. 1051.

Call for Account within Two Years. — The representative may be called upon by the legatees or the next of kin to account for or manage distributive funds and legacies even before the expiration of two years from the time of grant of administration. Hobbs v. Craige, 23 N. C. 332.

§ 28-170. Commissions allowed representatives. — Executors, administrators, testamentary trustees, collectors, or other personal representatives or fiduciaries shall be entitled to commissions to be fixed in the discretion of the clerk not to exceed five per cent upon the amount of receipts, includ-
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§ 28-171. Liability and compensation of clerk. — Every clerk of the superior court who may be intrusted with money or other estate in such case shall be liable on his official bond for the faithful discharge of the duties enjoined upon him by the judge in relation to said estate, and he may receive such compensation for his services as the judge may allow. (Rev., s. 152; Code, s. 1327; 1868-9, c. 93; C. S. 198.)

Art. 19. Actions by and against Representative.

§ 28-172. Action survives to and against representative. — Upon the death of any person, all debts owing to him, accounts, and rights to prosecute or defend any action or special proceeding, existing in favor of or against such person, except as hereinafter provided, shall survive to and against the executor, administrator or collector of his estate. (Rev., s. 156; Code, s. 1490; 1868-9, c. 113, s. 63; C. S. 159.)

Cross Reference. — As to abatement of actions, see § 1-74. Editor’s Note. — The rule of the common law is that a person’s right of action dies with the person. But great changes in this respect have been wrought by various statutes, and the maxim actio personalis mortuorum personalis is now maintainable by or against his personal representative. Suskin v. Maryland Trust Co., 214 N. C. 347, 199 S. E. 276.

The rule of the common law that a personal right of action dies with the person has been changed by this section. It was formerly held that this section did not change the common law rule that a right of action sounding in tort for personal injuries does not survive the tortfeasor or the injured person where the injury did not cause death. In view of the express terms of sec. 28-175, which then declared in long and intricate language that the recovery was upon a different theory than that allowed by the common law, it was necessary that the appeals should be dismissed. Stroud v. Western Union Tel. Co., 130 N. C. 299, 302, 41 S. E. 484.

But this provision of sec. 28-175 no longer exists. The inference is that the action has been statutorily limited to one based on a tangible physical injury, and such a limitation is reasonable and is in harmony with the policy of the state. The rule of the common law that a personal right of action dies with the person has been changed by this section and § 1-74 and, except in the instances specified in § 28-175, an action originally maintainable by or against a deceased person, and transferred to his representative under § 28-176, is not lost by his death. See Mast v. Sapp, 140 N. C. 533, 536, 53 S. E. 350.
broad provisions of this section, irrespective of whether the injury has caused death or not; and that the provisions of section 28-173 specifying the actions which will not survive the death of the injured party will be deemed to have failed. See Fuguey v. A. & W. Ry. Co., 199 N. C. 499, 153 S. E. 167.

As to those actions which are not based on a tangible physical injury, however, such as for mental anguish, etc., this analogy between such actions and actions for libel and slander which by express terms of section 28-175 are still declared not to survive.

Relation of Revival and Survival.—The general rule is that wherever an action can be revived against the representative, it will also survive against him. Butler v. Keelth, 51 N. C. 490.

This section does not revive the action against a distributee, but against the personal representative. Healey v. Reynolds Tobacco Co., 46 F. Supp. 207, 210.

The breach of the condition subsequent contained in a deed entitles the grantor during his life, of his heirs after his death, to bring suit for the land or to declare the estate forfeited, but does not entitle the administrator to bring such suit, this section not being applicable. Barkley v. Thomas, 220 N. C. 541, 17 S. E. (2d) 462.

Vindictive Damages.—The cause of action for treepass may survive against the representative of the trespassor, no vindictive damages may be recovered in such action. Rippey v. Miller, 33 N. C. 247.


§ 28-173. Death by wrongful act; recovery not assets; dying declarations;—When the death of a person is caused by a wrongful act, neglect or default of another, such as would, if the injured party had lived, have entitled him to an action for damages therefor, the person or corporation that would have been so liable, and his or their executors, administrators, collectors or successors shall be liable to an action for damages, to be brought within one year after such death, by the executor, administrator or collector of the deceased; and this notwithstanding the death, and although the wrongful act, neglect or default, causing the death, amounts in law to a felony. The amount recovered in such action is not liable to be applied as assets, in the payment of debts or legacies, except as to burial expenses of the deceased, but shall be disposed of as provided in this chapter for the distribution of personal property in case of intestacy.

In all actions brought under this section the amount from payment of debts was inserted by Public Law 1931, c. 235, § 1, and the provision that the personal representative may recover the amount from payment of debts was inserted by Public Law 1929, c. 654, § 1. In all actions brought under this section the amount from payment of debts was inserted by Public Law 1931, c. 235, § 1, and the provision that the personal representative may recover the amount from payment of debts was inserted by Public Law 1929, c. 654, § 1.

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§ 28-173. Death by wrongful act; recovery not assets; dying declarations;—When the death of a person is caused by a wrongful act, neglect or default of another, such as would, if the injured party had lived, have entitled him to an action for damages therefor, the person or corporation that would have been so liable, and his or their executors, administrators, collectors or successors shall be liable to an action for damages, to be brought within one year after such death, by the executor, administrator or collector of the deceased; and this notwithstanding the death, and although the wrongful act, neglect or default, causing the death, amounts in law to a felony. The amount recovered in such action is not liable to be applied as assets, in the payment of debts or legacies, except as to burial expenses of the deceased, but shall be disposed of as provided in this chapter for the distribution of personal property in case of intestacy.

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Hence it must be alleged and proved by the plaintiff to make out a cause of action and is not required to be pleaded as a statute of limitations. Bennett v. North Carolina R. Co., 159 N. C. 345, 74 S. E. 883; Albritt v. Mike, 221 N. C. 122, 1 S. E. 59; Hanie v. Penland, 193 N. C. 806, 138 S. E. 165.

The requirement that the action shall be brought within one year of the occurrence of the wrongful death applies equally to the person of the defendant and it must be shown by the plaintiff that he has complied therewith, and it is not necessary for the defendant to plead it as a statute of limitations. 145 S. E. 771.

Provision as to Time Strictly Construed. — This provision requiring suit to be brought within one year after the death must be strictly complied with, and a new action therefor may be only commenced within one year. 525, 526; Whitehead v. Branch, 230 N. C. 507, 17 S. E. (2d) 637. And no explanation as to why the action was not brought within such time can avail. Best v. Kinston, 106 N. C. 205, 10 S. E. 997.

Forfeiture of Rights to Survivors. — Where it appeared upon the face of the record that more than a year had elapsed since the death of the deceased, and no administratrix or executor of the deceased had taken any steps towards the commencement of suit, it was held that the plaintiff had thereby lost his right of action. George v. Mitchell, 198 N. C. 397, 151 S. E. 857.

Provision as to Time Strictly Construed. — This provision as to time strictly construed, is expressly intended to allow a full time to the personal representatives of the deceased to have all necessary arrangements made, before they are required to bring suit. Fleming v. R. R., 128 N. C. 80, 38 S. E. 253.

Conflict of Laws. — This section confers a right not existing at common law, and the provision that the action be brought within one year after the occurrence of the wrongful death is neither a statute of limitations, nor a statute of repose, nor a statute of restraint of suit. Christian v. Railroad Co., 136 N. C. 127, 126 S. E. 103.

Where a person is alleged to have caused the death of another, the cause of action lies against the executor and administrator of the deceased defendant under the provisions of this section. Scarlett v. Norwood, 115 N. C. 284, 285, 20 S. E. 459.

Administratrix of a deceased employee who has received compensation for the employee's death under the provisions of the Workmen's Compensation Act is thereby barred from prosecuting any other remedy for the injury, she may, under this section, pending the hearing before the Industrial Commission, institute an action against a third person whose negligent acts caused the death of the intestate, and where the injury and the death are the result of the same negligent acts, the action against such third person tort-feasor. Whitehead v. Branch, 230 N. C. 507, 17 S. E. (2d) 637.

Nature of Suit. — The statute requires the suit to be brought by the administrator in his official and not in his private or individual capacity. He must sue as administrator of the deceased. Hall v. Southern R. Co., 146 N. C. 345, 348, 59 S. E. 679.

Under this section an administrator sues in his own right and not en autre droit. Christian v. Railroad Co., 136 N. C. 127, 126 S. E. 103.

Hence under this section an action cannot be maintained by a widow as such, but must be brought by the personal representative of the deceased. Bennett v. North Carolina R. Co., 159 N. C. 345, 74 S. E. 883; Howell v. Commissioners, 121 N. C. 362, 28 S. E. 362; Craig v. Suncrest Lumber Co., 189 N. C. 137, 126 S. E. 312, 313.

Nor can a husband as such sue for the wrongful death of his wife. Hood v. American Tel., etc., Co., 162 N. C. 70, 77 S. E. 1096. See also, White v. Holding, 217 N. C. 129, 7 S. E. (2d) 24. 923.

Suit Must Be Brought by Personal Representative. — The personal representative of the deceased, his executor or administrator, etc., can alone maintain an action for damages for his wrongful death under the provisions of this section. Hanes v. Southern Pub. Utilities Co., 191 N. C. 13, 16, 131 S. E. 402; Hood v. American Tel., etc., Co., 162 N. C. 70, 77 S. E. 1096. See also, White v. Holding, 217 N. C. 129, 7 S. E. (2d) 24. 923.

Appointment of Administrator. — A cause of action under this section is sufficient for the appointment of an administrator. Vance v. Railroad, 138 N. C. 460, 464, 50 S. E. 650. But where a deceased has left a will disposing of all his property, then naming an executor, the right of action against a defendant for his wrongful death must be by the executor named. Hood v. American Tel., etc., Co., 162 N. C. 70, 77 S. E. 1096.

Foreign Administrator Cannot Sue. — A foreign administrator cannot bring an action under this section. Hall v. Southern R. Co., 149 N. C. 108, 62 S. E. 899. Therefore when an administrator does not qualify in this state until after the commission of the tort, the plaintiff cannot, under this section, bring an action against the defendant from the date of his intestate he cannot bring the action. Id. Vance v. Railroad, 138 N. C. 460, 50 S. E. 650.
IV. DISTRIBUTION OF RECOVERY.

In General.—With reference to the disposition of the recovery this section materially differs from the English statute and the statute in most of the states which generally provide for designated classes, such as the wife, the children, the administrator appointed by the court of another state, the defect may be taken by demurrer, since such plaintiff does not have legal capacity to sue and the complaint does not state facts sufficient to constitute a cause of action.

Admissibility of Evidence.—In an action for wrongful death, the admissibility of evidence of dying declarations to instances of wrongful death, does not change any vested rights, and is applicable in cases where such death was caused before its passage. This is a general statute changing the rule of evidence, in vested interest, and which the law-making power can extend its benefits to all by the will. Williams v. Randolph, etc., R. Co., 182 N. C. 267, 105 S. E. 915. And this change is valid and constitutional. Tatman v. Andrews Mfg. Co., 180 N. C. 627, 103 S. E. 423.

What Declarations Permitted.—This section permits in evidence declarations of the act of killing and circumstances immediately attendant on the act, which constitutes a part of the res gestae, and which declare the act, or the actual danger of death, and made in full apprehension thereof, and when the death accordingly ensued. Tatman v. Andrews Mfg. Co., 180 N. C. 627, 103 S. E. 423.

For the dying declarations of a person for whose death an action has been brought under this section are competent as evidence, provided the preliminary facts are made to appear. Southwell v. R. R., 189 N. C. 417, 127 S. E. 361. Otherwise they are not admissible. Holmes v. Wharton, 194 N. C. 470, 140 S. E. 93.

Where declarant was fatally injured in an automobile accident, declarations made by him the night before and two days before undertaking the journey are not admissible as dying declarations. Gassaway v. Gassaway, 230 N. C. 604, 18 S. E. 2d 130.

Declarations Must Have Been Voluntary.—In case of the admission of dying declarations, as in criminal actions for homicide, the dying declarations of one whose wrongful death has been caused to be admissible upon the trial of such action, the defendant must have been voluntarily made while the declarant was in extremis or under a sense of impending death, and declared to the existence of the life of the deceased must have been part of the res gestae. Dellingr v. Elliott Building Co., 187 N. C. 845, 123 S. E. 78.

§ 28-174. Damages recoverable for death by wrongful act.—The plaintiff in such action may recover such damages as are a fair and just compensation for the pecuniary injury resulting from such death. (Rev. s. 60; Code, s. 1499; 1868-9, c. 113, s. 71; R. C., c. 1, s. 10; C. S. 161.)

Mental Anguish Not to Be Considered.—Where the plaintiff brings an action, under this section, as administrator of his son, his recovery is limited to the value of the life and he is not entitled to any damages for mental anguish in this form of action, nor for the loss of the services of his child. Byrd v. Express Co., 139 N. C. 271, 51 S. E. 851.

Evidence as to Number of Children Inadmissible.—In an action for death under this section, evidence of the number of children left by the deceased who are not surviv- ing is inadmissible. Neill v. Wilson, 146 N. C. 242, 245, 59 S. E. 674.

Nature and Quantum of Damages Recoverable.—It is well settled that no damages are to be allowed as a sol- idum or a punishment. Kesler v. Smith, 66 N. C. 154; Bradley v. Great. N. C. R., 89 N. C. 98, 67 S. E. 8; Western Union Tel. Co. v. Catlett, 177 Fed. 71; Collier v. Arrington, 61 N. C. 356.

This section restricts the recovery for malpractice to compensatory damages. Gray v. Little, 127 N. C. 809, 57 S. E. 270.

In an action for wrongful death under this section the jury may consider the pecuniary loss of such as shall accrue to the following, the loss of wages, income from industry, skill, and business, and the admission of testimony that the deceased had a 200-acre farm, a comfortable home, and a plenty for his family to eat and had to require them to make the assessment of damages in any particular way.” Poe v. Railroad, 141 N. C. 526, 54 S. E. 406.

No “Hard and Fast Rule” Prescribed.—“This court has not prescribed any ‘hard and fast rule’ by which to bind the jury in making the estimate of what sum should be given or to require them to make the assessment of damages in any particular way.” Poe v. Railroad, 141 N. C. 526, 54 S. E. 406.

Nature of Quantum of Damages Recoverable.—It is well settled that no damages are to be allowed as a solidum or a punishment. Kesler v. Smith, 66 N. C. 154, 157; Bradley v. Great. N. C. R., 89 N. C. 98, 67 S. E. 8; Western Union Tel. Co. v. Catlett, 177 Fed, 71; Collier v. Arrington, 61 N. C. 356.

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business, etc., of the deceased is indispensable. Burton v. Wilmington, etc., R. Co., 82 N. C. 505.

The instruction for the determination of the quantum of damages is an important one, and should take into consideration all the pecuniary advantages from the continuance of the life of the deceased. Burton v. Wilmington, etc., R. Co., 82 N. C. 505.

The correct rule touching the quantum of damages is the reasonable expectation of pecuniary advantage from the continuance of the life of the deceased. Burton v. Wilmington, etc., R. Co., 82 N. C. 505.

The measure of damages for the wrongful killing of a mother of children is not to be ascertained by the pecuniary advantages of the children if she had lived out her expectancy, with or without regard to the number of her children and the intellectual and moral training she might have given them. Bradley v. Ohio River, etc., R. Co., 122 N. C. 972, 30 S. E. 8.

"It has been held by this court, in several similar cases, that the statute does not limit the recovery to actual pecuniary loss proved on the trial." Russell v. Windsor Steamboat Co., 126 N. C. 901, 909, 36 S. E. 191.

Under the statute the jury assesses the value of the life of the decedent in solido, which is disbursed under the statute of distributions. Horton v. Seaboard, etc., R. Co., 175 N. C. 477. Carter v. Asheville Power, etc., Co., 191 N. C. 130, 131 S. E. 400.

In ascertaining the net earnings the jury should deduct only the reasonably necessary personal expenses of the decedent, and only what he had spent for his family, or those dependent upon him, should not be deducted. Carter v. Railroad, 139 N. C. 499, 52 S. E. 642.

The total amount or net accumulated income, upon which the compensation is based, must be ascertained as of the time when the expectancy expired in contemplation of the fact that the deceased failed to live out his expectancy, and that the pecuniary advantages of the continuance of his life, character, habits, health, capacity, etc., of the deceased, Carter v. Railroad, 139 N. C. 499, 52 S. E. 642.

In such an action the value of the life before twenty-one years of age is recoverable. Gurley v. Southern Power Co., 172 N. C. 690, 695, 90 S. E. 943.

The court cannot instruct the jury in any case, when death is caused by the wrongful act of the defendant, that upon any state of facts it is their duty to render a verdict against the plaintiff, as the "reasonable expectation of pecuniary advantage from the continuance of the life of the deceased," is necessarily an inference of fact from all of the evidence and can only be drawn by the jury. Carter v. Railroad, 139 N. C. 499, 52 S. E. 642.

The meaning of damages, in the case of the wrongful death of a child, is necessarily an inference of fact from all of the evidence and can only be drawn by the jury. Carter v. Railroad, 139 N. C. 499, 52 S. E. 642.


The damages recoverable for the wrongful death of another negligently caused is the net present pecuniary worth of the deceased, to be ascertained by deducting the probable cost of his own living and his ordinary or usual expenses, from the probable gross income derived from his own exertions, based upon his life expectancy. Carpenter v. Asheville Power, etc., Co., 191 N. C. 130, 131 S. E. 400; Purnell v. Railroad, 139 N. C. 573, 130 S. E. 313; Russell v. Windsor Steamboat Co., 126 N. C. 961, 967, 36 S. E. 191.

In estimating damages under this section, the question is, did the defendant suffer any pecuniary loss by reason of the fact that the deceased failed to live out his expectancy, and in what respects? There is a necessity to consider the entire life, character, habits, health, capacity, etc., of the deceased. Carter v. Railroad, 139 N. C. 499, 52 S. E. 642.

In an action for death under this section it is competent to prove the age, strength, health, skill, industry, habits and character of the deceased, with a view to arrive at his pecuniary worth to his family. Kesler v. Smith, 66 N. C. 154.

Instructions as to Damages.—Where the evidence disclosed that intestate was a young man 18 years of age, of sober and industrious habits, that at the time of his death he was a newspaper photographer of skill and ability, and the court correctly instructed the jury as to the method of ascertaining the present net worth or deceased by the refusal of a requested instruction that since the administrator had not shown the amount of any earning on the part of the intestate, the jury should not speculate as to what his earnings had been, is not error. Queen City Coach Co. v. Lee, 218 N. C. 320, 11 S. E. (2d) 341.


§ 28-175. Actions which do not survive.—The following rights of action do not survive:

2. Causes of action for false imprisonment and assault and battery.
3. Causes where the relief sought could not be enjoyed, or granting it would be nugatory, after death. (Rev., s. 157; Code, s. 1491; 1868-9, c. 113, s. 64; 1915, c. 38; C. S. 162.)

Cross Reference.—As to abatement of actions, see § 1-74.

Editor's Note.—This section formerly contained an addi-
tional provision that "even an effect which the jury may
believe results from such injury does not cause the death of the injured party" shall not survive. But this provision was omitted by the amendment of 1915, ch. 38. See Editor's Note under section 28-177.

In General.—Except as specified in this section, an action originally maintainable by or against a deceased person is now maintainable by or against his personal representative. Suskin v. Maryland Trust Co., 214 N. C. 347, 199 S. E. 276.

§ 28-176. To sue or defend in representative capacity.—All actions and proceedings brought by or against executors, administrators or collectors, upon any cause of action or right to which the estate is the real party in interest, must be brought by or against them in their representa-
tive capacity. (Rev., s. 157; Code, s. 1507; 1868-9, c. 113, s. 79; C. S. 164.)

Cross References.—As to joinder of beneficiary, see § 1-63. As to when heirs and devisees are necessary parties, see § 28-87.

Heirs and Next of Kin as Parties.—The heirs and next of kin of a deceased person may be made parties to an action on account against the personal representative, although they allege collusion between the plaintiff and the representative. Byrd v. Byrd, 117 N. C. 523, 23 S. E. 324.

Application to Administrator d. b. n.—The provisions of this section apply to suits brought by administrator de bonis non, as well as to original administrator, and are mandatory. There is no middle ground. Rogers v. Gooch, 87 N. C. 468.

§ 28-177. Service on or appearance by one binds all.—In actions against several executors, administrators or collectors, they are all to be considered as one person, representing the decedent; and if the summons is served on one or more, but not all, the plaintiff may proceed against those served, and if he recovers, judgment may be entered against all. (Rev., s. 161; Code, s. 1508; 1868-9, c. 113, s. 81; C. S. 165.)

§ 28-178. When creditors may sue on claim; ex-
ecution in such action.—An action may be brought by a creditor against an executor, administrator or collector on a demand at any time after it is due, but no execution shall issue against the ex-
cutor, administrator or collector on a judgment therein against him without leave of the court,
upon notice of twenty days and upon proof that the defendant has refused to pay such judgment its ratable part, and such judgment shall be a lien for such assets or real property at any time subsequent to the death of the decedent. (Rev., s. 1513; 1866-9, c. 113, s. 85; C. S. 169.)

Art. 20. Representative’s Powers, Duties and Liabilities.

§ 28-182. Representative may maintain appropriate suits and proceedings.—Executors, administrators or collectors may maintain any appropriate action or proceeding to recover assets, and to recover possession of the real property of which executors are authorized to take possession by will; and to recover for any injury done to such assets or real property at any time subsequent to the death of the decedent. (Rev., s. 159; Code, s. 1501; 1868-9, c. 113, s. 73; C. S. 170.)

Cross Reference.—As to recovery of assets, see §§ 28-69 to 28-73.

Recovery of Realty by Administrator d. b. n. c. t. a.—Where an executor is entitled, under this section, to the possession of the land, his successor, an administrator de bonis non, cum testamento annexo, is entitled to the same rights and remedies as his predecessor in office. Smithers v. Moody, 112 N. C. 791, 795, 175 S. E. 332.

§ 28-183. Representative may purchase for estate to prevent loss.—At any auction sale of real property belonging to the estate, the executor, administrator or collector may bid in the property and take a conveyance to himself as executor, administrator or collector for the benefit of the estate when, in his opinion, this is necessary to prevent a loss to the estate. (Rev., s. 85; Code, s. 1503; 1868-9, c. 113, s. 77; C. S. 171.)

In Sale of Realty Only.—This section authorizes the representatives to bid at the sale of realty only. Hence the non-statutory rule that a representative cannot bid at his own sale applies in sales of personalty. Woody v. Smith, 65 N. C. 116, 118.

§ 28-184. Representatives hold in joint tenancy.—Every estate vested in executors, administrators or collectors, as such, shall be held by them in joint tenancy. (Rev., s. 166; Code, s. 1502; 1865-9, c. 113, s. 74; C. S. 172.)

§ 28-185. Representatives liable for devastavit.—The executors and administrators of persons who, as rightful executors or as executors in their own wrong, or as administrators, shall waste or convert to their own use any estate or assets of any person deceased, shall be chargeable in the same manner as their testator or intestate might have been. (Rev., s. 167; Code, s. 1495; 1868-9, c. 113, s. 68; C. S. 173.)

§ 28-186. Nonresident executor or guardian to appoint process agent.—A nonresident qualifying in the state as an executor or guardian shall at the time of his qualification appoint in writing a resident agent in the county of his qualification and the same manner as the original plaintiff might have done. (Rev., s. 164; Code, s. 1513; 1865-9, c. 113, s. 84; C. S. 168.)

§ 28-181. Action to continue, though letters revoked.—In case the letters of an executor, administrator or collector are revoked, pending an action to which he is a party, the adverse party may, notwithstanding, continue the action against him in order to charge him personally. If such party does not elect to proceed, within six months after notice of such revocation, the action may be continued against the successor of the executor, administrator or collector in the action against the estate, in the same manner as in case of death. (Rev., s. 165; Code, s. 1514; 1866-9, c. 113, s. 85; C. S. 169.)
§ 29-1. Rules of descent.

Chapter 29. Descents.

Sec. 29-1. Rules of descent. — When any person dies seized of any inheritance, or of any right thereto, or entitled to any interest therein, not having devised the same, it shall descend under the following rules: (Rev., s. 1556; Code, s. 1281; R. C., c. 38, s. 1; C. S. 1654.)

Cross References.—As to right of aliens to take by descent, see § 64-1. As to the distribution of estates, see §§ 28-149 et seq.

Editor's Note.—The English canons of descent were brought to this country by the early colonists and were established and prevailed here in the provincial governments. In North Carolina they survived the Revolution and remained in force until 1794. Certain principles found in the English Act, such as the males inheriting before the females, the eldest son only inheriting, and the half blood being excluded from the inheritance, seemed repugnant to the republican principles of the new land and thus the Legislature was led to make the changes which now distinguish this section from the English Act. For a detailed discussion of this subject, see Clement v. Cauble, 55 N. C. 82.

For cases dealing with the former provision governing descent to aliens, see Campbell v. Campbell, 58 N. C. 246; Rutherford's Heirs v. Wolfe, 10 N. C. 272. For a descriptive survey of the descent to aliens, see Campbell v. Campbell, 58 N. C. 246; Rutherford's Heirs v. Wolfe, 10 N. C. 272.

Definition.—Descent is the devolution of real property to the heir or heirs of one who dies intestate, the transmission by succession or inheritance. See Bouvier's Law Dict., 4th ed., s. 178. For a descriptive survey of the descent to aliens, see Campbell v. Campbell, 58 N. C. 246; Rutherford's Heirs v. Wolfe, 10 N. C. 272.

Kinds of Descent.—Descents are of two sorts: lineal, as from father to son, or grandfather to son or grandson; and collateral, as from brother to brother, and cousin to cousin, etc. See Levy v. McCarter, 6 Pet. 102, 8 L. Ed. 14. A descent may be said to be mediate or immediate, in regard to mediate or immediate descent of the estate or right; or it may be said to be mediate or immediate, in regard to the mediateness or immediateness of the pedigrees or degree of consanguinity. id.

Descent Regulated by Statute.—Descents in this State are regulated, not by the common law, but by statutes. University v. Markham, 174 N. C. 338, 349, 93 S. E. 845. And
thus are regulated entirely by the Legislature. Edwards v. Yearby, 168 N. C. 663, 85 S. E. 19.

By virtue of this section an heir takes only the undevised inheritance of which the ancestor was seized at the time of his death. Gossen v. McCullers, 202 N. C. 357, 162 S. E. 740.

Title Vests Immediately.—Upon the death of an intestate ancestor, the title to his estate descends and vests at once in the intestate's issue, subject to the attenuation by descent in the future like an executory devise. Harris v. Russell, 124 N. C. 547, 32 S. E. 958.

"Lawful Heirs" as Used in Will.—The expression "lawful heir" in a will, applied to describe those who are to take a bequest of personalty, means that such sort of property in cases of intestacy. Nelson v. Blue, 63 N. C. 659, 18 S. E. 733.

Section Held Not to Apply to Person Dying before Its Enactment.—The provisions of this section held not to affect the distribution of an estate of a person dying prior to the enactment of the statute, the provision of the statute that it should apply to estates of such persons whose estates had not then been distributed being inoperative, and an illegitimate person dying prior to the enactment of the statute leaving only the brothers of his mother, or their legal representatives, him surviving, leaves no person surviving him entitled to inherit from him, and his property, both real and personal, held to vest immediately in the University of North Carolina. The Constitution and laws of the United States, Carter v. Smith, 209 N. C. 788, 185 S. E. 15.

Rule 1, Lineal descent. Every inheritance shall lineally descend forever to the issue of the person who died last seized, entitled or having any interest therein, but shall not lineally ascend, except as hereinafter provided. (Rev., s. 1556; Code, s. 1281; R. C. c. 38, Rule 1; C. S. 1654.)

Cross Reference.—As to seizin, see notes under rule 12.

Actual or Legal Seizin Unnecessary.—By the terms of this paragraph and paragraph 12, neither actual nor legal seizin is necessary to make the stock in the devolution of estates. Sears v. McBride, 70 N. C. 152; Early v. Early, 134 N. C. 258, 267, 46 S. E. 503.

Descent of Remains.—Where a remainderman dies before the life tenant, by the death of the life tenant the remainder descends to the heirs at law of the original remainderman. Early v. Early, 134 N. C. 258, 267, 46 S. E. 503.

Distinguishing Lawrence v. Pitt, 46 N. C. 344 and King v. Scooggins, 92 N. C. 29, which cases were decided under the former provisions.

Rule 2, Females inherit with males, younger with older children; advancements. Females shall inherit equally with males, and younger with older children: Provided, that when a parent dies intestate, having in his or her lifetime settled upon or advanced to any of his or her children any real or personal estate, such child so advanced in the estate shall be utterly excluded from any share in the real estate descended from such parent, except so much thereof as will, when added to the real estate advanced, make the share of him who is advanced equal to the share of those who may not have been advanced, or not equally advanced. And any child so advanced in personal estate shall be utterly excluded from any share in the personal estate of which the parent died possessed, except so much thereof as will, when added to the personal estate advanced, make the share of him who is advanced equal to the share of those who may not have been advanced, or not equally advanced. And in case any of the children has been advanced in real estate, make the share of him who is advanced equal to the share of those who may not have been advanced, or not equally advanced. And in case any one of the children has been advanced in real estate of greater value than an equal share thereof which may come to the other children, he or his legal representatives shall be charged in the distribution of the personal estate of such deceased parent with the excess of value of such real estate so advanced as aforesaid, over and above an equal share as aforesaid. And in case any of the children has been advanced in personal estate of greater value than an equal share thereof which shall come to the other children, he or his legal representatives shall be charged in the division of the real estate, if there be any, of the excess in value, which he may have received as aforesaid, over and above an equal distributive share of the personal estate. (Rev., s. 1556; Code, s. 1281; R. C. c. 38, s. 1, Rule 2; 1784, c. 204, s. 2; 1808, c. 739; 1844, c. 51, ss. 1, 2; C. S. 1554.)

Cross References.—As to advancements generally, see §§ 28-150 and 28-151. As to the right of adopted children to inheritance, see §§ 28-156 and 28-160.

Priority Abolished.—This rule abolishes the priority of the male over the female line, and places them upon a perfect equality, both as to collateral and lineal descents. Bell v. Dozier, 12 N. C. 333, 334.

Providing for Equality.—This section was never intended to interfere in any case where the parent himself had by his will produced an inequality by giving to one of his children either land or chattels and not to the others. Where he dies totally intestate as to all his property of every kind, then the act provides for an equality, as near as it can, by directing that such of the children as have been advanced by the intestate in his lifetime, in either real or personal estate, shall be charged with the advancement of the division of both. Jenkins v. Mitchell, 57 N. C. 207, 212.

Owner's Wishes Respected.—This section contains nothing to exclude the intent and circumstances of the case, but leaves in force and in effect all the statutes, the provisions of the Statute of Distributions, as well as under our act on the subject, it has always been held that no advancements are advancements to him to be accounted for, the amount of which shall come to the other children, he or his legal representatives shall be charged in the division of the real estate, if there be any, of the excess in value, which he may have received as aforesaid, over and above an equal distributive share of the personal estate. (Rev., s. 1556; Code, s. 1281; R. C. c. 38, s. 1, Rule 2; 1784, c. 204, s. 2; 1808, c. 739; 1844, c. 51, ss. 1, 2; C. S. 1554.)

Adancements Regulated Early by Statute.—The doctrine of advancements was the subject of statutory enactments in England as early as the reign of Charles II. (22 and 23 Car. II., 1682-83). Nobles v. Davenport, 134 N. C. 256, 299, 111 S. E. 180.

Definitions of Advancement.—An advancement is said to be an irrevocable gift in praesenti of money or of property, real or personal, to a child by a parent, to enable the donee to anticipate his inheritance or succession to the extent of the gift. 14 Cyc., 162, Thompson v. Smith, 160 N. C. 255, 267, 73 S. E. 1010; Noble v. Davenport, 133 N. C. 207, 209, 111 S. E. 180. For further definition of advancement, see Holister v. Attmore, 58 N. C. 371; Meadows v. Meadows, 33 N. C. 148; Southern Distributing Co. v. Carraway, 189 N. C. 420, 175 S. E. 427; Parker v. Eason, 213 N. C. 115, 195 S. E. 360.

An advancement is a gift in praeasenti by a parent to a child for the purpose of advancing the latter in life, and thus for the child to anticipate the inheritance to the extent of the advancement. Paschal v. Paschal, 199 N. C. 40, 147 S. E. 680.

Where a son insures his life for the benefit of his mother in case she survives him, and otherwise to his estate, and some of the premiums on the policy are paid by the insurance company, and some by the mother, upon the prior death of the mother the administrator may not recover from the son the premiums paid by the mother on the theory that they were advancements to him to be accounted for, the arrangement appearing to be their joint enterprise. Id.

Same.—Small Presents Not Included.—An advancement is a gift of money or property for the preferment and setting of a child in life, not necessarily of a small value or such as are required for the maintenance or education of the child. The latter are the natural duties of the parent which he is required to perform. Meadows v. Meadows, 33 N. C. 148; Brader v. Cassidy, 76 N. C. 445; Kiger v. Terry, 119 N. C. 46, 458, 26 S. E. 38; Thompson v. Smith, 160 N. C. 256, 257, 73 S. E. 1010.

Applications Only in Case of Total Intestacy.—Under the English statute of distributions, as well as under our act on the subject, it has always been held that no advancements were to be accounted for except in cases of total intestacy. Brown v. Brown, 37 N. C. 309; Jenkins v. Mitchell, 57 N. C. 207, 212.

Hence advancements in land by a father are not to be brought into hotchpot and accounted for in the division among his children of his real estate, unless the father dies intestate. Brown v. Brown, 37 N. C. 309; Jenkins v. Mitchell, 57 N. C. 207, 212.

Presumption and Burden of Proof.—The doctrine of advancements is based on the idea that parents are presumed to
to intend, in the absence of a will, an equality of division among all the lineal descendants of a deceased intestate, prima facie an advancement, that is, property transferred or money paid in anticipation of a distribution of his estate. Ex parte Griffin, 143 N. C. 116, 54 S. E. 1007; James v. Jamison, 26 N. C. 331; Thompson v. Smith, 160 N. C. 256, 258, 75 S. E. 1010; Noble v. Davenport, 183 N. C. 207, 111 S. E. 190.

Same—Nominal Consideration.—If land is conveyed by a deed or instrument, prima facie an advancement is presumed, and the burden of proof is then on the grantee or donee to show that an advancement was not intended. Kiger v. Terry, 119 N. C. 456, 459, 26 S. E. 38.

Same—Value Consideration.—But when the deed recites a valuable and substantial consideration, especially when it is near the full value of the land or other property, the burden then to prove it an advancement is upon the person claiming it to be such. Kiger v. Terry, 119 N. C. 456, 459, 26 S. E. 38.

Same—Intention of Parent Governs.—Making proper allowance for the burden of proof, as fixed by the presumption arising out of the nature or circumstances of the gift, the question of whether there was a clear gift, a loan, or an advancement, is to be settled by ascertaining what was the intention of the parent. Melvin v. Bullard, 82 N. C. 34, 40; Harper v. Harper, 92 N. C. 300; Kiger v. Terry, 119 N. C. 456, 26 S. E. 38; Thompson v. Smith, 160 N. C. 256, 258, 75 S. E. 1010.

Same—Parol Evidence.—And in the determination of whether a loan, a gift or an advancement was intended parol evidence is admissible. Kiger v. Terry, 119 N. C. 456, 459, 26 S. E. 38.

Value Determined.—Ordinarily the value of an advancement is to be determined as of the date of its making, and on an accounting no interest is to be charged against an advancement prior to the date of the testator or intestate, the value of which, by will or devises, is extended beyond the death of the parent or testator. Southern Distributing Co. v. Carraway, 189 N. C. 420, 127 S. E. 427. See also, Stallings v. Stallings, 16 N. C. 298, 301. See also, Stallings v. Stallings, 16 N. C. 298, 301.

Where an intestate had put slaves into the possession of his child, and afterwards made a deed of gift of them, the advancement must take effect and be estimated as of the date of the deed and not of the commencement of the possession. Shiver v. Brock, 55 N. C. 137; Ward v. Riddick, 57 N. C. 22.

Examples of Advancement.—Property put into the possession of a child on his setting out in life, suitable to housekeeping and family purposes, is not to be considered as a present but as an advancement. Shiver v. Brock, 55 N. C. 137.

Under this paragraph an estate, pur autre vie, given to a child by an intestate father, is subject to be brought into hotchpot as an advancement in the division of other lands. Dixon v. Croward, 57 N. C. 354. One-half an estate in land given by an intestate by deed to his daughter and her husband is subject to be brought into hotchpot, i.e.

Application to Grandchildren.—Grandchildren are bound to bring in the gift to their parents, but not to those to themselves. This rule being restricted to gifts from a parent to a child, and not including donations to grandchildren. Headen v. Headen, 42 N. C. 159, 161. See Shiver v. Brock, 55 N. C. 137.

Rule 3, Lineal descendant represents ancestor. The lineal descendants of any person deceased shall represent their ancestor, and stand in the same place as the person himself would have done had he been living. (Rev., s. 1556; Code, s. 1281; R. C., c. 38, Rule 3; 1808, c. 739; C. S. 1654.)

A Copy of English Canon.—This section is an almost verbatim copy of the English canon and should receive the same construction as has been given to that rule. Clement v. Cauble, 55 N. C. 83, 91.

Right of Representation Indefinite.—In rules of the descent of real estate, the right of representation is indefinite, as well among collateral as lineal kindred. Johnston v. Chesser, 59 N. C. 146, 147.

Realty Descends Per Stirpes.—In the descent of real estate, the next collateral relations of the person last seized, who are of equal degree, take per stirpes, and not per capita. Clement v. Cauble, 55 N. C. 82; Haynes v. Johnson, 58 N. C. 124; Crump v. Fawcett, 70 N. C. 345.

Personalty Distributed Per Capita.—Where a fund comes solely by devise and not by advancement, and at the time of the intestate's death were and are now all in equal degree, the next of kin of the intestate, section 28-149 requires that the fund shall be distributed per capita. Ellis v. Harris, 140 N. C. 513, 43 S. E. 17.

Heirs of Trustee Take Nothing.—Where a trustee, in accordance with a proviso of the trust, passes his bare legal title to another, there was nothing to descend to his heir at his death. Fleming v. Barden, 126 N. C. 450, 36 S. E. 17.

Rule 4, Collateral descent of estate derived from ancestor. On failure of lineal descendants, and where the inheritance has been transmitted by descent from an ancestor, or has been derived by gift, devise or settlement from an ancestor, to whom the person thus advanced would, in the event of such ancestor's death, have been the heir or one of the heirs, the inheritance shall descend to the next collateral relations, capable of inheriting, of the person last seized, who were of the blood of such ancestor, subject to the two preceding rules. (Rev., s. 1556; Code, s. 1281; R. C., c. 38, Rule 4; 1808, c. 739; C. S. 1654.)

Editor's Note.—Under rule 5, purchased estates—in the popular sense of the term purchase—descend to the near collateral relations of the person last seized, and not to his maternal line. While under this rule descended estates and certain excepted purchased estates descend to the nearest relations of the propositus, who were of the blood of the person last seized, or from whom the purchased estates excepted, including those derived by gift, devise or settlement, are those where the purchaser would have been an heir in case of the ancestor's death, that is, those excepted purchased estates of particular parents, same footing with a descent. The question whether the purchaser or donee would have been an heir is determined as of the time of the purchase. And thus where a purchaser at the time of the purchase whom an heir had the ancestor died, rule 5 applies and collateral relations of both parties on maternal lines inherit, even though a subsequent act of the Legislature made such purchaser an heir. See Burgwyn v. Devreux, 23 N. C. 593.

This fourth rule has for its principal object the securing to the family of the man, by whose industry the property was acquired, the enjoyment of such property in preference to those who have no consanguinity with him. Poison v. Pettaway, 159 N. C. 650, 652, 75 S. E. 935; Wilkerson v. Bracken, 24 N. C. 315.

In General.—When an estate goes to a person through a sale or conveyance to others, and that person dies without issue, it results back to those on whose conveyance the inheritance has been transmitted who would be heirs of the ancestor from whom it originally descended, or by whom it was originally settled. Wilkerson v. Pettaway, 159 N. C. 650, 652, 75 S. E. 935.

Construed with Rule 6.—This rule and rule 6 are in pari materia and should be construed together, and it was clearly intended that they should be. Paul v. Carter, 153 N. C. 26, 57 S. E. 905.

Under Rules 4, 5 and 6 of this section a grandson of the devisee of lands does not take lands by descent from him when his father is living at the time of his grandfather's death, very often he would have been an heir in case of the same lands and interest and the devisee that he would have taken under this rule if his father had not been living, and he acquires a new estate by purchase, descendible to his heirs at law under the canons of descent. Peel v. Corey, 196 N. C. 79, 144 S. C. 259.

Applies When There Is No Will.—This rule is confined to cases where there is no other disposition of the land by the will which would interfere with the prescribed course of descent. Kirkman v. Smith, 174 N. C. 60, 606, 94 S. E. 423.

Blood of Ancestor Necessary.—In order for a collateral relation of the half blood to inherit under this paragraph, he must be of the blood of the purchasing ancestor from whom the lands descend. Poison v. Pettaway, 159 N. C. 650, 75 S. E. 930; Little v. Buie, 58 N. C. 10; McMichal v. Moore, 58 N. C. 471; Noble v. Williams, 167 N. C. 112, 83 S. E. 180.

Collateral Relations Take Per Stirpes.—When lands descend to collateral relations under this section the collateral

Where Contingency Happens.—Under a deed of gift of lands from a father to his son with contingent limitation over to the issue of another son, in the event the former should die without issue, the limitation over is not to the heirs general, but to the children who take on the happening of the contingency which would divest the title of the first taker, and where this contingency has happened and the estate goes over to the contingent remainderman, the latter takes from the grantor under the deed. Stevens v. Wooten, 190 N. C. 378, 130 S. E. 13.

Failure of Contingency.—Where lands were devised to be sold upon the happening of a certain event which failed to happen, it was held that the land was never converted into personalty but remained realty and belonged to the heirs at law of the testator. Elliott v. Lotfin, 160 N. C. 301, 76 S. E. 236.

If there were a person died intestate and without lineal descendants, the real estate inherited by him from his father descended to his brother, who was his next collateral relation capable of inheriting of the blood of his father. Jones v. Hoggard, 108 N. C. 178, 181, 12 S. E. 906, 907.

Where land was devised to a grandson by his paternal grandfather, and the devisee died in the lifetime of his father, the devise of the son to the heir one of the heirs of the devisor, the estate passed to his uncles and aunts on the mother's side as well as those on the side of the father, the devisee's parents then being dead. Osborne v. Widenhouse, 56 N. C. 55.

Rule 5, Collateral descent of estate not derived from ancestor. —Failure of lineal descendants, and where the inheritance has not been transmitted by descent or derived as aforesaid from an ancestor, or where, if so transmitted or derived, the blood of such ancestor is extinct, the inheritance shall descend to the next collateral relation capable of inheriting, of the person last seized, whether of the paternal or maternal line, subject to the second and third rules. (Rev. s. 1556; Code, s. 1281; R. C., c. 38, Rule 5; 1808, c. 739; C. S. 1634.)

Cross Reference.—See editor’s note under rule 4.

Descendant Estate.—Where an estate has been transmitted by descent, and the blood of the acquiring ancestor has become extinct, upon the death of the person last seized intestate and without issue, the estate descends to the nearest collateral relations. University v. Brown, 23 N. C. 449.

Necessary Qualification.—In the descent of acquired estates the only qualifications necessary to a collateral is that he be the nearest relation of the person last seized. Bell v. Dorsey, 12 N. C. 333.

Illegitimate Children.—A devise of lands by the testator to his wife for life and at her death to him and his heirs carries the title to the land upon the death of the wife to her illegitimate children as her heirs to the exclusion of his legitimate children. Battle v. Shore, 197 N. C. 449, 149 S. E. 590.

Illegitimate Not Included.—An illegitimate child is not a collateral relation of, and capable of inheriting from, a legitimate child of the same mother, under this section. Wilson v. Wilson, 189 N. C. 85, 126 S. E. 181, 182.

Married Brother or Sister.—Where a son acquires land by deed from his father and pays a valuable consideration therefor, and dies without lineal descendants prior to his father's death, intestate, the land descends to the collateral relations of the son whether of the whole or half-blood, and the inheritance is not limited to the collateral relations of the son who are also of the blood of the father, the grantor. Ex parte Barefoot, 201 N. C. 395, 394, 160 S. E. 366.

Rule 6, Half blood inherits with whole; parents from child. Collateral relations of the half blood shall inherit equally with those of the whole blood, and the degrees of relationship shall be computed according to the rules which prevail in descents at common law: Provided, that in all cases where the person last seized leaves no issue capable of inheriting, nor brother, nor sister, nor issue of such, the inheritance shall vest in the father and mother, as tenants in common if both are living, and if one of them is living, then in such survivor. (Rev. s. 1556; Code, s. 1281; R. C., c. 38, Rule 6; 1808, c. 739; 1915, c. 9, s. 1; C. S. 1654.)

In General.—The court, in McMichal v. Moore, 56 N. C. 471, said: "This general provision in favor of the father and mother expressly departs from the principle of keeping the inheritance in the blood of the first purchaser, which, for feudal reasons, was strictly adhered to by the common law, and which is retained in our statutes in regard to collateral relations, except for the purpose of preventing an intestate, the parents are by the statute looked upon as lineal relations. Under the plain language of the statute, it is their common-law principle is put entirely out of the way." Weeks v. Quinn, 135 N. C. 425, 426, 47 S. E. 596.

Construed with Rule 4.—This rule and rule 4 are in pari materia, and should be construed together and harmonized; and thus construed, the collateral relations of the half blood inherit equally with those of the whole blood as to the devises under the provisions of this rule, where, under the requirements of canon 4, they are of the blood of the ancestor from whom the estate was derived. Paul v. Carter, 133 N. C. 26, 65 S. E. 905; Noble v. Williams, 167 N. C. 112, 83 S. E. 180.

Personal Property.—Under this rule, claimants of the half blood are entitled to the same share of the inheritance in the blood of the testator as they would have if the whole blood in the distribution of personal property. In re Skinner’s Estate, 173 N. C. 706, 707, 100 S. E. 382.

Woman Blooms Ancestor Immaterial.—The surviving father or mother of the person seized of land, under a devise, or leaving issue capable of inheriting, or brothers, or sisters, or the issue of such, will take the inheritance under the provisions of this rule without regard to the question whether such parent or sister of the blood of the purchasing an- cestor. McMichal v. Moore, 56 N. C. 471.

Natural Parent Prevalent.—Where a child by adoption dies seized of realty, without leaving a brother or sister, and the property is claimed by both the adopted and natural father, this section confers it upon the latter. Edwards v. Yearby, 168 N. C. 663, 85 S. E. 19. (By virtue of § 48-6 this rule no longer has effect.)

Proviso Conditional.—The word "if" as used in the proviso to this rule is one of condition, and the estate will not vest if it is not complied with, being, in this case, a condition precedent. University v. Markham, 174 N. C. 338, 342, 93 S. E. 845.

Thus the fact that the mother was living at the death of her child is made a condition precedent to the vesting of the estate, and the claimant who discovers should the propitius have outlived the mother. University v. Markham, 174 N. C. 338, 93 S. E. 845.

Widow’s Heirs Inherit.—Where one is survived by his daughter and wife, and the daughter dies before the widow, the heirs of the deceased widow and not those of the husband, inherit the estate, and it is immaterial whether the daughter or widow were in possession. Weeks v. Quinn, 135 N. C. 425, 47 S. E. 596.

Effect of Amendment of 1915.—Upon the death of a minor child who takes an estate in remainder as a new propositus after the death of his mother, under his grandfather’s will, with both a brother or sister or issue of such, the inheritance is cast, under this rule of the canons of descent before the amendment of 1915, upon the father if living, the amend- ment having the effect of making the father and mother tenants in common if both of them are living, and if only one of them is living then in such survivor. Allen v. Parker, 187 N. C. 376, 121 S. E. 665.

Rule 7, Unborn infant may be heir. —No in- heritance shall descend to any person, as heir of the person last seized, unless such person shall be in life at the death of the person last seized, or shall be born within ten lunar months after the death of the person last seized. (Rev. s. 1556; Code, s. 1281; R. C., c. 38, Rule 7; 1803, c. 1210; C. S. 1654.)

When Rule Applies. —This rule applies only where the person last seized has died since the passage of the rule. Rutherford v. Green, 37 N. C. 121.

Inheritance Vests Immediately.—Upon the death of the father seized of lands, his wife then being sequester, the in- heritance will immediately vest in the child en ventre sa mere. Deal v. Sexton, 144 N. C. 157, 56 S. E. 691.
Child Born after Ten Months.—An estate is not divested out of one upon whom it has devolved by the birth of a child more than ten lunar months after the death of the propositus. Britton v. Miller, 63 N. C. 269.


Rule 8, Widow or husband may take as heir. When any person dies intestate, leaving none who can claim as heir to such deceased person, but leaving surviving a widow or husband, such widow or husband shall be deemed his heir and as such inherit his estate. (Rev., s. 1556; Code, s. 1281; R. C., c. 38, Rule 8; 1801, c. 575, s. 1; 1925, c. 7; C. S. 1654.)

Editor's Note.—Previous to the amendment of this rule by ch. 7, Pub. Laws 1925, it was provided that a widow should be deemed an heir of her husband in case of his death, leaving none other who could claim as an heir. The amendment makes the rule mutual between husband and wife.

The word "intestate" is inserted in the first line. Construing the original rule before this word was added the Supreme Court held that the rule could only apply to property not devised by the husband. Hence, if the husband's will gave a life estate to the widow, the widow, though surviving him, could not be said to be his "legal heir," and the widow failed to dissent to the will, the rule would not apply. Therefore, in such case, if the husband had no legal heirs, the property, at the death of the husband, would go to the widow as his "legal heir." See Grantham v. Jinnette, 177 N. C. 229, 98 S. E. 724. The addition of the word "intestate" seems to modify the Grantham v. Jinnette decision. Undoubtedly such terms will be construed parallel, as well as a total intestacy. See 4 N. C. Law Rev. 15.

When Rule Applies.—In express terms this paragraph provides that the widow shall be the heir only when there is no one else who can claim as heir. University v. Markham, 174 N. C. 338, 93 S. E. 845; Powers v. Kite, 83 N. C. 156. Bryant v. Bryant, 190 N. C. 372, 374, 130 S. E. 21.

Same—No Will.—This paragraph applies only if there is no will or a will not disposing of the entire estate. Grant- ham v. Jinnette, 177 N. C. 229, 98 S. E. 724.

Widow Prevals Over Illegitimate Half-Brother.—Dece- dent left a wife and no descendents or collateral relatives except an illegitimate half-brother. The wife and not the half-brother is the heir in such case. Wilson v. Wilson, 189 N. C. 85, 126 S. E. 181.

Rule 9, Illegitimate children inherit from mother. Every illegitimate child of the mother and the descendants of any such child deceased shall be considered an heir: Provided, however, that where the mother leaves legitimate and illegitimate children such illegitimate child or children shall not be capable of inheriting of such mother any land or interest therein which was conveyed or devised to such mother by the father of the legitimate child or children; but such illegitimate child or descendant shall not be allowed to claim, as representing such mother, any part of the estate of her kindred, whether lineal or collateral. (Rev., s. 1556, Rule 9; Code, s. 1281; R. C., c. 38, Rule 10; 1799, c. 522; 1913, c. 71; C. S. 1654.)

Cross References.—See also, rule 10 and annotations there- to. As to distribution of property among illegitimate chil- dren, see § 28-152. As to effects of legitimation, see § 49-11.

In General.—This rule breaks the connection at the mother in the ascending line when it is necessary to pur- suit her kindred, either lineal or collateral. The construction given to this rule is, that if an illegiti- mate or natural-born child shall die intestate without leaving any child or children, his or her estate shall descend to and be equally divided among his or her brothers and sisters, born of the body of the same mother, and their representatives, whether legitimate or illegitimate, in the same manner and under the same regulations and restric- tions as if he had been born in wedlock. Powers v. Kite, 83 N. C. 156, 157.

The illegitimates mentioned in this rule are those who are the children of the same mother, and they inherit as representing themselves and their representatives, as if they were legitimate. Bettis v. Avery, 140 N. C. 204, 210, 55 S. E. 854.

Representatives Must Be Legitimized.—This rule was construed in Powers v. Kite, 83 N. C. 156. In considering that construction it will be noted that the words "whether
legitimate or illegitimate"
follow the words "and their representatives." But in Tucker v. Tucker, 108 N. C. 235, 266, 13 S. E. 5, Clark, J., held that while the rule allows illegitimate children to be legitimate as between themselves and their respective parents, such children shall themselves be legitimate representatives of the illegitimate child. Bryant v. Bryant, 190 N. C. 372, 374, 130 S. E. 21.

Bastards Do Not Inherit from Legitimate.—The rule does not apply to descents from a legitimate child, and the law in this State, with respect to such descents, is the same now as it was when the opinion in Flintham v. Holder, 16 N. C. 343, was delivered at December term, 1836. It was then held to be the law that "bastards can never inherit but from the mother and from each other," thus the law remains. Wilson v. Wilson, 189 N. C. 85, 88, 126 S. E. 249.

Legitimates May Inherit from Bastards.—Where there are children of the same mother, some born in wedlock and some illegitimate, the former class may inherit from the latter. Flintham v. Holder, 16 N. C. 343. Thus where an illegitimate brother died intestate and without issue, his legitimate brothers and sisters shared in the inheritance. McBryde v. Patterson, 78 N. C. 412.

Law Ignores the Father.—There is no half blood between illegitimates; they are treated as children without a father of any kind. The law takes no notice of him, for they trace only through the mother. Ash v. Camp Mfg. Co., 153 N. C. 90, 112 S. E. 516.

Must Claim through Brother.—A legitimate, who does not claim directly from a brother or sister, or from the issue of heirs of either, but from an illegitimate first cousin, who has no such right, title, or interest, may, under the rule, assert his interest or claim to the inheritance. It may be possible that if there are two brothers coming under this description, and one of them, being illegitimate, marries and has issue, the other, who is legitimate, may establish a claim to the inheritance.

Rule Differs from Older Statutes.—This section was a departure from the English law as settled by 29 Charles II, which enacts (according to the ancient rule of law) that "heir of a parent of severance, to his next of kin, and does not fall within the residuary clause. Carolina Power Co. v. Haywood, 186 N. C. 313, 119 S. E. 500.

Rule 11, Estate for life of another, not devised, deemed inheritance. Every estate for the life of another, not devised, shall be deemed an inheritance of the deceased owner, within the meaning and operation of this chapter. (Rev., s. 1556; Code, s. 1281; R. C. c. 38, Rule 12; C. S. 1654.)

Rule Differs from Older Statutes.—This section was a departure from the English law as settled by 29 Charles II, which enacts (according to the ancient rule of law) that where there is no special occupant in whom the estate may vest, the tenant per autre vie may devise it by will, or it shall go to the executors or administrators, and be as seen in their hands for payment of debts; and the other, that of 14 Geo. II, c. 30, which enacts that the surplus of such estate per autre vie, after payment of debts, shall go in a course of distribution like a chattel interest. Brown v. Brown, 108 N. C. 235, 13 S. E. 5.

Rule 12, Seizin defined. Every person, in whom a seizin is required by any of the provisions of this chapter, shall be deemed to have been seized, if it may have had any right, title or interest in the inheritance. (Rev., s. 1556; Code, s. 1281; R. C. c. 38, Rule 13; C. S. 1654.)

Cross References.—See also, rule 1. As to distributees of illegitimates, see § 28-152. As to effects of legitimation, see § 49-2.

Common Law.—At the common law, seizin signified the possession or occupation of the soil by a free holder, one who has at least a life estate in the land. This seizin was of two kinds—seizin in deed or in fact, which was the same as the equivalent of the common law term of possession or occupation of the land with the intent, as is sometimes said, to cast a freehold interest and seizin in law, which was a bare right to possess or occupy the land or freehold, or, as otherwise defined, a right of immediate possession according to the nature of the estate. Early v. Early, 134 N. C. 258, 254, 46 S. E. 503.

Secured—Complete with Seizin under Rule.—The seizin, either in law or in deed, of the common law is not the seizin of the statute. The former requires that there shall be either actual possession or the right of immediate possession, which is that is required under the present section to constitute a sufficient seizin for the creation of a new stock of inheritance or stripes of descent is that the person from whom the descent is claimed should have had, at the time of the descent cast, some right, title or interest in the inheritance, whether vested or contingent. For the language of the statute is explicit that a person having any such right, title, or interest shall be deemed to have been seized thereof. Early v. Early, 134 N. C. 258, 267, 46 S. E. 303; Severt v. Lussi, 222 N. C. 531, 23 S. E. (2d) 829.

Trust for Wife Descends to Her Heirs.—The resulting trust in favor of the wife in lands the title to which has been acquired by her husband by deed is now descendible to her heirs under this rule, though she may not have been in separate possession thereof during her life. Barrett v. Brewer, 153 N. C. 547, 69 S. E. 614, cited and distinguished. Tyndall v. Tyndall, 186 N. C. 272, 119 S. E. 353.

New Proposition Created by Will.—A devise of land to testator's two daughters for life, and at the death of either, or both of them, said land shall go to the child or children of each, the child or children representing the mother in interest, it was held, upon the marriage of one of them, and having issue born alive, the issue so born taken by purchase of the estate, for the blood of the testator. Tucker v. Tucker, 108 N. C. 235, 238, 13 S. E. 516.

Issue of Contingent Remainderman Inherit.—Under the provisions of this chapter, if the descent is to the issue of the testator's two children, a devise to the daughter of the testator and her issue, upon the death of the testator's son without issue, is such an interest as is descendible to the issue of the daughter when she has died before the happening of the contingency. Hines v. Reynolds, 181 N. C. 343, 107 S. E. 144.

Upon an estate to W. during his life, and at his death to his eldest son, not then in esse, with residuary clause to the testator's children; upon the happening of the contingency, his devise to the children, to his heirs, to the issue of the daughter when she has died before the happening of the contingency. Hines v. Reynolds, 181 N. C. 343, 107 S. E. 144.

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Cross Reference.—As to marriages between slaves validated, see § 51-5 and notes.

Relation to Section 51-5.—There is this marked distinction between this section and section 51-5, that it is important in dealing with the competency of the declarations of a parent. Section 51-5 deals with marriage, and it is be-
cause the relationship of husband and wife is established that the children born in wedlock are legitimate, while this rule does not validate the cohabitation, but simply confers the right to inherit, and this right is limited to the estates of the parents. Bettis v. Avery, 140 N. C. 314, 187, 52 S. E. 584; Croom v. Whitehead, 174 N. C. 305, 310, 93 S. E. 854.

All Colored Parents Included.—This rule is a valid law as to descents after its passage, and renders legitimate the children of all colored parents living together as man and wife, born before 1 January, 1868, even the children of a woman of mixed blood, whose mother was a white woman, who lived with a slave as his wife at the time of their birth. Woodward v. Blue, 103 N. C. 109, 9 S. E. 492.

Rule Legitimates Children Only as to Inheritance.—Persons born in slavery, of slave parents, and who were not legitimated by their parents marrying subsequent to the war, are not legitimated by this paragraph, except to the extent of inheriting from their parents. Tucker v. Tucker, 103 N. C. 215, 9 S. E. 492.

Applies to Estate of Parents Only.—This paragraph conveys the right of inheritance upon the children only as to the estate of their parents, not as to collaterals. Tucker v. Bellamy, 98 N. C. 31, 4 S. E. 34; Tucker v. Tucker, 108 N. C. 593, 11 S. E. 5; Bettis v. Avery, 140 N. C. 854, 52 S. E. 584; Croom v. Whitehead, 174 N. C. 305, 310, 93 S. E. 854; Bryant v. Bryant, 190 N. C. 372, 374, 130 S. E. 21.

Operates Only Prospectively.—This rule operates only prospectively and cannot divest any estate theretofore acquired. Tucker v. Bellamy, 98 N. C. 31, 33, 4 S. E. 34; Jones v. Hoggard, 108 N. C. 178, 12 S. E. 906, 907.

No Rights Conferred on Collaterals.—This paragraph legitimates the children of colored parents, who were born before the first day of January, 1868, and merely extends the children's right of inheritance to the estate of the father, which was before that restricted to the estate of the mother, but it does not transmit any title to the plaintiff, who is claiming the land in dispute as heirs of an illegitimate first cousin. Bettis v. Avery, 140 N. C. 184, 52 S. E. 594.

Illegitimates Excluded.—Where a man and woman, both slaves, cohabited as husband and wife for several years, but separated prior to emancipation and children were born while this relation existed and after the separation the woman entered into a similar relation with another slave, which continued until after the end of the war, when the parties duly acknowledged and had recorded the fact of union. Jones v. Hoggard, 108 N. C. 178, 12 S. E. 906, 907.

Two Conditions Essential.—The two essential conditions necessary to give effect to this paragraph are cohabitation existing at the birth of the child, and the legitimacy of the party from whom the property claimed is derived. Woodward v. Blue, 103 N. C. 109, 116, 9 S. E. 492; Woodward v. Blue, 107 N. C. 407, 410, 12 S. E. 453; Croom v. Whitehead, 174 N. C. 305, 310, 93 S. E. 854; Spaugh v. Hartman, 104 N. C. 154, 64 S. E. 79.

Cohabitation Is a Presumption Only.—The cohabiting does not alone confer legitimacy, though it furnishes presumptive evidence that the child is the issue of the persons thus living and indicating their relations; but the presumed fact is open to disproof, and to be determined, as other facts, upon the force of the evidence adduced, which may be sufficient to overcome the presumption. Woodward v. Blue, 103 N. C. 109, 116, 9 S. E. 492.

Cohabitation Must Have Been Exclusive.—In order to come within the provision of this paragraph, legitimating the children of colored parents living together as man and wife, etc., and thus giving them the rights of inheritance, an exclusive cohabitation must be shown, as signified by the expression, "living together as man and wife," and not casual sexual intercourse. Spaugh v. Hartman, 105 N. C. 454, 54 S. E. 198.

The cohabitation must be exclusive in the sense that it must show a single, not a polygamous, relation. Branch v. Walker, 102 N. C. 34, 40, 8 S. E. 896; Croom v. Whitehead, 174 N. C. 305, 310, 93 S. E. 854.

Evidence.—The quasi marriage relation necessary to legitimize the children of colored parents, under the provision of this paragraph may be shown in evidence by reputation, cohabitation, declarations and conduct, under the same general rule of evidence applicable to establish the fact of marriage. Nelson v. Hunter, 140 N. C. 598, 599, 53 S. E. 439, cited and approved; Spaugh v. Hartman, 135 N. C. 454, 64 S. E. 198.

Same.—Rule Less Strict than Where Legal Marriage.—To repeal the inference of paternity, drawn from the mere fact of cohabitation, the same stringent rules do not prevail as in cases of established legal marriage, when, to bastardize the issue, there must be full, affirmative, repelling proof, such as impotency, nonaccess and the like, or the presumption of legitimacy will stand. Woodward v. Blue, 103 N. C. 109, 116, 9 S. E. 492.

Chapter 30. Widows.

Part 1. Dissent from Will.

30-1. Time and manner of dissent.

30-2. Effect of dissent.

30-3. Widow's interest not liable for husband's debts.

Part 2. Dower.

30-4. Who entitled to dower.

30-5. In what property widow entitled to dower.

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Part 3. Allotment of Dower.

30-11. By agreement between widow and heir.

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Part 4. Year's Allowance.

30-15. When widow entitled to allowance.

30-16. Duty of personal representative or justice to assign allowance.

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30-20. Procedure for assignment.


30-22. Fees of commissioners.

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30-24. Hearing on appeal.

30-25. Personal representative entitled to credit.

30-26. When above allowance is in full.

Part 3. Assigned in Superior Court.

30-27. Widow or child may apply to superior court.


30-29. What complaint must show.
Art. 1. Dissent from Will.

§ 30-1. Time and manner of dissent. — Every widow may dissent from her husband's will before the clerk of the superior court of the county in which such will is proved, at any time within six months after the probate. The dissent may be in person, or by attorney authorized in writing, executed by the widow and attested by at least one witness and duly proved. The dissent, whether in person or by attorney, shall be filed as a record of court. If the widow be an infant or insane, she may dissent by her guardian. (Rev. § 30-10; Code, § 2108; 1868-9, c. 93, s. 37; C. S. 4096.)

Cross Reference. — See annotation to § 30-5.

Sec. 30-10. Judgment and order for commissioners. — Where the widow is a minor without a guardian, she may dissent by her guardian. (Rev. § 30-10; Code, § 2108; 1868-9, c. 93, s. 37; C. S. 4096.)

Cross Reference. — See annotation to § 30-5.

Art. 2. Effect of dissent.

§ 30-2. Effect of dissent — Upon such dissent, the widow shall have the same rights and estates in the real and personal property of her husband as if he had died intestate. (Rev. § 30-10; Code, § 2109; R. C., c. 118, s. 12; 1868-9, c. 93, s. 38; C. S. 4097.)

Cross Reference. — As to distribution in case of intestacy, see § 30-19. As to descent in case of intestacy, see § 39-1, class 8.

Generally. — The "estate" referred to is dower; the "rights" referred to are the year's support and child's support as a distributee, both of which are legal rights, enforceable at law and not in equity. The "rights" in a court of equity except when by law may be invoked to enforce her legal rights. Drewry v. Bank, etc., Co., 173 N. C. 664, 92 S. E. 593.

The words "as if he had died intestate" are not limited to the ordinary meaning of the husband dying without making a will, but include the case of his death without effectually disposing of his property. Corporation Commission v. Dunn, 174 N. C. 697, 44 S. E. 47.

Method of Determining Widow's Share. — In ascertaining the distributive share of a widow who dissent from her husband's will, all of his personal estate, whether consisting of advancements heretofore made to children, or legacies to grandchildren or to strangers, is to be brought together, and her share is to be taken out of it pursuant to the statute of distributions. Arrington v. Dorsten, 77 N. C. 357.

Dissent Accelerates the Vesting of the Property. — Where property is devised to the widow during her life and then to a university and she dissents thereto, such property vests immediately in the university if the property is not given to the widow in her dower. Trustees v. Borden, 132 N. C. 476, 44 S. E. 47.

Right Subject to Inheritance Tax. — The donor right in favor of the husband taken by the dissenting widow is subject to the inheritance tax. Corporation Commission v. Dunn, 174 N. C. 679, 685, 94 S. E. 481.

Widow as Donee of Power. — Where the widow is the donee of a discretionary power, by dissenting from the will she renounces all gifts whether of estates or powers under it, at least of such powers as imply personal trust and confidence. Hinton v. Hinton, 68 N. C. 100, 104.

§ 30-3. Widow's interest not liable for husband's debts. — The donor or right of donor of a widow, and such lands as may be devised to her by his will, if such lands do not exceed the quantity she would be entitled to by right of dower, [ 61 ]
although she has not disserted from such will, shall not be subject to the payment of debts due from the estate of her husband, during the term of her life. (Rev., s. 3082; Code, ss. 2104, 2105; R. C., c. 118, s. 8; 1868-9, c. 93, s. 34; 1791, c. 351, s. 4; C. S. 4098.)

Generally.—This section secures a provision out of the husband's land to the widow in two cases: (1) Where dower has been actually assigned, as in cases of intestacy, and dower and dissent from the husband's will, and (2) where the husband devises lands to the wife, which are presumed to be in lieu of dower. Simonton v. Houston, 78 N. C. 468. Exempt from Judgment.—Dower assigned to a widow who dissents from her husband's will is subject to neither debts nor legacies, Bray v. Lamb, 17 N. C. 372, 374, and where the personalty is insufficient to pay the debts the land is sold subject to this right of dower. Higdon v. Higdon, 206 N. C. 62, 64, 173 S. E. 273.

§ 30-5. In what property widow entitled to dower.—Subject to the provision in § 30-4, every married woman, upon the death of her husband intestate, or in case she shall dissent from his will, or in case she shall dissent from his will, or in case she shall dissent from his will, she shall be entitled to an estate for her life in one-third of all the lands, tenements and hereditaments whereof her husband was seized and possessed at any time during the coverture, in which the third part shall be included the dwelling-house in which her husband usually resided, together with offices, out-houses, buildings and improvements thereunto belonging or appurtenant; she shall in like manner be entitled to such an estate in all legal rights of redemption and equities of redemption or other equitable estates in lands, tenements and hereditaments whereof her husband was seized in fee at any time during the coverture, subject to all valid encumbrances existing before the coverture or made during it with her free consent lawfully appearing thereto. The jury summoned for the purpose of assigning dower to a widow shall not be restricted to assign the same in every separate and distinct tract of land, but may allot her dower in one or more tracts, having a due regard to the interest of the heirs as well as to the right of the widow. This section shall not be construed so as to compel the jury selected to allot dower to allot the dwelling-house in which the husband usually resided, when the widow shall request that the same be allotted in other property. (Rev., s. 3084; Code, c. 2103; R. C., c. 118, s. 3; R. S., c. 121, s. 3; 1827, c. 46; 1869-70, c. 176; 1883, c. 175; 1908, c. 132; C. S. 4100.)

I. General Consideration of Dower.

II. Property Subject to Dower.

A. In General.

B. Estates and Interests.

1. Nature of Seisin Required.

2. Applications.

III. Pleading and Practice.

Cross Reference.

As to liability for husband's debts, see § 30-3. As to allotment of dower, see § 30-11 et seq.

See 11 N. C. Law Rev., 272, for suggested change in this section.

I. GENERAL CONSIDERATION OF DOWER

Editor's Note.—It is practically impossible in a work of this nature to give a full treatment and discussion of the whole law of this important subject, for any one of the innumerable issues which arise in litigation on this topic could be the basis of a lengthy article. As will be seen from the front analysis, the editor has endeavored to present the viewpoint of the practitioner, to place hereunder a cross reference which contains part of the specific section of this book and to deal with those topics which appear to have a bearing on the most troublesome issues in the decided cases.

Positive Law Is Basis of Dower.—The contract of marriage does not vest in the wife her right of dower. The right is not regarded as a conveyance from contract, although the contract of marriage is a prerequisite to its existence. The positive law appears to sustain the position of the practitioner, to place hereunder a cross reference which contains part of the specific section and to deal with those topics which appear to have a bearing on the most troublesome issues in the decided cases.

Right of Dower Is a Legal Right.—The right of a widow is a legal right and is prior to that of the heir. Cameron v. Murphy, 174 N. C. 679, 681, 94 S. E. 481; Rose v. Rose, 63 N. C. 391.

Right of Dower Does Not Vary with the Wife’s Right of Dower. This right is not regarded as varying from contract, although the contract of marriage is a prerequisite to its existence.

As to exemption from debts and legacies, see note to
Law of Situs Governors. — The existence and incidents of the right of dower are determined by the law of the state in which the husband resides during coverture, and the establishment of the domicile of the parties for the purpose of the marriage or the domiciliation of the parties. Corporation Commission v. Dunn, 174 N. C. 679, 81 S. E. 481. The law of the state in which the husband resides is also the law consummating the consummation of the husband's death is the governing law. Id.

Where Dissent of Wife Not Necessary. — It will be noticed that the widow's right to claim dower is subject to the two conditions, that the husband dies intestate and that he dissent from his will. In other words, this and the foregoing section give the widow the right to elect whether she will take under the provisions of the will or the intestacy. This takes under the intestacy is considered a continuation of the estate in the nature of a chose in action, which, upon assignment of dower, becomes a life estate in the property and widow. Vannoy v. Green, 206 N. C. 77, 173 S. E. 277.

Not Consummated Until Death of Husband. — A married woman has an inchoate right or estate in one-third in value of all the lands of which her husband was seized and possessed during coverture, but its enjoyment is postponed by law until his death, and is contingent upon her surviving him. Gatewood v. Tomlinson, 113 N. C. 312, 313, 18 S. E. 188. And the inchoate dower in the lifetime of her husband has her dower allotted even though his lands are sold under execution. Gatewood v. Tomlinson, 113 N. C. 312, 313, 18 S. E. 219.

Upon the death of a husband, the widow's right of dower becomes consummated, and is a vested and vested right of property in the nature of a chose in action, which, upon assignment of dower, becomes a life estate in the property possessed by her husband during the marriage or the domicile of the parties. Corporation Commission v. Dunn, 174 N. C. 679, 81 S. E. 481. In summarizing the nature of this right, it is said in 2 S. E. 219.

Seizin of Estate of Inheritance Necessary. — The seizin to the right of dower being a substantial right, possessing in contemplation of its attributes, is to be estimated and valued as such." And in Dolley v. Coln, 14 Wall 472, 479, 20 L. Ed. 830, it is said: "A wife having only an inchoate right of dower has no present title to the land, either legal or equitable."—Ed. Note.

It must be remembered that the widow's lands are sold by a receiver appointed by the court, and the husband and wife join in the receiver's deed to the purchaser, who assumes prior mortgage indebtedness thereon, and the parties agree that the widow's inchoate dower attaches to the proceeds of the sale, and the cash value of the inchoate right is computable by the wife is entitled thereto among the other creditors of the husband. American Blower Co. v. Mackenzie, 197 N. C. 152, 147 S. E. 829, laying down rule for computing present value of right of dower.

Although inchoate dower has a present value, the enjoyment of the estate is expressly postponed by statute until after the husband's death, and is contingent upon the widow surviving him. Higdon v. Higdon, 206 N. C. 62, 173 S. E. 271.

Cited in Honeycutt v. Burleson, 198 N. C. 37, 38, 150 S. E. 634.

II. PROPERTY SUBJECT TO DOWER.

A. In General.

Editor's Note.—The courts have followed the clear and unambiguous terms of this section in the determination of just what property is subject to the dower right of the widow. The cases given below will illustrate that the property must be real estate which is the wife's personal property, is the widow required to dissent from this will in order to lay claim to dower in the defeasible fee of which the widow has no title or estate in the property which he could dispose of by will. Now when the husband dies having a devise to his widow of a life estate in land, and the limitation is defeated at his death because of the non-performance of the condition thereof, then he has no legal title or estate in the land which he could dispose of by will. When the husband takes a defeasible title to lands and the limitation is defeated, this will in order to lay claim to dower in the defeasible fee of which the husband has no right to dower or that the husband dies leaving a will disposing of all the personal property, is the widow required to dissent from this will in order to lay claim to dower in the defeasible fee of which the husband was seized and possessed during coverture, but its enjoyment is postponed by law until his death, and is contingent upon her surviving him. Gatewood v. Tomlinson, 113 N. C. 312, 313, 18 S. E. 188. And the inchoate dower in the lifetime of her husband has her dower allotted even though his lands are sold under execution. Gatewood v. Tomlinson, 113 N. C. 312, 313, 18 S. E. 219.

The widow has no right under this section, to select the dwelling-house, and not conferring the right of seized by her dying before her husband.'

Not Consummated Until Death of Husband. — A married woman has an inchoate right or estate in one-third in value of all the lands of which her husband was seized and possessed during coverture, but its enjoyment is postponed by law until his death, and is contingent upon her surviving him. Wing v. Green, 206 N. C. 77, 173 S. E. 277.

Una phenomenon subject to the dower right of the husband. But whatever constitutes the basis of this section has reference to property which may be the subject of a devise. The husband in this case has no right to dower. The husband's death is the governing law. Id. The widow has no right under this section, to select the dwelling-house, and not conferring the right of seized by her dying before her husband.'

Not Consummated Until Death of Husband. — A married woman has an inchoate right or estate in one-third in value of all the lands of which her husband was seized and possessed during coverture, but its enjoyment is postponed by law until his death, and is contingent upon her surviving him. Gatewood v. Tomlinson, 113 N. C. 312, 313, 18 S. E. 188. And the inchoate dower in the lifetime of her husband has her dower allotted even though his lands are sold under execution. Gatewood v. Tomlinson, 113 N. C. 312, 313, 18 S. E. 219.

Upon the death of a husband, the widow's right of dower becomes consummated, and is a fixed and vested right of property in the nature of a chose in action, which, upon assignment of dower, becomes a life estate in the property possessed by her husband during the marriage or the domicile of the parties. Citizens Bank, etc., Co. v. Watkins, 215 N. C. 25, 1 S. E. (2d) 85.

The widow has no right under this section to select the land to constitute her dower, the provision providing that the commissioners need not select the dwelling-house if the widow does not express a desire that it be selected. See also, 2 S. E. 219.

Valuation of Property.—A widow is not entitled to have dower of the improved value of her husband's estate, but she must take it according to the value as it was in his lifetime. Campbell v. Murphy, 55 N. C. 357.

Right of Dower.—The claim of dower becomes a vested right upon allotment, continuing from the death of her husband, and from that time she is entitled to the usufruct of the same, notwithstanding the opposite may have been kept out of possession. In re Gorham, 177 N. C. 271, 98 S. E. 717.

Same.—Where Lands Sold to Pay Debts of Deceased.—In case of a sale of the lands to make assets to pay the debts of the deceased, the widow is entitled to interest on her proportionate part from the sale until payment, charging her interest in return, for such sums as she may be entitled to the estate. In re Gorham, 177 N. C. 271, 98 S. E. 717.

Partnership Property.—Real estate belonging to a partnership is subject to dower in favor of a widow of one of the partners, and in case of the death of the partner, the partnership assets are sold to pay partnership debts, the surplus retains its character as real estate and descends to the heir, so that the heir takes subject to the widow's right of dower. In re Gorham, 177 N. C. 271, 98 S. E. 717.

Mortgaged Property.—Under this section where an entire transaction was in effect an indirect mortgage on the property of a father, and his children received no consid- eration and no conveyed beneficial interest, but the interest of the sole beneficial interest in the lands was in the father, and upon his death his widow is entitled to dower rights in the lands. Stack v. Stack, 202 N. C. 461, 163 S. E. 560.
render the estate dowerable must be of an estate of inher-
ance, with the freehold vested in the deceased husband.

Possession alone will not suffice. — Possession cannot
supply the seizin of an inheritable estate necessary to sup-
Efland v. Efland, 96 N. C. 488, 1 S. E. 888.

The original Act of 1784 read "seized or possessed." The
section now reads "seized and possessed," the substitution
of the word "and" for the word "or" having been made by
the Act of 1836. This substitution, however, does not affect
the substantive meaning and intent of the section, and is
said in Weir v. Tate, 39 N. C. 264, 278, to be only a clerical
error. This being true the section as it now reads is to be
given the same construction as it received prior to the ex-
change of these words. Under this construction it would
seem that the word "possessed" is surplusage, and at least on
one occasion, Efland v. Efland, supra, the court has so
ever understood why it was placed in the section. Weir v.
Tate, supra. This view seems to be rested on the fact that
whether or not the husband has been seized of the land,
the widow's right to dower rests upon the theory that
the requisite of seizin is satisfied, the possession, so far
as required, having arisen in various forms, and have involved
the actual possession of a freehold estate and the former
to the right to the immediate possession or enjoyment of a

I. POSSESSION.

Seizin in Law or in Deed.—A widow is entitled to
dower only in an estate of inheritance of which her husband
had a seizin in law or in deed at any time during the cov-
Efland v. Efland, 96 N. C. 488, 1 S. E. 888.

When Husband Deemed to Be Seized.—The husband is
generally deemed to be seized of any land, "when he may have
had any right, title, or interest in the inheritance." 112 N. C. 600, 685, 24 S. E. 429.

2. Application.

Editor's Note. — The determination of the question as to
whether or not the husband has been seized of the land,
within the meaning of the judicial construction placed on
the word as used in this section, has been the most
fruitful source of litigation of the whole subject of dower.
The contests which have been waged around this particu-
lar requisite have arisen in various forms, and have involved
all kinds of estates and interests. However, the con-
clusions reached by the courts are believed to be placed on
the word as used in this section, probably has been the most
fruitful source of litigation of the whole subject of dower.
The general doctrine of the rule in Shelley's Case may
be stated generally as follows: "If the husband dies
within the meaning of the section for, as we have already seen, seizin as
here used means an estate of inheritance. See note of Barnes v. Roper, ante, this note, analysis line II, B. 1.

The reason for preventing the wife from recovering under the rule of
the Thompson case, just noted, was the fact that the words "born of his wife" were held to qualify and explain "the lawful heirs of the husband," and that the son was not the lawful heir of the husband.

For a discussion of the rule in Shelley's Case, see
the note to section 41.1—Ed. Note.

Seizin under Unrecorded Deed.—Where title to land is
challenged to the widow under a deed, it is essential that such deed be reg-
listerd for otherwise the widow is not entitled to dower out of
d Kufts v. Clatts, 58 N. C. 92.

Devises by Will.—Rule in Shelley's Case.—Where under
his will a testator gave all his lands to his son for life, and
after his death to his lawful heirs, born of his wife, it

The case of Thomas v. Thomas, supra, was cited without
joinder of the wife in a conveyance by the husband was
claimed under a deed it is essential that such deed be reg-
istered for otherwise the widow is not entitled to dower out of
the premises covered by the unrecorded deed. Thomas v.
Thomas, 32 N. C. 123. But see Tyson v. Harrington, 41 N. C. 329, 5 S. E. 676. Under this construction it would
be held that a deed for land had been delivered, but from whom it had
been abstracted before registration, has a right to her dower
in such land, the husband having an incomplete legal title.
The case of Thomas v. Thomas, supra, was cited without
Disapproved.

Rent.—In a U. S. Supreme Court case, Herbert v. Wren, 7
Cranch 370, 3 L. Ed. 374, it was held that if a wife join her
husband in a lease for years, she is still entitled to dower in the rent.

Estate at Will.—At common law a wife had no right of
dower in an estate at will. See Duncan v. Navassa Phosphate Co., 137 U. S. 647, 34 L. Ed. 826.

III. PLEADING AND PRACTICE.

Only One Proceeding Necessary.—This section gives the widow
dower in all the lands of which the husband was
seized during coverture, and this provision contemplates that
the dower proceeding shall be the one proceeding in which the husband
shall have been seized during coverture. See Duncan v.
Navassa Phosphate Co., 137 U. S. 647, 34 L. Ed. 826.

The rationale of this section tends to indicate that there
should be only one proceeding for the allotment of dower,
whether it is a dower proceeding or a proceeding for partiti-
on of land, in which widow is entitled to dower, and that
proceeding should be in the county where "the dwelling
house in which her husband usually resided" is situated.
High v. Pearce, 230 N. C. 266, 274, 17 S. E. (2d) 108 (con-
versational). (Rev.) and cases cited therein.

There is no statute of limitations in regard to the writ of
dower; and if her case is not affected by the statute of
preemptions, her widow is entitled to account for a delay.
Campbell v. Murphy, 55 N. C. 357.

Parties.—As to who are necessary parties, see section
30-12 and the note thereto.

§ 30-6. Dower not affected by conveyance of husband; exception.—No alienation of the hus-
bond alone, with or without covenant of war-
ranty, shall have any other or further effect than
to pass his interest in such estate, subject to the
dower right of his wife: Provided, that a mortgage
or trust deed by the husband to secure the pur-
chase money, or any part thereof, of land bought
by him, shall, without the wife executing the deed,
be effectual to pass the whole interest according
to the provisions of the said deed. (Rev. s. 3085;
Code, s. 2105; 1868-9, c. 93, s. 35; C. S. 4101.)

Cross Reference.—As to private examination of wife, see
§ 39-7 and annotation thereto.

Editor's Note.—Under this section as it formerly stood no
joinder of the wife in a conveyance by the husband was
required. Under this section as it stood under the old
law, the wife was given dower only in those lands of which
the husband died seized. That section no longer requires seizin
at the death of the husband, but only a seizin of inheritance
thereafter, which must have been a complete and
utter seizure of an estate of inheritance within the meaning
of the words as used in this section. But if the rule in Shelley's
Case is inapplicable, then the husband takes only a life
estate out of which dower cannot be had, and this because
the husband will not have been "seized" within the mean-
ing of this section for, as we have already seen, seizin as
here used means an estate of inheritance. See note of Barnes v. Roper, ante, this note, analysis line II, B. 1.

The reason for preventing the wife from recovering under the rule of
the Thompson case, just noted, was the fact that the words "born of his wife" were held to qualify and explain "the lawful heirs of the husband," and that the son was not the lawful heir of the husband.

For a discussion of the rule in Shelley's Case, see
the note to section 41.1—Ed. Note.
taken away by the change of the wording of section 30-5, and the wife's right, although, in a sense, a qualified one, is preserved by the husband's conveyance to his wife of the right of dower, assuming of course, the existence of the essential elements. It necessarily follows, then, that all purchasers, etc., take the property conveyed by the husband, subject to the right of dower, and section 30-6 is merely a statutory protection thereof.

This section is modified by section 30-9 to the extent that the husband of an insane or lunatic wife may alienate his property without her joinder provided the terms of that section are complied with.

Generally.—It is an established principle that every citizen has the right to enjoy the fruits of his own labor, and when his earnings are invested in land, the rule is that he acquires with the title the incidental right of absolute and un-restrained alienation. However there are a few instances where a right is vested in the husband to reach some beneficent end; the provision that the wife must join in a conveyance by her husband constitutes one of these restrictions. But this and the other restrictions must be construed and carried out the kindly purpose for which they were created, with no more restraint on the power of alienation than is necessary to make them effectual. Hughes v. Hodges, 103 N. C. 236, 9 S. E. 437.

Non Joinder of Wife—Dowerable Property Retained.—Where the husband has sold and conveyed portions of his land for valuable consideration without the joinder of the wife, but the land sold was subject to dower, the original deed is not void, though it does not convey the quantity which permit that dower be assigned out of the lands descended and according to the provisions of this section, the purchasers have a right to require that dower be shown and, if it is not shown, they have a right to have the purchase price returned to them. Case v. Fittsmon, 209 N. C. 783, 184 S. E. 818.


§ 30-7. Dower conveyed by wife's joinder in deed.—The right to dower under this chapter shall pass and be effectual against any widow or person claiming under her upon the wife joining with her husband in the deed of conveyance and being privately examined as to her consent thereto in the manner prescribed by law. (Rev. s. 3056; Code, s. 2107; 1868-9, c. 93, s. 30; C. S. 4102.)

Cross Reference.—As to private examination of the wife, see § 39-7 and annotation thereof.

See annotations to § 30-8.

Inchoate Right of Dower as Collateral Security.—The wife by joining in her husband's mortgage given on his lands may convey, as additional security to his debt, her inchoate right of dower. Griffin v. Griffin, 191 N. C. 227, 131 S. E. 583.

Same—Forclosure.—A deed of trust given by the husband and joined in by the wife unreservedly of her inchoate right of dower, may be enforced under its terms and conditions to pay off the debt it secures, and completely bars the inchoate right of dower. Griffin v. Griffin, 191 N. C. 227, 131 S. E. 583.

Where a wife joins in the execution of a mortgage or deed of trust, she is entitled to executory dower, and is considered as having the right of dower, and upon foreclosure after her husband's death she may not assert her dower in the land as against the purchaser at the foreclosure sale, although, her position being executory dower, she is entitled to assert a claim against her husband's estate to the amount of the value of her dower. Realty Purchase Corp. v. Hail, 213 N. C. 363, 194 S. E. 651.

Same—Equity Will Not Intervene.—Equity will not interfere in behalf of the wife who has unreservedly joined in a mortgage on her husband's lands, to restrain the sale according to the terms and conditions of the mortgage, even though she is entitled to a foreclosure sale of the lands outside of the wife's inchoate interest, and if not sufficient, subject her interest to sale for the payment of her husband's debt. Griffin v. Griffin, 191 N. C. 227, 131 S. E. 585.

Joinder Makes Wife a Surety.—When the wife encumbers her inchoate right of dower by joining in a mortgage of her land to secure her debt she becomes her surety, Griffin v. Lynch, 208 N. C. 391, 126 S. E. 469.


§ 30-8. Conveyance of home site with wife's assent.—No deed or other conveyance, except to secure purchase money, made by the owner of a home site, which shall include the residence and other buildings together with the particular lot or tract of land upon which the residence is situated, whether actually occupied by said owner or not, shall be valid to pass possession or title during the lifetime of the wife without the voluntary signature and assent of her wife, signed on her private examination according to law. Provided, the wife does not commit adultery, or has not abandoned and does not abandon the husband and apart from him. Provided further, that all married women under the age of twenty-one shall have the same privilege to renounce their dower rights in and to the home site as is now conferred upon married women twenty-one years and over, and, the deed or other conveyances thereof made by the owner of a home site with the voluntary signature and assent of his wife, signed on her private examination according to law. Even though the wife be under twenty-one years of age, shall be valid and immediately pass possession and title thereto as of the date thereof, even though the wife of said owner was under twenty-one years of age at the time of such signature and assent. (1919, c. 133; 1937, c. 69; C. S. 4103.)

Cross Reference.—As to mortgage of household and kitchen furniture, see § 39-3.

Editor's Note.—Section 30-9 passed by the Public Laws of 1923, is undoubtedly intended to modify this section in that it allows the husband in certain specified cases to alienate the property concerned without the joinder of his wife.

The 1927 amendment directed that the last two provisos be added at the end of this section.

In Coker v. Virginia-Carolina Joint-Stock Land Bank, 208 N. C. 391, 126 S. E. 469, it was held that § 30-9 is not to be construed to include a conveyance by the owner of a home site as is now conferred upon married women twenty-one years and over:

Provided further, that all conveyances of a home site, as defined in this section, made prior to February 27, 1937, by the owner thereof, with the voluntary signature and assent of his wife, signed on her private examination according to law, shall be valid and pass the title and possession thereto as of the date thereof, even though the wife of said owner was under twenty-one years of age at the time of such signature and assent. (1919, c. 133; 1937, c. 69; C. S. 4103.)

In General.—In Southern State Bank v. Summer, 188 N. C. 697, 688, 125 S. E. 489, the court said: "The value of the 'home site' is not fixed by the statute. It is not certain as to whether it is the site of the residence, or the lands within, the homestead right. Nothing is said as to whether it is superior to the rights of heirs or the claims of creditors. It has been suggested that the statute may apply, and probably was intended to apply only as against those claiming [65]
under a deed from the husband without his wife's proper joiner. We leave its interpretation for future consideration.

The amendment of 1935 made this section applicable to the renunciation of curtesy and assent to conveyances of real property.

**Art. 3. Allotment of Dower.**

§ 30-11. By agreement between widow and heir. — If the personal property of a decedent be sufficient to pay his debts and charges of administration, the heir or devisee with the widow may, by deed, agree to an assignment of her dower. (Rev., s. 3087; Code, s. 2110; 1869-9, c. 93, s. 39; C. S. 4104.)

There is nothing in this or the following section to indicate that the widow may select her dower or "endow herself." Vannoy v. Green, 506 N. C. 77, 173 S. E. 277.

§ 30-12. Petition filed in superior court. — If no such agreement be made, the widow may apply for assignment of dower by petition in the superior court, and, if she fail to make such application within three months after the death of her husband, any heir or devisee may file a petition reciting the facts that the widow is entitled to dower on certain lands and has not applied for it, and demand that her dower be assigned to her. In all cases the widow and all heirs and devisees and persons in possession of, or claiming estates in, the lands shall be made parties, and the court shall hear and pass upon the petition in like manner as in other cases of special proceedings. (Rev., s. 3088; Code, ss. 2111, 2112; 1891, c. 133; 1869-9, c. 93, ss. 40, 41; C. S. 4105.)

Cross Reference. — As to the statute of limitations for allotment of dower upon lands not in actual possession of the widow, see § 46-15 and annotations thereto. In General. — The remedy by petition, as prescribed by this section, is a substitute for the action of dower at law. McKnight v. Turner, 179 N. C. 127, 150 S. E. 497.

§ 30-9. Conveyance without joinder of insane wife; certificate of lunacy. — Every man whose wife is a lunatic or insane may bargain, sell, lease, mortgage, transfer and convey any of his real estate by deed, mortgage deed, deed of trust or lease executed, probated and registered in accordance with law shall convey all the estate and interest therein intended to be granted in the land conveyed, free and exempt from the dower rights and all other interests of his wife. (Rev., s. 3087; Code, s. 2110; 1869-9, c. 93, ss. 40, 41; C. S. 4105.)

Cross Reference.—See annotations to § 30-8.

Editor's Note.—Attention is called to the fact that sections two of the act of 1923, which enacted this section, provided that the certificate of the court in which the wife was adjudged a lunatic or declared insane, or the superintendents of an insane institution of the state, or any other state, shall certify under his hand and seal that she has been adjudged a lunatic or declared insane, and that her sanity has not been declared restored as is provided by law, and this certificate must be attached to the husband's deed, mortgage deed, deed of trust, or lease. Such deed, mortgage deed, deed of trust or lease executed, probated and registered in accordance with law shall convey all the estate and interest therein intended to be granted in the land conveyed, free and exempt from the dower rights and all other interests of his wife. The amendment of 1935 made this section applicable to the renunciation of curtesy and assent to conveyances of real property.

Dissent Essential to Jurisdiction. — The entry of a dissent by the widow is an incident to the jurisdiction of the superior court, and not to the court in chancery. Gatewood v. Tomlinson, 113 N. C. 312, 18 S. E. 318. The amendment of 1935 made this section applicable to the renunciation of curtesy and assent to conveyances of real property.

§ 30-10. Renouncement of dower. — All married persons under the age of twenty-one years shall have the same privilege to renounce their dower rights and rights of curtesy and to give their written assent to conveyances of real property as are now conferred upon married persons twenty-one years old and over. (1923, c. 67, c. 2; 1935, c. 18; C. S. 4103(b).)

Cross Reference.—See also, § 52-13.

Editor's Note.—Attention is called to the fact that sections two of the act of 1923, which enacted this section, provided that the certificate of the court in which the wife was adjudged a lunatic or declared insane, or the superintendents of an insane institution of the state, or any other state, shall certify under his hand and seal that she has been adjudged a lunatic or declared insane, and that her sanity has not been declared restored as is provided by law, and this certificate must be attached to the husband's deed, mortgage deed, deed of trust, or lease. Such deed, mortgage deed, deed of trust, or lease executed, probated and registered in accordance with law shall convey all the estate and interest therein intended to be granted in the land conveyed, free and exempt from the dower rights and all other interests of his wife. (Rev., s. 3087; Code, s. 2110; 1869-9, c. 93, ss. 40, 41; C. S. 4105.)
of the superior court, the widow's dissent is to be made and entered upon the minutes of the court. Rev., s. 30-231.
Assignment before Allotment.—Where the right to a dow er has been assigned before allotment, the assignee's remedy to enforce it is by civil action in term; the clerk of the court in whose jurisdiction Par ton v. Allison, 109 N. C. 674, 14 S. E. 107.
Allotment by Heirs.—In McMillan v. Turner, 52 N. C. 456, 5 N. C. 323, it was held that the husband assigns the widow her dower, and also that twenty years con tinuous possession by the widow of a certain tract of land claimed as dower, is sufficient to raise a presumption that such assignment had been made. But as to the last point mentioned, i. e., allotment by heirs, see Freeman's Heirs v. Ramsey, 189 N. C. 790, 128 S. E. 404, where it is held that the assignation of dower is exclusive.
Administrator as a Party.—If there is no prayer against the administrator he is not a necessary party to a bill for the assignment of dower. Campbell v. Murphy, 55 N. C. 17.
Creditor as Parties.—Creditors are not necessary parties to the proceedings, Ramsour v. Ramsour, 63 N. C. 231; but the court may permit a creditor of a person, who died seized and possessed of lands to be made a party to the proceed ing and contest the claim of the widow. Welfare v. Wel fare, 108 N. C. 272, 12 S. E. 1025.
Clerk Must Make Exceptions within Allotted Time.— While creditors of an estate may be permitted to contest the widow's allotment of dower in proper instances upon the ground that the allotment is excessive, they must pursue the aggrieved course by the time the court has appointed a port of the jury, and their motion to be made parties in order to contest the allotment of dower, made almost three months after approval by the court of the clerk's confirmation of the jury's report, is too late. Poindexter v. Call, 208 N. C. 62, 179 S. E. 335.
Judgment Conclusive upon All Claimants.—The judgment in the proceeding to allot and set apart to the widow her dower is intended by this section to be and is conclusive upon the heirs, devisees or other claimants who may be parties as to the title of the husband and the rights of the widow. Boyd v. Redd, 118 N. C. 680, 685, 24 S. E. 420.
Same—Where Lessee Not Made Party. — The lessee of lands for a term during the continuance of the lease after the death of the deceased owner, is a proper and necessary party to proceedings to lay off the widow's dower wherein the lessee was interested, and where he has not been made a party he is not bound by the judgment in his action of ejectment and to recover damages against the widow, administrator and heirs at law. Ingram v. Corbit, 177 N. C. 318, 99 S. E. 18.
Cited in High v. Pearce, 220 N. C. 266, 17 S. E. (2d) 108 (com. op.).

§ 30-13. Assignment of dower.—If dower be adjudged, it shall be assigned by a jury of three persons qualified to act as jurors, unless one of the parties demand a greater number, not exceeding twelve, who shall be summoned by the sheriff to meet on the premises or some part thereof, and to be sworn by the sheriff or other person judged, it shall be assigned by a jury of three persons, and the jury's report to the court is conclusive upon all claimants. Welfare v. Welfare, 108 N. C. 272, 12 S. E. 1025.

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§ 30-13. Assignment of dower.—If dower be adjudged, it shall be assigned by a jury of three persons qualified to act as jurors, unless one of the parties demand a greater number, not exceeding twelve, who shall be summoned by the sheriff to meet on the premises or some part thereof, and to be sworn by the sheriff or other person authorized to administer oaths, shall proceed to allot and set apart to the widow her dower in said premises according to law and make report of their proceedings under their hands within five days to the clerk of the superior court.

When the husband dies seized and possessed of lands in any other county than that in which dower is to be assigned, the clerk of the superior court of the county in which dower is to be assigned shall, upon application of the widow entitled to dower, issue a commission to the sheriff of such other county requiring him to summon three or more persons, as may be asked in said application, qualified to act as juro rs, to go upon the lands of said husband in the superior court of the county in which said husband shall countersign the same as their report to the clerk issuing said commission; and said report in the hands of the jury summoned to assign the dower shall be considered by them a true valuation of the lands mentioned in the report, and said last-mentioned jury shall be deemed to have met on the lands thus assessed and shall assign dower accordingly. But if agreeable to and convenient to the jury so summoned or appointed, as the case may be, in the county where the proceeding is pending, for the allotment of dower, said jury may go upon, view and assign and allot the land which lies in any other county or counties; and when so viewed, assessed and allotted, if it or any part of it be allotted as dower, their acts shall be valid and their allotment of dower be as valid, as if all of the land of the deceased husband lay in the county where the proceeding was brought and pending, upon properly certified copy of such allotment being filed and recorded in such other county or counties, other than the one in which the original proceedings were instituted, in which lands acted upon do lie.

If either party to the proceeding shall demand it, the clerk shall appoint three persons qualified to act as jurors, unless one of the parties demands a greater number, and then not exceeding twelve, who shall meet on the premises or some part thereof, and after being duly sworn by the clerk or someone authorized to administer oaths, shall proceed to allot and set apart to the widow her dower in said premises according to law and make report of their proceedings under their hands, or the hands of a majority of them, within five days to the clerk of the Superior Court; and when the jurors are so appointed the sheriff will not countersign the report nor take any part in the proceedings, except that the clerk may cause notice to be served on the jurors so appointed, if he deems or finds it necessary. (Rev., s. 3089; Code, s. 2113; 1893, c. 314: 1908-9, c. 93, s. 42; 1931, c. 393; 1939, c. 339; C. S. 4106.)

Cross References.—As to property subject to dower, see § 30-5 and annotation thereto. As to valuation of property of deceased husband, see annotation to § 30-5. As to conclusiveness of judgment in proceeding, see annotation to § 30-12.

Editor's Note.—The 1931 amendment added the last paragraph to this section.

1939 Amendment added the second sentence of the second paragraph.

Signature of Sheriff Unnecessary.—It is not required that the sheriff attest the report of the jury by signing it the same. Brickhouse v. Sutton, 99 N. C. 101, 5 S. E. 380.

Where Secondary Evidence of Report Admissible.—Where it appeared that the report of the jury fully described the land of the wife, which had been lost, and the omission of a certain line in the record was made in copying it upon the record, it was held that the report is a part of the record and secondary evidence of its contents is admissible. Wells v. Harrell, 152 N. C. 218, 67 S. E. 584.

Manner of Allotment of Mortgaged Lands.—In a petition for dower, where the lands consisted principally of different parcels mortgaged in several deeds by husband and wife, the allotment should not be in part of the lands as if unencumbered or subject to the same encumbrance, but in each parcel separately, and then the widow can work out her relief by asserting her equity against each creditor, as he seeks to enforce his security. Askew v. Askew, 103 N. C. 285, 290, 9 S. E. 646.

The remedy against an excessive assignment of dower is by action of ejectment and to recover damages against the sheriff, for whom the sheriff is not required to render an account of which it is competent for the court to hear affidavits with view to ascertain the facts. Welfare v. Welfare, 108 N. C. 272, 12 S. E. 1025.

Power of Court.—Ordinarily, the court, before which exceptions to the report of the jury in the allotment of dower is heard, is the sole judge whether a reassignment or successive reassignments shall be made. Poindexter v. Call, 208 N. C. 62, 179 S. E. 335.
§ 30-14 Notice to parties of meeting of jury.—The parties to such proceeding, or their attorneys, if within the county, shall be notified of the time and place of meeting of the jury appointed to assign dower, at least five days before the meeting. (Rev. s. 3090; Code, s. 2114; 1888-9, c. 91, s. 43; C. S. 4107.)

Art. 4. Year's Allowance.


§ 30-15. When widow entitled to allowance.—Every widow of an intestate, or of a testator from whose will she has dissented, shall, unless she has forfeited her right thereto as provided by §§ 52-19 and 52-20, be entitled, in addition to her distributive share, to an allowance the value of five hundred dollars for her support for one year after his death. Such allowance shall be exempt from any lien, by judgment or execution, acquired against the property of the husband. (Rev. s. 3091; Code, s. 2116; 1888-9, c. 93, s. 81; 1871-2, c. 103, s. 44; 1850, c. 42; 1889, c. 499, s. 2; C. S. 4108.)

Cross References.—As to property subject to allowance, see § 30-18 and annotations thereto. As to effect of widow's adultery, see § 32-20. As to when children entitled to an allowance, see § 30-18.

Purely a Statutory Right.—The right of a widow to a year's support is purely statutory. Broadnax v. Broadnax, 110 N. C. 432, 76 S. E. 216. See Drewry v. Raleigh Savings Bank and Trust Co., 173 N. C. 664, 92 S. E. 593.

Priority Over Creditors.—Rule Stated.—The widow is given her right to her years support against all general creditors, but no better title to the property assigned her than her husband had under his will, which was done, and both parties assented to the report in writing, it was held that the widow in the absence of fraud and undue influence was estopped by the antenuptial contract re-linquishing all claim to any property of her husband. Perkins v. Bloom, 97 N. C. 559.

Award under Will as Estoppel.—Where the widow and the executor by mutual consent selected three men to lay off the dowry land and execute and deliver a patent therefor, and the husband's will, which was done, and both parties assented to the report in writing, it was held that the widow in the absence of fraud and undue influence was estopped by the antenuptial contract relinquishing all claim to any property of her husband. Perkins v. Bloom, 97 N. C. 559.

Antenuptial Contract as a Bar.—A widow is barred from recovering a year's support by an antenuptial contract relinquishing all claim to any property of her husband. Perkins v. Bloom, 97 N. C. 559.

Award under Will as Estoppel.—Where the widow and the executor by mutual consent selected three men to lay off the dowry land and execute and deliver a patent therefor, and the husband's will, which was done, and both parties assented to the report in writing, it was held that the widow in the absence of fraud and undue influence was estopped by the antenuptial contract relinquishing all claim to any property of her husband. Perkins v. Bloom, 97 N. C. 559.

Next Friend as Representative of Minor Widow.—In disposing of a minor widow's estate, provided the proceeding is not for the purpose of releasing the minor widow from the duties of her status, the court has power to appoint a next friend to act in the minor widow's behalf. (Rev., ss. 3096, 3098; Code, ss. 2120, 2122; 1868-9, c. 93, s. 12; 1870-1, c. 253; 1889, c. 496, 531; 1891, c. 13; C. S. 4113, 4115.)

Assignment under Section Not Exclusive.—The assignment of a year's provision under this section does not serve as a bar to the assignment of the whole estate. Simpson v. Careen, 97 N. C. 115, 2 S. E. 668; Medley v. Dunlop, 91 N. C. 527.

The decision in this case appears to have been changed in the case of Jones v. Layne, 144 N. C. 600, 57 S. E. 372, in which it is held that a widow, whose husband died domiciled in another state, is entitled to her year's support in this State in which there is a fund due her husband, if the widow is a bona fide resident in this State. The reason given for this ruling is that the fiction that personal property is being considered as belonging to the domicil of the owner applies only to the distribution of the assets of the one deceased, and has no application to payment of debts, legacies, costs of administration, etc. See Moye v. May, 43 N. C. 131, also Story Conf. Laws, 354. When it is recalled that the year's support given to the widow is superior to all these claims, then this, coupled with the fact that it seems well settled that the fiction that personal property is being considered as belonging to the domicil of the owner applies only to the distribution of the assets of the one deceased, will be ample reason for the ruling in the Jones case. Further support may also be found in the very purpose and object of the enactment of the Legislature giving to the widow her year's support. See In re Hayes, 112, N. C. 76, 77, 16 S. E. 904; Kimball v. Deming, 27 N. C. 418. Ed. Note.

Adultery Prior to Enactment of Section, Not a Bar.—A widow is not barred of her right to a year's support under this section by reason of adultery committed prior to the passage of this section. See In re Cook v. Sexton, 79 N. C. 325.

Where husband predeceased by wife, see note of In re S. T. S., 111 N. C. 40, 16 S. E. 553; and see § 30-14. When Husband Died a Citizen of Foreign State.—The widow of a man who dies a citizen of another state is not entitled to a year's support out of the assets of the decedent in this State, and the fact that she became a citizen of this State after her husband's death is immaterial, since her relations to the estate and her right to share in it are fixed at the intestate's death, and by the laws of his domicil.
to preclude her right to an increase thereof under section 30-26 et seq. Mann v. Mann, 173 N. C. 178, 86 S. E. 353.

The reasons for this construction are two-fold. (1) The year's provision is intended for the immediate and pressing needs of the widow and children, and is not given them as a substitute for any time held to be personal to the widow—be it personal estate, has been given a year's allowance out of his estate, to an allowance of the widow personally, and to enable her at that mournful time to preclude her right to an increase thereof under section 30-17. When children entitled to an allowance.

—Whenever any parent dies leaving any child under the age of fifteen years, including an adopted child, or a child with whom the widow may be pregnant at the death of her husband, or any other person under the age of fifteen years residing with the deceased parent at the time of the death to whom the deceased parent or the surviving parent stood in loco parentis, every such child shall be entitled, besides its distributive share of the personal estate of such deceased parent, to an allowance of one year's provision from the personal estate of the deceased parent at the time of the death to provide this situation, a statute was passed in 1889 (c. 496, § 30-17. When children entitled to an allowance.

Education of Child before Filing of Application.—Where two children under the age of fifteen years, one of whom was at the death of his father, and one died before the application for the year's provision was filed, it was held that the widow was entitled to an allowance for two children. In re Hayes, 112 N. C. 76, 77, 16 S. E. 94.

This decision was rested on the ground that the chief object of this and the foregoing sections is to provide for the dependent family of the deceased residing with the widow at the death of the husband, and not at the date of her application. As was said in the early case of Kimball v. Deming, 27 N. C. 418, cited and approved in In re Hayes, supra, 'the purpose of the legislature was to make provision for the immediate and pressing needs of the widow personally, and to enable her at that mournful juncture to keep her family about her for a short season, prevent the necessity of scattering her children abroad, until time and circumstances should be made suitable for selecting suitable situations for them.'—Ed. Note.

Entire Allowance to Widow. —It is proper to make the entire allowance to the widow and none to the minor children, but the existence of such children may be a bar, the widow being charged with their care and support. Drewry v. Bank, etc., Co., 173 N. C. 664, 92 S. E. 393.

§ 30-18. From what property assigned. —Such allowance shall be assigned from the crop, stock and provisions or any other personal property of the deceased in his possession at the time of his death, if there be a sufficiency thereof in value: and if there be a deficiency, it shall be made up by the personal representative from the personal estate of the deceased. (Rev., s. 3005; Code, s. 2117; 1868-9, c. 93, s. 9; 1923, c. 92; C. S. 4112.)

Editor's Note.—The words "or any personal property" after the word "provisions" were inserted by the Public Laws of 1939. The insertion of these words takes away all doubt as to whether or not the enumerated classes of property herein contained were meant to exclude all other property. In re Hayes, supra. It is submitted that the addition of these words to this section was not intended to make all the personal property of the deceased subject to the widow's allowance in the first place, but to make it plain that personal property, following the enumeration of specific classes (real estate, crop, stock, and provisions) must, under the maxim ejusdem generis, be restricted to things of the same kind as those specifically mentioned and enumerated. This seems to be the only possible construction to give to the new words since the section in all its other respects is left without any change whatever, and note must be taken of the clause that "if there be a deficiency it shall be made up by the personal representative from the personal estate of the deceased." Unless the newly inserted words are given the limited meaning ascribed to them in the cited cases, the provision would be surplusage but would be meaningless. In other words, the door to the personal estate of the deceased has been opened wider but has not been opened to its fullest extent. For example, since the words used in this section seem to contemplate only personal property of a tangible nature, the intangible property would still be outside the scope of the provision from which the widow's allowance may be taken, unless it is necessary to make up a deficiency.

"Stock." —In an early case, Van Norden v. Prim, 3 N. C. 149, the word "stock" contained in this section was construed to mean "all personal property to be used at her pleasure." Kimball v. Deming, 27 N. C. 418; Simpson v. Cureton, 9 N. C. 112, 116, 2 S. E. 668, 670. As a consequence, if the husband dies leaving no widow, or if the widow died before her year's allowance was assigned to her, no allowance could be set aside for the surviving children as such. Kimball v. Deming, supra. To remedy this situation, a statute was passed in 1889 (c. 496, codified as § 30-17 of the General Statutes of N. C.), which provided that in case there was no widow, or if she died before her year's allowance was set aside, an allotment still could be made for the benefit of the child of any age under the age of fifteen years. See In re Stewart, supra. The 1939 amendment amended and rewrote this statute so as to substitute the widow's year's allowance from the concept of its inclusion in the widow's allotment, and to give him an independent legal status of his own for the purpose of receiving a year's allowance. The statute carries this further by adding that if the widow survives the father, it shall be paid to her for the child's benefit "in lieu of the allowance heretofore made such widow on account of her own year's provision."—Ed. Note.

CH. 30. WIDOWS—YEAR'S ALLOWANCE

§ 30-19. Time of Valuation. —The widow's allowance must be made on the basis of the property's value at the time of the application, and not at the time of the testator's death. In re Haywood, N. C. 131, 136.
have her year's support assigned to her therefrom. Broad- 

Failure to Pay Deficiency.—An administrator is personally liable if he has assets to pay a deficiency and he fails to pay it. Irvin v. Hughes, 82 N. C. 210.

§ 30-19. Value of property ascertained. — The value of stock, crop and provisions or any other personal estate of the deceased, and if any, so much thereof as they shall be entitled to hand, and assign to the widow and to the children, as well as that of the articles consumed, shall be ascertained by a justice of the peace and two persons qualified to act as jurors of the county in which administration was granted or the will proved. (Rev., s. 3097; Code, s. 2121; 1868-9, c. 93, s. 13; C. S. 4114.)

§ 30-20. Procedure for assignment. — Upon the application of the widow, or whenever it shall appear that a child is entitled to an allowance as provided by § 30-18, the justice shall apply to a justice of the peace in the township in which the deceased resided, or some adjoining township, to summon two persons qualified to act as jurors, who, having been sworn by the justice to act impartially as commissioners shall, with him, ascertain the person or persons entitled to an allowance according to the provisions of this chapter, and examine the crop, stock, and provisions and any other personal property on hand, and assign to the widow and to the children, if any, so much thereof as they shall be entitled to by law. Any deficiencies shall be made up from any of the personal estate of the deceased, and also from any debt or debts known to be due the deceased. Such assignment shall vest in the widow and children such property, and the right to collect the debts thus allotted. (Rev., s. 3098; Code, s. 2122; 1870-1, c. 263; 1891, c. 13; 1899, c. 531; C. S. 4115.)

Cross Reference. — As to recovery of deficiency, see § 30-18 and annotation thereto.

§ 30-21. Report of commissioners. — The commissioners shall make and sign three lists of the articles assigned to each person, stating their quantity and value, and the deficiency to be paid by the personal representative. Where the allowance is to the widow, one of these lists shall be delivered to her. Where the allowance is to a child, one of these lists shall be delivered to the widow or surviving parent with whom the child is living; or to the child's guardian or next friend if the child is not living with said widow or surviving parent; or to the child if said child is not living with the widow or surviving parent and has no guardian or next friend. One list shall be delivered to the personal representative. One list shall be returned by the justice, within twenty days after the assignment, to the Superior Court of the county, and the clerk shall file and record the same and enter judgment against the personal representative, to be paid when assets shall come into his hands, for any residue found in favor of the person entitled to the allowance. (Rev., s. 3099; Code, s. 2123; 1868-9, c. 93, s. 15; C. S. 4116.)

Filing of List of Articles Mandatory. — The filing and retaining of the list of articles allotted to the widow, as her year's support, as required by this section, is essential to its validity, and to the vesting in her of the property or debt allotted to the widow. Kiff v. Kiff, 95 N. C. 72.

Reasonable Certainty Required. — The allotment to the widow must be made with such reasonable certainty, in regard to the thing allotted, as to indicate what property was intended by the commissioners, otherwise the allotment will be void. Kiff v. Kiff, 95 N. C. 72. Under this principle the item, "labor for 3½ years, $273," was held void. Id.

§ 30-22. Fees of commissioners. — Any person appointed by any justice of the peace to allot or set apart to any widow and/or child a year's allowance under the statute, and who shall serve, shall be paid the sum of one dollar a day or fraction of a day engaged, and the same shall be taxed as a part of the bill of costs of the proceeding. (1907, c. 223; 1913, c. 18; C. S. 3900.)

§ 30-23. Right of appeal. — The personal representative, or the widow or child by his guardian or next friend, or any creditor, legatee or distributee of the deceased, may appeal from the finding of the commissioners to the superior court of the county, and, within ten days after the assignment, cite the adverse party to appear before such court on a certain day, not less than five nor exceeding ten days after the service of the citation. (Rev., s. 3100; Code, s. 2124; 1868-9, c. 93, s. 16; 1897, c. 442; C. S. 4117.)

Evidence to Support Findings as Bar to Appeal. — The findings of the judge in the special proceedings for the allotment of the year's support will not be reviewed on appeal where there is evidence to support such findings. Drewry v. Bank, etc., Co., 173 N. C. 664, 92 S. E. 593.

§ 30-24. Hearing on appeal. — At or before the day named, the appellant shall file with the clerk a copy of the assignment and a statement of his exceptions thereto, and the issues thereby raised shall be decided as other issues are directed to be. When the issues shall have been decided, judgment shall be entered accordingly, if it may be without injustice, without remitting the proceedings to the commissioners. (Rev., s. 3101; Code, s. 2125; 1868-9, c. 93, s. 17; C. S. 4118.)

§ 30-25. Personal representative entitled to credit. — Upon the settlement of the accounts of the personal representative, he shall be credited with the articles assigned, and the value of the deficiency assessed as aforesaid, if the same shall have been paid, unless the allowance be impeached for fraud or gross negligence in him. (Rev., s. 3102; Code, s. 2126; 1868-9, c. 93, s. 18; C. S. 4119.)

§ 30-26. When above allowance is in full. — If the estate of a deceased be insolvent, or if his personal estate does not exceed two thousand dollars, the allowances for the year's support of his widow and the children shall not, in any case, exceed the value prescribed above; and the allowances made to them as above prescribed shall preclude them from any further allowances. (Rev., s. 3103; Code, s. 2127; 1868-9, c. 93, s. 19; C. S. 4120.)

All allowance under section 30-20 does not preclude operation of this section, see note of Mann v. Mann, 173 N. C. 20, 91 S. E. 355, under section 30-20.

Part 3. Assigned in Superior Court.

§ 30-27. Widow or child may apply to superior court. — It shall not, however, be obligatory on a widow or child to have the support assigned as above prescribed. Without application to the per-
sonal representative, the widow, or the child through his guardian or next friend, may, at any time within one year after the decedent's death, apply to the superior court of the county in which administration was granted to have a year's support assigned. (Rev., s. 3104; Code, s. 2128; 1868-9, c. 93, s. 20; C. S. 4121.)

§ 30-28. Nature of proceeding; parties.—The application shall be by summons, as is prescribed for special proceedings, in which the personal representative of the deceased, if there be one other than the plaintiff, the largest known creditor, or legatee, or some distributee of the deceased, living in the county, shall be made defendant, and the proceedings shall be as prescribed for special proceedings between parties. (Rev., s. 3105; Code, s. 2129; 1868-9, c. 93, s. 21; C. S. 4122.)

§ 30-29. What complaint must show.—In the complaint the plaintiff shall set forth, besides the facts entitling plaintiff to a year's support and the value of the support claimed, the further facts that the estate of the decedent is not insolvent, and that proper officer of the county, commanding him to summon a justice of the peace and two indifferent persons qualified to act as jurors of the county, to thereupon issue an order to the sheriff or other officer of the county, to cite the personal representative, or any creditor, distributee or legatee of the deceased, within twenty days after service of the notice, and answer the same; and, after the return of the report, may file exceptions thereto. The plaintiff shall be notified thereof and cited to appear before the court on a certain day, within twenty and not less than ten days after service of the notice, and answer the same; the case shall thereafter be proceeded in, heard and decided as provided in special proceedings between parties. (Rev., s. 3106; Code, s. 2130; 1868-9, c. 93, s. 22; C. S. 4123.)

§ 30-30. Judgment and order for commissioners.—If the material allegations of the complaint be found true, the judgment shall be that plaintiff is entitled to the relief sought; and the court shall declare, and execution shall issue to enforce the judgment as in like cases. (Rev., s. 3110; Code, s. 2133; 1868-9, c. 93, s. 25; C. S. 4126.)

§ 30-31. Duty of commissioners; amount of allowance.—The said commissioners shall be sworn by the justice and shall proceed as prescribed in this chapter, except that they may assign to the plaintiff a value sufficient for the support of plaintiff according to the estate and condition of the decedent and regard to the limitations set forth in this chapter; but the value allowed shall be fixed with due consideration for other persons entitled to allowances for year's support from the decedent's estate; and the total value of all allowances shall not in any case exceed the one-half of the average annual net income of the deceased for three years next preceding his death. This report shall be returned by the justice to the court. (Rev., s. 3108; Code, s. 2132; 1868-9, c. 93, s. 24; C. S. 4123.)

Definition of Annual Net Income.—The provision of this section that the allowance shall not exceed "the one-half of the annual net income of the deceased for three years next preceding his death" means the one-half of one year's net income, determined by the average annual income for the three years next preceding the decease, and not one-half of the sum total of the annual net income for the three year period. Holland v. Henson, 189 N. C. 742, 128 S. E. 145.

Allowance Sustained Where Discretion Not Abused.—Where the estate of the deceased husband is large and in good condition, and he received a net annual income for three years prior to his death of over $38,500, an allowance of $12,500 for a year's support to his widow with minor son, less the value of the household furniture, is not an abuse of the superior court's discretion which the supreme court will review. Drewry v. Raleigh Sav. Bank, etc., Co., 173 N. C. 664, 92 S. E. 593.

§ 30-32. Exceptions to the report.—The personal representative, or any creditor, distributee or legatee of the deceased, within twenty days after the return of the report, may file exceptions thereto. The plaintiff shall be notified thereof and cited to appear before the court on a certain day, within twenty and not less than ten days after service of the notice, and answer the same; the case shall thereafter be proceeded in, heard and decided as provided in special proceedings between parties. (Rev., s. 3109; Code, s. 2133; 1868-9, c. 93, s. 25; C. S. 4126.)

§ 30-33. Confirmation of report; execution.—If the report shall be confirmed, the court shall so declare, and execution shall issue to enforce the judgment as in like cases. (Rev., s. 3110; Code, s. 2134; 1868-9, c. 93, s. 26; C. S. 4127.)
Sec. 31-16. What shown on application for probate.
31-17. Proof and examination in writing.
31-18. Manner of probate.
31-19. Probate conclusive until vacated; substitution of consolidated bank as executor or trustee under will.
31-20. Wills filed in clerk’s office.
31-21. Validation of wills heretofore certified and recorded.

Art. 1. Execution of Will.

§ 31-1. Infants incapable.—No person shall be capable of disposing of real or personal estate by will until he or she shall have attained the age of twenty-one years. (Rev. s. 3111; Code, s. 2137; R. C. c. 119, s. 2; 1811, c. 280; C. S. 4128.)

Under the prior law, see Williams’s Legatees v. Heirs at Law, 44 N. C. 271, where it was held that an infant between twenty-one and eighteen could dispose of personal estate by will.

A will executed by a minor’s father is not sufficient grounds for a court of equity to refuse the petition of the minor’s guardian to be authorized and directed to enter proceedings to attack a consent judgment on grounds of irregularity and that it was not binding on the minor, it appearing that the purported will executed by the minor’s father seeking to divest the minor’s interest in trust estates was void under this section, the minor’s father at the time of executing the instrument being under twenty-one years of age. In re Reynolds, 206 N. C. 276, 173 S. E. 729.

§ 31-2. Married woman capable.—A married woman owning real or personal property may dispose of the same by will. (Rev. s. 3112; Code, s. 2138; R. C. c. 119, s. 3; 1844, c. 88, s. 8; C. S. 4129.)


§ 31-3. Formal execution. — No last will or testament shall be good or sufficient, in law, to convey or give any estate, real or personal, unless such last will shall have been written in the testator’s lifetime and signed by him, or by some other person in his presence and by his direction, and subscribed in his presence by two witnesses at least, no one of whom shall be interested in the devise or bequest of the estate, except as hereinafter provided; or, unless such last will and testament be found among the valuable papers

and effects of any deceased person, or shall have been lodged in the hands of any person for safekeeping, and the same shall be in the handwriting of such deceased person, with his name subscribed thereto or inserted in some part of such will; and if such handwriting shall be proved by three credible witnesses, who verify believe such will and every part thereof is in the handwriting of the person whose will it appears to be, then such will shall be sufficient to give and convey real and personal estate. (Rev. s. 3113; Code, s. 2136; R. C. c. 119, s. 1; 1784, c. 201, s. 11; 1784, c. 225, s. 5; 1840, c. 54; C. S. 4131.)

I. In General.

II. Signing Attestation and Date.

III. Holograph Wills—Deposit with Valuable Papers.

Cross Reference.

Art. 6. Caveat to Will.

§ 31-32. When and by whom caveat filed.
31-33. Bond given and cause transferred to trial docket.
31-34. Prosecution bond required in actions to contest wills.
31-35. Affidavit of witness as evidence.
31-36. Lapse of time in settling will; caveat suspends proceedings under will.
31-37. Superior court clerks to enter notice of caveat on will book; final judgment also to be entered.

Art. 7. Construction of Will.

§ 31-38. Devise presumed to be in fee.
31-39. Probate necessary to pass title; recordation in county where land lies; rights of innocent purchasers.

§ 31-40. What property passes by will.
31-41. Will relates to death of testator.
31-42. Lapsed and void devises pass under residuary clause.
31-43. General gift by will an execution of power of appointment.
31-44. Gifts to children dying before testator pass to their issue.
31-45. After-born children share in testator’s estate.

Editor’s Note.—The Statute of Frauds in England, in relation to wills, and this section upon the same subject, have in view the same object, namely, the protection of the heirs-at-law, and next of kin of a decedent, from the effect of a forged or false paper as a will. For that purpose, many forms and ceremonies are required to be observed in the execution of such instruments. With regard to attested wills, the requisites of the English statute, and this section, except as to the number of witnesses, are substantially the same. The courts, in both countries, have demanded a strict compliance with these provisions of the law. The same policy must govern the courts of this State when they come to decide whether the requisitions of this section have been complied with in the execution of a paper writing, propounded as a holograph will. See Little v. Lockman, 49 N. C. 495, 496.

Natural Right to Dispose of Property by Will.—The right to dispose of property by will is not a natural right, but one conferred and regulated by statute. Peace v. Edwards, 170 N. C. 64, 86 S. E. 807.

Necessity of Animus Testandi.—The distinguishing feature of all genuine testamentary instruments, whatever their form, is that the paper-writing must appear to be written in the testator’s lifetime, that the testator intended it should
operate as his will, or as a codicil to it. In re Perry, 193 N. C. 397, 398, 137 S. E. 145.

For a memorandum written and signed by the testator to take effect as his will, it must, among other requisites, show the testator's then present intention to dispose of his property, and be signed by him at the time of his death. Other formalities that have been observed, a "pack" of letters containing a note in his favor, with the indorsement written thereon, and signed by him, a long time prior to his death, and signed by his attorney, does not operate either as a valid holograph will or codicil, Id.

Where the animus testandi appears as doubtful or ambiguous, the instrument must be construed together. In re Will of Harrison, 183 N. C. 457, 111 S. E. 867.

Proposers whereupon introduce ample evidence that the paper-writing was in the handwriting of deceased and that it is evident, considering its wording and the circumstances surrounding same, that the testator intended it to operate as his will, is competent. Baldwin, 146 N. C. 25, 29, 59 S. E. 163.

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Where the animus testandi appears as doubtful or ambiguous, the instrument must be construed together. In re Will of Harrison, 183 N. C. 457, 111 S. E. 867.
fact of there being a signature of one subscribing witness to a will of land does not prevent it from being proved as a holograph will; and it is no objection to the probate of a script as a holograph will that it has one subscribing witness, and was intended to be the last will and testament, which intent was frustrated by the fact that the second attesting witness was incompetent. Hill v. Bell, 61 N. C. 122, 124.

Deposit Not Required.—The testator’s signature to the will is required though it is not required that the paper-writing be subscribed or dated. Therefore an undated will, when the name of the testator, in his own handwriting, is the body of the writing, be admitted into effect as those bearing dates and subscribed by the testator. Peace v. Edwards, 170 N. C. 64, 66 S. E. 807.

A paper-writing in the handwriting of testator, duly proved and authenticated by testator and found among her valuable papers after her death, which paper-writing contains dispositive words sufficient to dispose of the estate, is valid as a holograph will under this section and § 31-18, subsection 2, and it is not necessary that the writing be dated or show the place of execution. In re Parson’s Will, 207 N. C. 584, 178 S. E. 78.

Evidence of Finding among Valuables.—That a holograph script was properly deposited, under this section and § 31-18, subsection 2, and it is not necessary that the writing be dated or show the place of execution. In re Parson’s Will, 207 N. C. 584, 178 S. E. 78.

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tion must be accompanied with animus testandi; the decision seems to be clearly unsound, inasmuch as the letter in question discloses no such intention. This conclusion is supported by later decisions of the court which in express terms refused to follow the decision of Allen v. Davis, see Spencer v. Spencer, 163 N. C. 83, 79 S. E. 291. It is believed that if the writer of the letter indicates clearly that by mailing it to the addressee he intends to deposit it as a will, no further act by the addressee to accept it will be required. See the case of In re Ledford's Will, 176 N. C. 610, 97 S. E. 482; 12 N. C. Law Rev. 199.

§ 31-4. Execution of power of appointment by will.—No appointment, made by will in the exercise of any power, shall be valid unless the same be executed in the manner by law required for the execution of wills; and every will, executed in such manner, shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by will, notwithstanding it shall have been expressly required that a will made in exercise of such power should be executed with some additional or other form of execution or solemnity. (Rev., s. 3114; Code, s. 2139; R. C., c. 119, s. 4; 1844, c. 88, s. 9; C. S. 4132.) Cross Reference.—See also, § 31-43.

Art. 2. Revocation of Will.

§ 31-5. Revocation by writing or by cancellation or destruction.—No will or testament in writing, or any clause thereof, shall be revocable otherwise than by some other will or codicil in writing, or other writing declaring the same, or by burning, canceling, tearing, or obliterating the same, by the testator himself, or in his presence and by his direction and consent; but all wills or testaments shall remain and continue in force until the same be burnt, canceled, torn, or obliterated, or by his consent and direction; or unless the same be altered or revoked by some other will or codicil in writing, or other writing of the testator, signed by him, or some other person in his presence and by his direction, and subscribed in his presence by two witnesses at least; or unless the same be altered or revoked by some other will or codicil in writing, or other writing of the testator, all of which shall be in the handwriting of the testator, and his name subscribed thereto or inserted therein, and lodged by him with some person for safe-keeping, or left by him in some secure place, or among his valuable papers and effects, every part of which will or codicil or other writing shall be proved to be in the handwriting of the testator, by three witnesses at least. (Rev., s. 3115; Code, s. 2176; R. C., c. 119, s. 22; 1784, c. 204, s. 14; 1819, c. 1004, ss. 1, 2; 1840, c. 62; C. S. 4133.)

Material Alteration Necessary.—In order for there to be a revocation of a will, in whole or in part, under the provisions of this section, there must be an existing will of the testator to cancel, but there must be the physical act of cancellation; and while it is not required that the words should be entirely effaced where the cancellation is in part, so as to make the same illegible, the portion erased must be of such significance as to effect a material alteration in the meaning of the will or the clause of the will that is challenged on the issue. In re Love's Will, 186 N. C. 714, 120 S. E. 479.

Same—Primary Controlling Clause Unaltered, Effect.—Where the primary or controlling clause of a will remains unaltered by the obliteration by the testator of words therein and the unobliterated words remaining are sufficient to carry the designated property to the devisee, it will not amount to a revocation within the intent and meaning of this section; nor will the obliteration of the name of any other beneficiary be sufficient as to him, when it appears that the intent of the revocation by the testator was dependent upon the successful revocation of the principal alterations from the erasures were insufficient to effectuate a legal cancellation. In re Love's Will, 186 N. C. 714, 120 S. E. 479.

Presumption of Revocation Will Cannot Be Found.—It being shown that a will was once in existence and last found after his death, a presumption arises that it was destroyed by his consent with intent to cancel it. Scoggins v. Turner, 98 N. C. 135, 3 S. E. 739.

Revocation of Holographic Will.—It seems clear that a holographic will may be revoked just as an attested will may, i.e., (1) by burning, canceling, tearing, or obliterating the same, by another will, which may be holographic or attested, provided only that the statutory requirements in each case are complied with; or (2) by a revocatory paper, necessary on the holographic revocation. See 14 L. R. A. N. S. 968 and 112 Am. St. Rep. 822, 2 N. C. Law Rev. 110.

Revocatory Paper Must Be a Testamentary Paper.—Where the writing offered as operating a revocation of a will of the testator contains none of the elements of a testamentary paper, it cannot be helped by evidence aliunde, and hence has no revocatory effect. Davis v. King, 89 N. C. 437.

Effect of Disposal of Articles Already Bequeathed.—A bequest of personal property in a trunk which contained the bequeathed articles, and which was opened and rifled of the deceased, although it purports to be a subsequent will containing a revoking clause or provisions inconsistent with those of the previous will, or by a subsequent declaration, must be of such significance as to effect a material alteration in the meaning of the will or the clause of the will that is challenged on the issue. In re Love's Will, 186 N. C. 714, 120 S. E. 479.

Interlineations and Annotations Held Insufficient to Show Revocation.—Where, testator, in his own handwriting, makes certain interlineations and annotations upon his will, which had been properly executed and marked through certain words of the will, and it appears that such alterations were insufficient to constitute a holographic will and were made with the intent of altering the will at some future date in accordance with the alterations, but that such alterations were not made with the intent to revoke the will in whole or in part, such interlineations and annotations are insufficient to show a revocation of the will, intent to revoke being essential to a revocation as distinguished from a modification of the will by testator under this section. In re Will of Roediger, 209 N. C. 470, 184 S. E. 74.

Revised Section Prior to Section.—See early case of Giles v. Giles, 1 N. C. 377, prior to the enactment of this section, where it is held that a will of real estate in writing may be revoked by parol if the words of revocation denote a present intention to revoke. Revisited by Parol Declaration.—A revocation of a will of real estate carried completely into effect cannot be revoked by any subsequent declaration by parol. Giles v. Giles, 1 N. C. 377.

Cited in re Will of Watson, 213 N. C. 309, 195 S. E. 772.

§ 31-6. Revocation by marriage; exception.—All wills shall be revoked by subsequent marriage of the maker except a will made in exercise of a power of appointment, when the real or personal estate thereby appointed would not, in default of such appointment, pass to his heirs, executor or administrator, or the person entitled as his next of kin, under the statute of distributions. (Rev., s. 3116; Code, s. 2177; R. C., c. 119, s. 23; 1844, c. 88, s. 10; C. S. 4134.)

Reproduction by Parol Not Effective.—Under this section the will of a married woman is revoked by another marriage contracted after the will was made by her verbal declaration, during the last coverture, that said paperwriting was
her last will and testament without any further execution thereof. It is to be done with the statute, does not constitute a reexecution and republication of her last will and testament. In Chappell v. White, 146 N. C. 571, 573, 160 S. E. 635, construed in 1875 by an exceptionally able court, and the opinion delivered by Chief Justice Pearson in a notable case, which has been since repeatedly cited and approved. 

Parol Evidence to Fasten Constructive Trust.—Since the enactment of this section, parol evidence is incompetent to fasten upon a devise of land a constructive or implied trust.

Subsequent Birth or Adoption of Child.—The subsequent birth or adoption of a child or the subsequent adoption of one under our statute, does not revoke the will of the father under this section as in case of subsequent marriage under section 31-6. Sorrell v. Sorrell, 193 N. C. 439, 137 S. E. 306.

Value of holographic will does not affect revocation.

While after-born children not provided for in the will of their deceased parent may claim by inheritance their part of the estate, under section 31-45, it does not amount to revocation of the entire will. Fawcett v. Fawcett, 191 N. C. 679.

executor or administrator competent.—An executor or administrator may testify in favor of the will, even by renouncing and releasing his interest, and he is still incompetent as to any will that was made before January, 1856. Gunter v. Gunter, 48 N. C. 44.

May be Examined for Both Parties.—Under this section one named as executor in a receipt, propounded as a will, though named as plaintiff in an issue devisavit vel non, may be examined in the cause as an executor, and as such may testify in favor of the will, even by renouncing and releasing his interest, and he is still incompetent as to any will that was made before January, 1856. Gunter v. Gunter, 48 N. C. 44.

§ 31-7. No revocation by altered circumstances.

—No will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances.

Where Construed, Approved and Cited.—This statute was approved in 1864, in Cook v. Redman, 27 N. C. 625, in which a trust of this kind was upheld. Chappell v. White, 146 N. C. 571, 60 S. E. 635.

Parol Evidence to Fasten Constructive Trust.—Since the enactment of this section parol evidence is incompetent to fasten upon a devise of land a constructive or implied trust in favor of another. Chappell v. White, 146 N. C. 571, 60 S. E. 635.

Conveyance, etc., Not to Affect Provisions of Will.—No conveyance or act made or done subsequently to the execution of a will of, or relating to, any real or personal estate therein comprised, except an act by which such will shall have been revoked, shall prevent the operation of the will with respect to any estate or interest in such real or personal estate as a testator shall have power to dispose of by will at the time of his death. (Rev., s. 3118; Code, s. 2179; R. C. C. 119, s. 25; 1844, c. 88, s. 11; C. S. 4136.)

in General.—This section avoids only the devise or bequest to the attesting witness and to his and her wife and privies, and leaves the other dispositions made in the will in unimpaired force and operation. Vester v. Collins, 101 N. C. 114, 116, 7 S. E. 687.

Interest of Witness to Holographic Will Not Avoided.—One who is a devisee of a holographic will may testify in favor of the will, without losing his interest thereunder. His interest in the estate, interest, legacy, or appointment shall, so far only as concerns such person attesting the execution of such will or the wife or husband of such person, or any person claiming under such person, or wife or husband, be void; and such person so attesting shall be admitted as a witness to prove the execution of such will, or the validity or invalidity thereof. (Rev., s. 3120; Code, s. 2475; R. C. C. 119, s. 10; C. S. 4136.)

Competency of Widow and Devisee.—The widow and devisee of the testator is a competent witness to prove the execution of such will, or to prove the validity or invalidity thereof. (Rev., s. 3120; Code, s. 2146; R. C. C. 119, s. 9; C. S. 4137.)

Purpose of Section.—This section was intended to give the benefit of the executor's testimony to every person who should be interested, either in the establishment or defeat of the will, that all gifts to them or to their husbands or wives are annulled, and all temptations to swerve from the truth are taken away. Hamp- ton v. Hardin, 88 N. C. 592.

Interest of One Who Does Not Sign as Witness Not Avoided.—One who signs his name on a holographic will, propounded as a will, though not a subscribing witness of a will that the statute requires to be attested by two witnesses, and to the attesting witness. Hence a devisee under a holographic will is a competent witness to prove the will, without losing his interest thereunder. His interest in the results affects only the credit to be given to his testimony. Hampton v. Hardin, 88 N. C. 592.

Competency of Witness—Question of Law.—If a witness to a will is interested as a legatee thereunder, he is a competent witness to prove the will, the effect being to deprive the court of the right to exclude him by a competency of the statute to render the competency of a witness a question for the court and not a question for the jury. The competency of a witness is a question for the court alone, and when he offers to testify, and to be determined by the court. McElwee v. Smith, 103 N. C. 70.

Object in Avoiding Witnesses' Interest.—It was to remove all improper influences and secure impartiality, in such as are called for by the execution of the will, that all gifts to them or to their husbands or wives are annulled, and all temptations to swerve from the truth are taken away. Hamp- ton v. Hardin, 88 N. C. 592, 593.

Competency of Widow and Devisee.—The widow and devisee of the testator is a competent witness to prove the fact that the script propounded was found among the valu-
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§ 31-11

Art. 4. Depository for Wills.

§ 31-11. Depositories in offices of clerks of superior court where living persons may file wills.

—The clerk of the superior court in each county of North Carolina shall be required to keep a receptacle or depository in which any person who desires to do so may file his or her will for safekeeping; and the clerk shall make a charge of fifty cents (50c) for the filing of such will, and shall, upon written request of the testator, or the duly authorized agent or attorney for the testator, permit said will or testament to be withdrawn from said depository or receptacle at any time prior to the death of the testator: Provided, that the contents of said will shall not be made public or open to the inspection of any one other than the testator or his duly authorized agent until such time as the said will shall be offered for probate. (1937, c. 435, § 1.)

Local Modification.—Guilford: 1937, c. 435, s. 2.

Editor's Note.—This section, which makes it possible for a testator during his lifetime to file his will for safekeeping with the probate judge, represents a rather progressive step in the law of wills. If taken advantage of by testators, it may prevent the loss or fraudulent destruction of many validly executed wills, and may tend to prevent the offer of forged wills for probate and contests of wills upon written request of the testator, or the duly authorized agent or attorney for the testator, permitting a testator during his lifetime to file his will for safekeeping with the probate judge, as provided in sec. 941 [2-20]; and in either case, the procedure would provide a simple and speedy method of obtaining the probate of wills, in the office of the clerk of the superior court of the county whose clerk was a subscribing witness thereto, or a devisee or legatee thereunder, or who had a pecuniary interest in the property disposed of by such will and the clerk in said last mentioned county is hereby authorized to type letters to personal representatives, who may qualify and administer the estate in said will as if it originally probated in said county, and the title to all property, both real and personal, conveyed and devised in said will shall always be effectual as if the said will had been originally probated and recorded in said last mentioned county. (Rev., s. 3129; Code, s. 2151; C. C. P., s. 439; 1919, c. 15; 1921, c. 99; 1923, c. 14; C. S. 4139.)

Cross References.—As to jurisdiction of the clerk see §§ 28-1 and 28-2. As to disqualification of clerk, see §§ 2-17 through 2-21. As to conveyances within two years of the death of the decedent where there is no will, see § 28-81. As to rights of innocent purchasers when will withheld from probate, see § 31-39.

Editor's Note.—The provisions of this section, which concern the probating of wills where the clerk of the superior court having jurisdiction to probate it is a subscribing witness thereto, are added by the amendment of 1921, (Public Laws 1921, c. 99), and the similar provisions where such clerk is a devisee or legatee thereunder, are added by the amendment of 1923, (Public Laws 1923, c. 14).

While the amending statutes expressly refer to this section, they more particularly affect §§ 1 [28-1] and 2 [28-2], of the code defining the jurisdiction of the clerk in administrations, and §§ 929 [2-17], 940 [2-19] and 941 [2-20], as to the disqualification of a subscribing witness where the person who has interest in the property disposed of by the will, is added by the amendment of 1923, (Public Laws 1923, c. 14).

No Limitation to Probate a Will—Exception.—In the absence of a subscribing witness, the will may be probated, when he is one of the two subscribing witnesses. Section 940 [2-19]; Trenwith v. Smallwood (1923) 111 N. C. 132, 15 S. E. 1030. The procedure would then be under the amended statute, or by application to the judge, as provided in sec. 941 [2-20]; and in either case, the will, after probate, would be returned to the clerk of the original county to proceed with the administration of the estate under the will, he is disqualified by sec. 929 [2-17]; but this may be waived, and he may then proceed as if the defect did not exist. Section 940 [2-19]. If this defect is not waived, there is a presumption, that the subsequent amendment says that the petition may be filed and probate taken before the clerk of any adjoining county and when a certified return is made to the clerk of the original county, he may proceed to appoint the personal representative. Section 941 [2-20] provides that application may be made to the proper judge for an order to remove the proceedings to the clerk of any adjoining county, in the same district, or the judge himself may make all necessary orders for the settlement of the estate. There appears to be a conflict between the two statutes in this respect, unless the recent amendment is limited to the mere fact of probate; but that is all that is meant, the amendment is not necessary, since the same result may be readily obtained under the former statute. The application for disqualification of the personal representative is as much a judicial act as any other order made in the settlement of the estate; and to allow the clerk who is interested to proceed in the matter without a proper order, would make the same result a matter of extra-judicial action, contrary to the general policy of the law. Land Co. v. Jennett, (1901), 128 N. C. 3, 37 S. E. 954. The purpose of the amendment is to provide a simple and speedy method of obtaining the probate of a will, when the clerk was disqualified, and this has been done; but how far it was intended to change the former practice, if at all, is one of case of interest, is not clearly shown." 1 N. C. Law Rev. 314.

In General.—This section and § 31-15, by implication at least, require the probate of a will. Wells v. Odum, 207 N. C. 220, 176 S. E. 562.

No Limitation toProbate a Will—Exception.—In the ab—
sence of some statute to the contrary, there is no limit upon the time after a testator's death within which a will may be proven. When the death of the testator so as to vest title from that date as to bona fide purchasers.—Ed. Note.

Title Descends to Heirs Subject to Be Divested.—The title of the land descends, with the effects of the testator, subject to be divested in favor of the devisee, when the will is duly admitted to probate. Floyd v. Herring, 66 N. C. 409, 411.

Limitation as to Lost Wills Prior to Statute.—See McCormick v. Jernigan, 110 N. C. 406, 411, where it is held that no statute of limitation applies to the probate of a lost will. This case was decided prior to the amendment of 1919, which sets a limitation to the probate of all lost wills. The right of bona fide purchasers are involved.

Citation to those in interest is not necessary to the probate of a will in common form, and when probated the paper-writing is valid and operative as a will and may not be attacked collaterally.

§ 31-13. Executor failing, beneficiary may apply.—If no executor apply to have the will proved within sixty days after the death of the testator, any devisee or legatee named in the will, or any other person interested in the estate, may make such application, upon ten days notice thereof, to the executor. (Rev., s. 3132; Code, s. 2152; C. C. P., s. 440; C. S. 4140.)

Cross Reference.—A to who may apply for letters of administration in case of intestacy, see § 28-6 et seq.

Notice to Executor in Probating a Codicil.—Before others interested in the probate of a will may apply for its probate ten days previous notice must be given the executor therein named, and where an executor has probated and qualified under the will, it is equally necessary to give the statutory notice before offering for probate a separate paper-writing as a codicil. Spencer v. Spencer, 163 N. C. 83, 79 S. E. 291.

§ 31-14. Clerk to notify legatees and devisees of wills of probate. —The clerks of the superior court of the state are hereby required and directed to notify by mail, all legatees and devisees who have probated and qualified under the will in solemn form, of the probate of wills therein named, designated in wills filed for probate in their respective counties. All expense incident to such notification shall be deemed a proper charge in the administration of the respective estates. (1933, c. 133.)

While this requirement appears to be mandatory, it does not seem to be prerequisite to the probate of the will itself. Nor does it assume the status and importance of a citation to those in interest "to see the proceedings," as an ex parte proceeding and not binding on caveators upon the issue of the validity of the will, and the admission in evidence in the proceeding and not binding on caveators upon the issue of the validity of the will, and the admission in evidence in the proceeding of a will is not a prerequisite to the probate of the will itself. Apparently the purpose of the statute is to expedite the settlement of the estate of a person who no longer has living relatives, to exhibit the same in his court for probate, and to assist the court in the performance of such duty, in good faith, regardless of the facts, shall, by summons, compel any person in the state, having in possession the last will of any decedent, to exhibit the same in his court for probate; and whoever being duly summoned refuses, in contempt of the court, to produce such will, or (the same having been parted with by him) refuses to inform the court on oath where such will is, or in what manner he has disposed of it, shall, by order of the clerk of the superior court, be committed to the jail of the county, there to remain without bail till such will be produced or accounted for, and due submission made for the contempt. (Rev., s. 3124; Code, s. 2154; C. C. P., s. 442; C. S. 4141.)

Cross References.—See annotations to § 31-12. As to the effect of a decedent being in possession of a will for one year, see § 14-77.

In General.—A petition before the clerk of the superior court alleging that the respondents were in possession of a later will than that probated in another county, and that the respondents had withheld, for the purpose of reviving, etc., is a proceeding under this section to compel the production of a will. Williams v. Bailey, 177 N. C. 37, 97 S. E. 721.

Failure of Petitioners to Pursue Proceedings—Discharge of Respondents.—Where the respondents in proceedings to compel the production of a will before the clerk at the time set for the hearing, and in writing under oath fully and accurately state the facts, the court may, for failure to offer evidence, or request an examination, as to be divested in favor of the devisee, when the will is duly admitted to probate, or (the same having been parted with by him) refuses to inform the court on oath where such will is, or in what manner he has disposed of it, shall, by order of the clerk of the superior court, be committed to the jail of the county,
nesses touching the execution of a will, and he shall embody the substance of such proofs and examinations, in case the will is admitted to probate, in his certificate of the probate thereof, which certificate must be recorded with the will. The proofs and examinations as taken must be filed in the office. (Rev., s. 3126; Code, s. 2149; C. C. P., s. 437; C. S. 4143.)

Former Practice.—Formerly the court of pleas and quarter sessions had jurisdiction of the probate of wills, and there was at that time no provision in the statute requiring the taking of the proofs of writing or for recording the probate. The practice was to exhibit the will before the court and offer the proofs of execution, and for an entry to be made upon the record, and the will was not recorded until the certificate of the superior court, upon the minutes of the adjudication, and the clerk, acting under the authority of the court, then recorded the will upon the will book. In most instances he also recorded a memorandum of the proceedings before the court, but this was not done in all cases. Poplin v. Hatley, 179 N. C. 163, 166, 8 S. E. 1038.

Presumption of Valid Recordation.—The requirements of this section did not obtain in the probate of a will in the old practice before the court of pleas and quarter sessions; and where the records show that a will sought to be set aside for improper probate, valid on its face, has been transcribed upon the records of that court, it is presumed to have been duly admitted to probate and properly transcribed upon the record, the burden being upon the caveator to show to the contrary. Poplin v. Hatley, 179 N. C. 163, 166, 8 S. E. 1038.

Presumption of Validty.—A will of a competent testator, recorded in the county where the land lies, the will is sufficient. Roscoe v. Roper Lumber Co., 124 N. C. 42, 32 S. E. 857.

§ 31-18. Manner of probate.—Wills and testaments must be admitted to probate only in the following manner:

1. In case of a written will, with witnesses, on the oath of at least two of the subscribing witnesses, if living; but when any one or more of the subscribing witnesses to such will are dead, or reside out of the state, the same after due diligence is found within the state, or are insane or otherwise incompetent to testify, then such proof may be taken of the handwriting, both of the testator and of the witness or witnesses so dead, absent, insane or incompetent, and also of such other circumstances as will satisfy the clerk of the superior court of the genuineness and the due execution of such will. In all cases where the testator executed the will by making his mark, and where any one or more of the subscribing witnesses are dead or reside out of the state, or are insane or otherwise incompetent to testify, it shall not be necessary to produce the handwriting of the testator, but proof of the handwriting of the subscribing witness or witnesses so dead, absent, insane or incompetent shall be sufficient. The probate of all wills herefore taken in compliance with the requirements of this section are hereby declared to be valid.

2. In case of a holograph will, on the oath of at least three credible witnesses, who state that they verily believe such will and every part thereof is in the handwriting of the person whose will it purports to be, and whose name must be subscribed thereto, or inserted in some part thereof. It must further appear upon the oath of some one of the subscribing witnesses, or of some other credible person, that such will was found among the valuable papers and effects of the decedent, or was lodged in the hands of some person for safe-keeping.

3. In case of a nuncupative will, on the oath of at least two credible witnesses present at the making thereof, who state that they were specially required to hear witness thereto by the testator himself. It must also be proved that such nuncupative will was made in the testator's last sickness, in his own habitation, or where he had been previously resident for at least ten days, unless he died on a journey or from home. No nuncupative will shall be proved by the witnesses after six months from the making thereof, unless it was put in writing within ten days from such making; nor shall it be proved till a citation has been first issued or publication been made for six weeks in some newspaper published in the state, to call in the widow and next of kin to contest such will if they think proper. (Rev., s. 3127; Code, s. 2148; 1893, c. 269; 1901, c. 278; C. C. P., s. 435; C. S. 4144.)

Local Modification.—Burke, Scotland: C. S. 4154; Cleveland, Henderson, Transylvania, Wake: C. S. 4156; 1929, c. 313; 1939, c. 34; Halifax: 1924, c. 10; 1929, c. 313; 1939, c. 34; Haywood: C. S. 4157; Lee: 1929, c. 313; 1939, c. 34.

I. IN GENERAL.—ATTES TED WILLS.

Evidence Must Show Subscribing in Presence of Testator.—Under sec. 31-3 and this section regulating the manner in which wills shall be attested and admitted to probate, it is essential, not only that the document shall be subscribed in the presence of the testator by at least two witnesses, but that the evidence upon which the will is admitted to probate must show that fact. In re Thomas, 111 N. C. 409, 411, 1 S. E. 469.

Proof of Handwriting of Testator Where One Witness Alive.—Upon an issue of devisavit vel non, purporting to be signed by the testator himself, it is necessary for the proponent to show, to the satisfaction of the superior court, that the handwriting of the testator and his signature to the will is alive, the matter being competent evidence in this respect. Watson v. Hinson, 162 N. C. 72, 77 S. E. 1898. [Quoted in Cartwright v. Jones, 215 N. C. 108, 1 S. E. (2d) 359.]

Cited in In re Will of Thompson, 196 N. C. 271, 145 S. E. 393; In re Will of Shemwell, 197 N. C. 332, 333, 148 S. E. 469; In re Will of Lowrence, 199 N. C. 782, 784, 155 S. E. 876; In re Will of Stewatt, 198 N. C. 577, 152 S. E. 685.

II. HOLOGRAPHIC WILLS.

The phrase, “among the valuable papers and effects of,” etc., used in this section, does not necessarily and without exception mean among the most valuable papers, etc., Winstead v. Bowman, 68 N. C. 170.

The probate of a holograph will, where the writing propounded as the holograph will of deceased was found in his home in a washstand or bureau drawer in which he also kept deeds and receipts, is sufficient to be submitted to the jury on the question of its genuineness, and the probate of the holograph will is not affected by the evidence as to its genuineness among his valuable papers and effects as required by this section since the requirement of the statute is met if the paper writing at large among papers and effects regarded by decedent as valuable. In re Williams' Will 215 N. C. 259, 1 S. E. (2d) 857.

Effect of Provisions of Section 8-51.—Where the validity of a holograph will depends upon its being left with the beneficiary for safe keeping, his testimony thereof, after the death of the testator, is a transaction or commu-

Handwriting Goes to Jury on Testimony of Three Witnesses.—Testimony of three witnesses that the paper writing propounded as the holograph will of decedent was in his handwriting takes the case to the jury as to this requirement, notwithstanding conflicting testimony of caveator. In re Williams' Will, 215 N. C. 259, 1 S. E. (2d) 857.

In re Brown's Will.—In an action to prove a 'destructive' holographic will, the propounder must show that the instrument in the handwriting of the deceased and signed by him once existed and was destroyed under circumstances that would be probative of the authenticity of such writing. If, in such proof, there is a failure of the proof of the res and a non suit is proper. Hewett v. Murray, 218 N. C. 569, 11 S. E. (2d) 241.

III. NUNCAPUTIVE WILL.

Same—English Statute of Frauds.—The statutory provisions in relation to nuncaputive wills have existed in this State since 1784, and they are substantially the same as those in the Statute of Frauds, 29 Car. II., ch. 3, sec. 19, 20; and these provisions have always been strictly construed and enforced by the courts, both in this State and in England. Smith v. Smith, 63 N. C. 637, 639.

Strict Compliance—Necessary—Purpose of Requirements.—The requisites of this statutory provision must be strictly complied with and observed, in all material respects, in order to prevent opportunity for fraudulent purposes or to avoid the possibility of obtaining undue advantage of persons in their last sickness as to the final disposition of their property; and also to prevent mischiefs from the omission, refusal, or failure, on the part of such persons as would be disposed to obtain undue advantage of such wills. The purpose of such requisites is to prevent the fabrication of such wills; they are necessary, and it is essential to observe them strictly. Brown v. Brown, 6 N. C. 350; Rankin v. Rankin, 31 N. C. 156; Webster v. Webster, 50 N. C. 95; Haden v. Bradshaw, 60 N. C. 259; Smith v. Smith, 63 N. C. 637; Bundrick v. Haygood, 106 N. C. 468, 11 S. E. (2d) 421; Long v. Foust, 101 N. C. 114, 11 S. E. 889.

WITNESSES MUST BE CALLED TO IN WITNESS TRANSACTION.—Where a person in extremis, and conscious of it, desires to make a will, said she wanted to give to her two other persons but did not call them thereto, or either of them, to witness to her will, and they did so, and it is shown that the testator state her wishes in the presence of two witnesses, it is sufficient that the testator saw the witnesses and charged them to bear witness to his will, that he did so, and it is shown that the witness "bear witness" to the will, that be- side, testator gave specific directions for the disposition of his property, and thereupon the contents of the will were declared at a time when he was physically unable to execute it, is invalid as a nuncaputive will. Bundrick v. Haygood, 106 N. C. 468, 11 S. E. 423.

Same.—Designation by Name Not Necessary.—It is suf- ficient that the testator saw the witnesses and charged them to bear witness to his will, and they did so, and it is shown that the testator state his wishes in the presence of two witnesses, to wit: (1) his intent that it should be a written will is evi- dent from his words, "I desire made of my property and that he desired his provi- sions carried out, without reading or having the paper read at the time, but relying upon the assertion of a person then present that it contained his wishes as dictated by him severally made on a paper writing within ten days next after the dictation was made to one witness alone; (2) there was no sufficient declaration then and there of the testator's wishes in the presence of two witnesses from which they could reduce their recollection to writing within four days before his death. Kennedy v. Douglas, 151 N. C. 336, 66 S. E. 216.

The declaration of a testator made in the presence of two witnesses that a paper writing contained the disposition he desired made of his property and that he desired its provi- sions carried out, without reading or having the paper read at the time, but relying upon the assertion of a person then present that it contained his wishes as dictated by him severally made on a paper writing within ten days after the dictation was made to one witness alone; (2) there was no sufficient declaration then and there of the testator's wishes in the presence of two witnesses from which they could reduce their recollection to writing within four days before his death. Kennedy v. Douglas, 151 N. C. 336, 66 S. E. 216.
transferred all its assets and liabilities to another bank or trust company doing business in North Carolina, such latter bank or trust company shall be deemed substituted for and shall have all the rights and powers of the former bank or trust company. (Rev., s. 3128; Code, s. 2150; C. C. P., c. 438; 1929, c. 150; 1941, c. 70; C. S. 4145.)

Editor's Note.—The Act of 1929 added the proviso with the words "or shall have sold and transferred all its assets and liabilities to another bank or trust company doing business in North Carolina," which were added by the 1941 amendment.

Court's Notice or Intimation.—A will probated in common form before the clerk of the superior court is conclusively valid until declared void by a competent tribunal, and may be offered in evidence in proceedings to establish the validity of the will, until vacated on appeal, or declared void by a competent tribunal in a proceeding instituted for that purpose. It cannot be vacated in a collateral manner. Underwood v. Miles, 196 N. C. 599, 143 S. E. 130; In re Will of Cooper, 196 N. C. 418, 145 S. E. 782.

Before the probate in common form is not subject to collateral attack, but is binding or conclusive unless set aside in the manner prescribed. Mills v. Mills, 196 N. C. 599, 143 S. E. 130; In re Will of Cooper, 196 N. C. 418, 145 S. E. 782.

Until so set aside it is conclusively presumed to be the will of the testator. In re Will of Cooper, 196 N. C. 418, 145 S. E. 782.

A will which has been duly probated in common form may not be collaterally attacked even for fraud. Crowell v. Bradsher, 203 N. C. 492, 166 S. E. 731.

Probate a Judicial Act.—Conclusive Presumption of Validity.—Probate of a will by the clerk of the superior court is a judicial act, and his certificate is conclusive evidence of the validity of the will, until vacated on appeal, or declared void by a competent tribunal in a proceeding instituted for that purpose. It cannot be vacated in a collateral manner. McCollum v. Spivey, 123 N. C. 678, 31 S. E. 857.

An order of the clerk adjudging a will to be fully proved in common form is not "conclusive in evidence of the validity of the will" under this section, on the issue of the validity of the will of the testator. Underwood v. Miles, 28 N. C. 402; McClure v. Spivey, 123 N. C. 678, 31 S. E. 857.

The revocation of the probate in common form did not have the effect of annulling the administration properly granted. Holt v. Ziglar, 163 N. C. 390, 79 S. E. 805.

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The revocation of the probate in common form did not have the effect of annulling the administration properly granted. Holt v. Ziglar, 163 N. C. 390, 79 S. E. 805.

Determination of the validity of a will shall be made by the evidence offered in the proceedings thereon, and any evidence of the genuineness of the handwriting of the testator to the instrument in controversy. Croom v. Sugg, 110 N. C. 599, 14 S. E. 748.

§ 31-20. Wills filed in clerk's office.—All original wills shall remain in the clerk's office, among the records of the court where the same shall be proved, and to such wills any person may have access, as to the other records. If said will contains a devise of real estate, outside said county where said will is probated, then a copy of the said will, together with the probate of the same, certified under the hand and seal of the clerk of the superior court of said county may be recorded in the book of wills and filed in the office of the clerk of the superior court of any county in the state in which said land is situated with the effect as to passing the title to said real estate as if said will had originally been probated and filed in said county. The court shall grant or refuse to grant jurisdiction to probate the same. (Rev., s. 3129; Code, s. 2173; R. C., c. 119, s. 19; 1777, c. 115, s. 59; 1921, c. 108, s. 1; C. S. 4146.)

Cross Reference.—See § 31-39.

Editor's Note.—All but the first sentence of this section was added by the amendment of 1921, Public Laws, ch. 108, c. 172.

When Devisees Entitled to Rents and Profits until Probate Set Aside—Where there is no evidence tending to show that any of the devisees in said will procured its execution by undue or fraudulent influence, the devisees and their ancestors had any property, upon a duly certified copy or probate of the same, the same effect as to passing the title to said real estate as contained therein, to the extent to which any title to real estate was affected by the revocation of the probate in common form. (Rev., s. 3129; Code, s. 2173; R. C., c. 119, s. 19; 1777, c. 115, s. 59; 1921, c. 108, s. 1; C. S. 4146.)

§ 31-21. Validation of wills heretofore certified and recorded.—All wills which have prior to March 9, 1921, been certified and recorded in the office of the clerk of the superior court of any county, substantially following the provisions of this section, are validated and approved as to the conveyance and transfer of any title to real estate as contained therein, to said devisees and their ancestors, and the clerk of the superior court of said county had jurisdiction to probate the same, provided the probates and witnesses to the said wills are sufficient and according to law. (1921, c. 108, s. 2; C. S. 4146(a).)
§ 31-24. Probate when witnesses are nonresident; examination before notary public.—Where one or more of the subscribing witnesses to the will of a testator, resident in this state, reside in another state, or in another county in this state than the one in which the will is being probated, the examination of such witnesses may be had, taken and subscribed in the form of an affidavit, before a notary public residing in the county and state in which the witnesses reside; and the affidavits, so taken and subscribed, shall be transmitted by the notary public, under his hand and official seal, to the clerk of the court before whom the will has been filed for probate. If such affidavits are, upon examination by the clerk, found to establish the facts necessary to be established before the clerk to authorize the probate of the will if the witnesses had appeared before him personally, then it shall be the duty of the clerk to order the will to be probated, and record the will with the same effect as if the subscribing witnesses had appeared before him in person and been examined under oath. (1917, c. 183; 1933, c. 114; C. S. 4149.)

Editor's Note.—Public Laws 1931, c. 114, inserted, near the beginning of this section, the words "or in another county in this state than the one in which the will is being probated", after the words "where difficulty is encountered in securing the personal appearance of witnesses who reside within the state but at a distance from the county of probate." 11 N. C. Law Rev. 262.

§ 31-25. Probate when witnesses in another county.—When a will is offered for probate in one county of this state and the witnesses reside in another county, the clerk of the court before whom such will is offered shall have power and authority to issue a subpoena to the witnesses requiring them to appear before him and prove the will; and the clerk shall likewise have power and authority to issue a commission to take the deposition of such witnesses when they reside more than seventy-five miles from the place where the will is to be probated, such deposition and commission to be returned and the clerk to adjudge the will to be duly proven. Also, when it shall be found as a fact under affidavit with other proof, by the clerk of any county where a will is to be probated, that any witness to the will resides outside of the county, or inside of the county, and seventy-five miles or less from the place where the will is to be probated, and that the witness is so infirm of body as to be unable to appear in person before the clerk to prove the will, then the clerk shall have the power and authority to issue a commission to take the deposition of the witness, the commission and deposition of the witness to be returned, and the clerk to adjudge the will to be duly proved thereon as if the witness had appeared in person before him. (Rev., s. 3132; 1899, c. 55; 1911, c. 13; 1923, c. 59; C. S. 4150.)

§ 31-26. Probate of wills of members of the armed forces.—In addition to the methods already provided in existing statutes therefor, the will of a member of the armed forces of the United States, or the merchant marine, executed while in the active service of the United States, shall be admitted to probate (whether there were subscribing witnesses thereto or not, if they, or either of them, is out of the state at the time said will is offered for probate) upon the oath of at least three credible witnesses that the signature to said will is in the handwriting of the person whose will it purports to be. Such will so proven shall be effective to devise real property as well as to bequeath personal estate of all kinds. This section shall not apply to cases pending in courts and at issue on the date of its ratification. (1919, c. 216; Ex. Sess. 1921, c. 39; 1943, c. 218; C. S. 4151.)

Editor's Note.—Prior to the 1943 amendment, which was ratified on February 23, 1943, this section applied only to soldiers and sailors.

§ 31-27. Certified copy of will of nonresident recorded.—Whenever any will made by a citizen or subject of any other state or country is duly proven and allowed in such state or country according to the laws thereof, a copy or exemplification of such will and of the proceedings had in connection with the probate thereof, duly certified, and authenticated by the clerk of the court in which such will has been proven and allowed, if within the United States, or by any ambassador, minister, consul or commercial agent of the United States under his official seal, when produced or exhibited before the clerk of the superior court of any county wherein any kind of property of the testator may be, shall be allowed, filed and recorded in the same manner as if the original and not a copy had been produced, proved and allowed before such clerk. But when any will contains any devise or disposition of real estate in this state, such devise or disposition shall not have any validity or operation unless the will is executed according to the laws of this state, and that fact must appear affirmatively from the testimony of a witness or witnesses to such will, or from findings of fact or recitals in the order of probate, or otherwise, in such manner as any copy or exemplification of the will and probate proceedings. If it does not so appear, the clerk before whom the will is exhibited shall have power to issue a commission to take proofs touching the execution of the will, as prescribed in § 31-22, and the same may be adjudged duly proved, and shall be recorded as herein provided. (Rev., s. 3133; Code, s. 2156; 1885, c. 393; [82]
Editor's Note.—The 1941 amendment inserted the words "'and the handwriting of the other subscribing witness,' in the first sentence and made other changes in the section. The amendment, which became effective March 15, 1941, provided that it should not affect pending litigation.

On comment on this amendment, see 19 N. C. Law Rev. 547.

Note that the statement in the first syllabus of Whitton v. Peace, 188 N. C. 298, 124 S. E. 571, stating: "semble, a will properly attested and otherwise sufficient under the laws of another state would operate to pass title to lands situated here," is erroneous, unless it is qualified by saying: provided it also conformed to the requirements of the law of this State. The statute in plain and express terms declares such wills invalid as to really devised in the State, unless the wills were duly probated in the State where they were made.

§ 31-28. Probates validated where proof taken by commissioner or another clerk.—In all cases where the probate of any will made prior to March 8, 1899 in common form before any clerk of the superior courts of this state, where the testimony of the subscribing witnesses has been taken in the state or out of it by any commissioner appointed by said clerk or taken by any other clerk of the superior courts in any other county of this state, and the will admitted to probate upon such testimony, the proceedings are validated. (Rev., s. 3184; 1899, c. 680; C. S. 4153.)

§ 31-29. Probates in another state before 1860 validated. — In all cases where any will devises land in this state, and the original will was duly admitted to probate in some other state prior to the year one thousand eight hundred and sixty, and a certified copy of such will and the probate thereof has been admitted to probate and record in any county in this state, and it in any way appears from such recorded copy that there were two subscribing witnesses to such will, and its execution was proved by the examination of such witnesses when the original was admitted to probate, such will shall be held and considered, and hereby is held valid for the purpose of passing title to the lands devised thereby, situated in this state, as fully and completely as if the original will had been duly executed and admitted to probate and recorded in this state in accordance with the laws of this state. (1913, c. 93, s. 1; C. S. 4155.)

§ 31-30. Validation of wills recorded without probate by subscribing witnesses. In all cases where wills and testaments were executed prior to the first day of January, one thousand eight hundred and seventy-five (1875), and which appear as recorded in the record of last wills and testaments to have had two (2) or more witnesses thereto, and such last wills and testaments were admitted to probate and recorded in the record of wills in the proper county in this state prior to the first day of January, one thousand eight hundred and eighty-eight (1888), without having been duly probated in this state, provided the wills and such wills were presented to the clerk of the superior court in any county in this state where the makers of said wills owned property, and where the makers of such wills lived and died, and were by such clerks recorded in the record of wills for his county, said wills and testaments or exemplified copies thereof, so recorded, if otherwise sufficient, shall have the effect to pass the title to real or personal property, or both, therein devised and bequeathed, to the same extent and as completely as if the execution thereof had been duly proven by the two (2) subscribing witnesses thereto in the manner provided by law of this state. Nothing herein shall be construed to prevent such wills from being impeached for fraud. (1921, c. 66; C. S. 4157(a).)

§ 31-31. Validation of wills admitted on oath of one subscribing witness.—In all cases where last wills and testaments which appear as recorded in the record of last wills and testaments to have had two (2) subscribing witnesses thereto and such last wills and testaments were admitted to probate and recorded in the record of wills in the proper county in this state prior to the first day of January, one thousand eight hundred and ninety (1890) upon the oath and examination of one of the witnesses, such proof being taken in writing and recorded, and the certificate of probate of the Clerk of the Court states that such a will is proven by one of the subscribing witnesses thereto and the handwriting of the other subscribing witness being a non-resident is proven under oath, and such a will and certificate has been recorded in the record of wills of the proper county, such a will is hereby validated as fully as if the proof of the handwriting of the non-resident witness had been taken in regular form in writing and recorded. (1929, c. 41, ss. 1, 2.)

Art. 6. Caveat to Will. § 31-32. When and by whom caveat filed.—At the time of application for probate of any will, and the probate thereof in common form, or at
any time within seven years thereafter, any person entitled under such will, or interested in the estate, may appear in person or by attorney before the clerk of the superior court and enter a caveat to the probate of such will: Provided, That if any person entitled to file a caveat be within the age of twenty-one years, or insane, or immature at the time of death of the testator, or the time the testator was fixed at a reasonable time. See In re Hedgepeth, 150 N. C. 245, 63 S. E. 1025. In that case it was held that the seven years’ limitation intended by the amendatory act did not apply to caveats filed prior to the amendment to a will probated before the amendment. See also, In re Will Beauchamp, 146 N. C. 254, 59 S. E. 687; Etheridge v. Corprew’s Executors, 48 N. C. 14; Gray v. Maer, 20 N. C. 250; Maxwell, 20 N. C. 41; In re Dupree, 163 N. C. 256, 259, 79 S. E. 611.

Until the amendment of 1925 married women were extended an additional period of three years after the removal of the disability of coverture. But the amendatory act did not apply to caveats filed prior to the amendment. See In re Witherington’s Will, 186 N. C. 152, 159 S. E. 11, 12.

In General.—By this section, the legislature recognized that it is against the sound public policy to allow probate of wills and settlements of property rights thereunder to be established in common form and require the propounder to act, of their removal from the State many years prior to 1907. In re Beauchamp, 146 N. C. 254, 59 S. E. 687.

Common Law Limitation Applied After Amendment.—As the amendatory act did not apply to caveats filed prior to the amendments, it was held that the right to caveat the will was barred.

Forty Years of Laches.—An action to probate a will in common form was defeated because the propounder knew of the will probates in common form and required the propounder to be estopped to file a second caveat to the paper-writing, nor bound by the former judgment therein sustaining the validity of the paper-writing propounded. Mills v. Mills, 195 N. C. 143, 143 S. E. 30.

Proceedings Transferred to Civil Issue Docket.—Where a caveat to a will is duly filed, with the required bond, etc., at the time the paper-writing is offered for probate, it is required of the clerk that the proceeding be transferred to the civil-issue docket for the trial of the issue of devisavit vel non, and all further steps are stayed in the matter until its settlement. In re Dupree, 163 N. C. 256, 79 S. E. 611.

Nature of Proceedings.—The proceedings in the matter of probating a will are summary and at first it is ordinarily ex parte, and the contest of it is begun by filing a caveat under this section. In re Haygood’s Will, 101 N. C. 619, 7 S. E. 582.

Caveat Proceeding in Rem—Nonsuit.—Proceedings to caveat a will are in rem involving the rights of the beneficiaries as named in the will, and those of the opposing heir at law, and the nature of the section is such that it is ordinarily ex parte, and the contest of it is begun by filing a caveat under this section. In re Haygood’s Will, 101 N. C. 619, 7 S. E. 582.

Who May Caveat the Will.—The right to interfere in a question of probate belongs to a party in interest, which means a party having an interest in the subject-matter of the probate of the instrument to the prejudice of the party. In re Thompson, 178 N. C. 540, 542, 101 S. E. 107; Armstrong v. Baker, 31 N. C. 109, 114.

In this section it is held only one interested person to caveat a will, under this section, and it becomes the duty of the clerk thereupon to bring in interested persons, under § 31-33. When they come in they may align themselves as they will, and the probate of the will is determined by the court to determine whether on such facts the presumption of the validity of the paper-writing propounded. Mills v. Mills, 195 N. C. 143, 143 S. E. 30.

Suspension of Limitation.—Application to Caveat Barred.—Chap. 78, Laws 1898, suspending the running of the statute of limitations, has no application to a caveat to a will theretofore probated and for which there was no such statute prior to 1907. In re Beauchamp, 146 N. C. 254, 59 S. E. 687.

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What Propounder Must Prove upon Caveat Being Filed.—Upon the filing of a caveat to a will probated in common form the propounder must show that the will per testes may be heard upon the subject. In re Thompson, 178 N. C. 540, 542, 101 S. E. 107.
will or that it had not been destroyed by the testator or trial the propounder carries the burden of proof to establish the formal execution of the will. This he must do by proving the will in solemn form. In re Rowland, 202 N. C. 355, 357, 152 S. E. 897.

Application to Clerk within the Time No Excuse, When.—When the parties seeking to caveat a will have forfeited their right to do so by unreasonable delay and acquiescence, the mere fact that they had applied to the clerk several times when their rights would have been allowed, and the clerk declined to entertain the application, because the parties failed to give a proper bond as required by law, does not affect the result, for no caveat is properly constituted until the statutory requirements are met; and if it had been so constituted, the absence of notice issued in reasonable time works a discontinuance. In re Dupree, 163 N. C. 256, 79 S. E. 611.

Proof in Common Form Valid Until Set Aside.—The probate of a will in common form is valid until set aside, and the right to require probate in solemn form may be forfeited, either by acquiescence or unreasonable delay, now seven years, under this section. In re Beauchamp, 146 N. C. 254, 59 S. E. 687.

Effect of Infancy, Absence from the State.—Where the common law presumption of forfeiture of the right to caveat when absence from the State or acquiescence prevails, the matters of infancy, (overcourt,) and absence from the State are not necessarily controlling, but they are considered as rebutting the presumption. If the common law presumption will prevail, and more especially is this true in its application to the absence from the State of a party claiming under the will, when he had first remained in possession of the property for more than a year and the court determines that he is one where jurisdiction could be acquired by publication.

In re Dupree, 163 N. C. 256, 79 S. E. 611. Good Faith Claimants Protected until Probate Attacked.—All persons who claim in good faith under a will which has been duly probated in common form as provided by statute are protected by its provisions, until the probate is attacked by a caveat proceeding instituted as provided by this section. Whitehurst v. Hinton, 209 N. C. 390, 184 S. E. 66.

Applied in In re Will of Roediger, 209 N. C. 470, 184 S. E. 74.

§ 31-33. Bond given and cause transferred to trial docket.—Upon any caveatator giving bond, with sufficient surety to be approved by the clerk, in the sum of two hundred dollars, payable to the propounder of the will, conditioned to pay all costs which may be adjudged against such caveatator in the superior court by reason of his failure to prosecute his suit with effect, or deposit the money or give a mortgage in lieu of such bond, or shall file affidavits and satisfy the clerk of his inability to give such bonds or secure such costs, the clerk shall transfer the cause to the superior court for trial; and he shall also forthwith issue a citation to all devisees, legatees or other parties in interest within the state, and cause publication to be made, for four weeks, in some newspaper printed in the state, for nonresidents to appear at the term of the superior court, to which the proceeding is transferred to and to make themselves proper parties to the proceeding, if they choose. At the term of court to which the proceeding is transferred to the court, on motion to that effect shall be made by the propounder, and before trial, the judge shall require any of the persons so cited, either those who make themselves parties with the caveatators or whose interests appear to him antagonistic to that of the propounders of the will, and who shall appear to him to be able so to do, to file such bond within such time as he shall direct and before trial; and if a failure to file such bond the judge shall dismiss the action. (Rev. s. 3137; Code, s. 2159; 1899, c. 13; 1901, c. 748; C. C. P., s. 447; 1909, c. 74; C. S. 4159.)

Bringing in Interested Persons.—In this state it takes only one interested person to caveat a will under § 31-32 and it becomes the duty of the clerk, under this section, to give notice to all interested persons. When the time comes they may align themselves as they will. Bailey v. Maclin, 215 N. C. 150, 1 S. E. (3d) 372.

Trial by Jury.—The probate of a will in solemn form is a proceeding in a civil nature, and the issue raised by the caveat must be tried by a jury and the propounder and caveatator may not waive trial by jury and submit the issue to the court for an agreement as to the proofs of facts. In re Will of Rodeger, 209 N. C. 470, 184 S. E. 74. Cited in Mills v. Mills, 195 N. C. 595, 596, 143 S. E. 139.

§ 31-34. Prosecution bond required in actions to contest wills.—When any action is instituted to contest a will the clerk of the superior court will require the prosecution bond required in other civil actions: Provided, however, that provisions for bringing suit in forma pauperis shall also apply to the provisions of this section. (1937, c. 383.)

Editor's Note.—The purpose of this section is not entirely clear. The usual method of contesting a will is to file a caveat, either at the time the will is presented for probate, or within seven years thereafter. This is said to be neither a civil action nor a special proceeding, but is in the nature of a proceeding in rem, in which the propounder has the burden of establishing the formal execution of the will, and the caveatators the burden of showing that it is not a valid will. It may be the purpose of the statute to require the propounder to give bond when a caveat is filed, so as to have the costs secured by both parties. 15 N. C. Law Rev. 352.

§ 31-35. Affidavit of witness as evidence. Whenever the subscribing witness to any will shall die, or be absent beyond the state, it shall be competent upon any issue of devisavit vel non to give in evidence the affidavits and proofs taken by the clerk upon admitting the will to probate in common form, and such affidavit and proceedings before the clerk shall be prima facie evidence of the due and legal execution of said will. (Rev. s. 3121; 1890, c. 680, s. 2; C. S. 4160.)

§ 31-36. Caveat suspends proceedings under will.—Where a caveat is entered and bond given, the clerk of the superior court shall forthwith issue an order to any personal representative, having the estate in charge, to suspend all further proceedings in relation to the estate, except the preservation of the property and the collection of the debts and debts that are liable upon the property of the decedent, as may be allowed by order of the clerk of the superior court, until a decision of the issue is had. (Rev. s. 3137; Code, s. 2160; C. C. P., s. 448; 1927, c. 119; C. S. 4161.)

Editor's Note.—By the amendment of 1927 (Pub. Laws, c. 119), the representative can not be made to stop, upon a nonresidents to appear at the term of the superior court, to which the proceeding is transferred and to make themselves proper parties to the proceeding, if they choose. At the term of court at which the proceeding is transferred to the court, on motion to that effect shall be made by the propounder, and before trial, the judge shall require any of the persons so cited, either those who make themselves parties with the caveatators or whose interests appear to him antagonistic to that of the
The filing of a caveat suspends further proceedings in the administration of the estate, but does not deprive the executor or executrix of the right to the possession of the assets of the estate. Elledge v. Hawkins, 208 N. C. 757, 199 S. E. 248.

Effect of Caveat upon Rights and Duties of Representative.

The executor is not divested of all his representative powers; nor is the first probate vacated absolutely when the caveat is entered. An executor, or administrator c. t. a., after the will is proved in common form, may be sued, and by leave of court may proceed in the collection of debts due the deceased. An executor, or administrator c. t. a., after the will is proved in common form. may be sued, and by leave of court may sell property to pay debts, but cannot pay legacies or devises. Vickers v. Leigh, 104 N. C. 246, 257, 10 S. E. 358.

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Effect of Absence of Order to Suspend Proceeding.—In the absence of an order to suspend further proceedings upon the filing of a caveat, as provided by this section, the acts of the executor in filing a petition or proceeding with the sale of the land were not void nor were the rights of purchasers from the estate of the estate of the deceased. The presumption established by this section that a devise of land shall be construed in fee, etc., gives way to the intent of the testator as gathered from the entire will controls its interpretation; and this rule applies to the construction of deeds as for devises. Vickers v. Leigh, 104 N. C. 246, 257, 10 S. E. 358.

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Thus under a devise to the testator's wife of all of his "estate real and personal," and by a later paragraph all of the rest of the testator's property "as above stated" during her widowhood, and should she remarry her dower "according to law": It was held only a life estate, according to the testator's intent, is given to his widow, and her conveyance of a fee-simple title is ineffectual, the statutory presumption of a fee-simple title being inoperative. Roberts v. Saunders, 192 N. C. 191, 134 S. E. 451.

Where the testator, by bequeathing or devising property to a person, expresses a wish or desire as to its use or disposition, such expression is entitled to full effect; if the testator intended to pass an estate in fee, it was held, on the ground that without the use and benefit with the expressed intent that it should be the duty of such cierk, and he is hereby directed that final judgment has been entered, either sustaining or setting aside such will. (1929, c. 81.)

Art. 7. Construction of Will.

§ 31-38. Devise presumed to be in fee.—When real estate shall be devised to any person, the same shall be held and construed to be a devise in fee simple, unless such devise shall, in plain and express words, show, or it shall be plainly intended by the will, or some part thereof, that the testator intended to convey an estate of less dignity. (Rev. s. 3138; Code, s. 2180; R. C., c. 119, s. 28; 1784, c. 204, s. 12; C. S. 4162.)

Editor's Note.—The trend of judicial decisions for years has been toward relaxing the rigor of the common-law rule, that without words of inheritance it creates an estate of greater dignity than for life could be created by deed. While devises were held, after the statute of wills, to be of a species of nature excepting those which construed them more liberally than deeds; and where, without the use and benefit with the expressed intent that it should be the duty of such cierk, and he is hereby directed that final judgment has been entered, either sustaining or setting aside such will. (1929, c. 81.)

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vest in him absolutely with full right to dispose of it, with limitation over should he die without children surviving, if not disposed of by him during his life, under the provisions of this section. If he died leaving no issue of his body, the devise to the estate to one of less dignity, the devisee took a fee-simple title thereto, and could convey a good title to the purchaser.


The rule that a general devise will be construed to be in fee, applies only when the language employed by testator fails to show a clear intent to convey an estate of less dignity. Hampton v. West, 212 N. C. 315, 193 S. E. 290.

An unrestricted devise of real estate passes the fee, but a devise with power of full management and control, as a devisee's share to descend to other grandchildren, such devises vest a fee simple estate in the first devisee, defeasible only on condition that he dies without leaving heirs of his body. Whitley v. Garfield, 114 N. C. 24, 45 S. E. 904.

Fee Simple with Power of Appointment.—A devise to A, and to such of his issue as he may appoint. In such a devise the devisee is given the power of disposal of the fee simple, unless an intent to convey an estate of less dignity is apparent from the will, and regard will be had to the natural objects of the testator's bounty, and the testator's intention as gathered from the whole instrument will be given effect unless it is contrary to some rule of law or public policy. Jolley v. Humphries, 204 N. C. 672, 169 S. E. 417.

Under this section the fee generally passes upon a devise of the proceeds of land when an intention to separate the income from the principal is not expressed, or where the devise is general and the devisee is given the power of disposal, the devisee will take the fee simple, unless it be not disposed of by the first taker. Harmbright v. Carroll, 204 N. C. 496, 168 S. E. 817.

In conflicts between wills and courts will endeavor to ascertain the intent of the testator as expressed in the words used, and in cases of doubt resort may be had to the usual canons of interpretation, and a devise will be construed to be in fee unless it is apparent from the will that the testator intended to convey an estate of less dignity. Bell v. Gilliam, 200 N. C. 411, 157 S. E. 60.

A general devise to a testator's wife with subsequent items provides that one-half of the estate "remaining" at her death should go to his adopted son in fee, and the other half, in part, should go to his natural children, vesting the absolute title thereto in the testator's wife, rebutting the presumption that the testator had the power to convey the entire estate by deed in fee simple, unless the terms of the devise indicate the testator intended to convey an estate of less dignity. Bell v. Gilliam, 200 N. C. 411, 157 S. E. 60.

Devise for "Use and Benefit without Let or Hindrance."—Where testator left property in trust with power in his wife to demand that trustee turn over property to her "for her benefit and without let or hindrance," the devisee could not recover the property, since the devisee had no right to his devisees' share to descend to her children, vests the fee in the widow, and did not convey to the widow a fee simple, not being the kind of trust set up by the will. Follows v. Durify, 165 N. C. 305, 79 S. E. 631.

Conflicting Expressions—Which Controls.—Where a testator devises all of his estate to his wife, clearly and unmistakably in fee, a different intent may not be inferred from subsequent provisions of the will. Follows v. Durify, 165 N. C. 305, 79 S. E. 631.

Conflicting Interest—General Interest Prevails.—The provisions of this section, while laying down a rule of construction, still leave the question of the intention of the testator open for construction, and where there is a particular, and a general paramount interest apparent in the same will, and they clash, the general interest must prevail. Leeper v. Neagle, 94 N. C. 338.

Section Does Not Apply to Devise to Trustee.—Where a devise created no interest in certain lands in favor of testator's husband, a devise to the husband in an active trust for the purpose of carrying out the wishes of her father for the care of his widow, this section has no application to the devise to the husband as trustee in an active trust for the purpose of carrying out the wishes of her heirs upon the termination of the will. Stephens v. Clark, 211 N. C. 84, 189 S. E. 191.

Devise Creating a Life Estate.—In Alexander v. Alexander, 210 N. C. 221, 186 S. E. 319, it was held that the devise created an estate limited at most to the life of the widow, and did not convey to the widow a fee simple, notwithstanding the provisions of this section and notwithstanding the existence of a provision in the will that the estate to a per stirpes gen- erally or indefinitely with power of disposition ordinarily carries the fee, since it is apparent from the words of the devise that the testator had no intention to vest the fee simple.

Void Restriction on Alienation.—Where a restriction on alienation was declared void, the devise was unrestricted and vested the fee in the devisee. Williams v. McPherson, 215 N. C. 565, 5 S. E. (2d) 230.
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Probate necessary to pass title; recordation in county where real estate lies; rights of innocent purchasers.—No will shall be effectual to pass real or personal estate unless it shall have been duly proved and allowed in the proper court of the proper county, and a duly certified copy thereof shall be recorded in the office of the superior court clerk of the county wherein the land is situate, and the probate of a will devising real estate shall be conclusive as to the execution thereof, against the heirs and devisees of the testator, whenever the probate thereof, under the like circumstances, would be conclusive against the next of kin and legatees of the testator: Provided, that the probate and registration of any will shall not affect the rights of innocent purchasers for value from the heirs at law of the testator when such purchase is made more than two years after the death of such testator, unless the will has been fraudulently withheld from probate. (Rev., s. 3139; Code, s. 2174; R. C. c. 119, s. 20: 1784, c. 225, s. 6: 1915, c. 219; C. S. 4163.)

Cross Reference.—As to further provisions relative to wills fraudulently withheld from probate, see § 31-12.

Probate of a Descriptive Will.—The probate of a will containing a description of real estate is a prerequisite to its validity as a conveyance of real estate. Osborne v. Leak, 89 N. C. 433; Paul v. Davenport, 217 N. C. 262, 265, 102 S. E. 386.

No Statute of Limitation to Nullify a Will.—There is no statute of limitations as to when a will may be admitted to probate and section 47-18 has no application to wills: the probate, when proved, allowed and recorded, as the statute requires, becomes effective and relates back to the date of the devisee, passing the title from that date, avoiding all disposition or conveyances of the property by the heirs contrary to the provisions of the will, unless the claimants are protected by the statute of limitations or some recognized equitable principle. Cooley v. Lee, 170 N. C. 18, 66 S. E. 270.

Probate Not Retroactive as to Recordation.—This section requiring copies of wills to be recorded in the county wherein the deviser resides is prospective in effect, and the devisees for value from the heirs at law of the testator, immediately prior to the testator's death, pass real or personal estate unless it shall have been duly proved and recorded, and the ordinary registration acts having no application to wills; they became effective from the date of the devisees from that date against all dispositions or conveyances from the heirs to the contrary. Barnhardt v. Morrison, 178 N. C. 563, 101 S. E. 218.

Same—Amendment Not Retroactive.—The amendment of this statute has been prospective in effect, and the right of the devisees, under the amendment, to have unlimited time to probate the will will not be affected except from the effective date of the amendment. Barnhardt v. Morrison, 178 N. C. 563, 101 S. E. 218. That is the devisees will have two years after the effective date of the amendment to have their will probated.—Ed. Note.

§ 31-40. What property passes by will.—Any testator, by his will duly executed, may devise, bequeath, or dispose of all real and personal estate which he shall be entitled to at the time of his death, whether by will or not if so devised, bequeathed, or disposed of, while he shall be living, or any estate in the land (before the breach of the condition, the testator having a mere possibility of reverter) at the date of the amendment to have their will probated.—Ed. Note.

§ 31-41. Will relates to death of testator.—Every will shall be construed, with reference to the real and personal estate comprised therein, to speak and take effect as if it had been executed immediately prior to the death of the testator, unless a contrary intention shall appear by the will. (Rev., s. 3141; Code, s. 2141; R. C. c. 119, s. 16: 1844, c. 88, s. 3: C. S. 4165.)

The General Rule Expounded.—This general rule seems to be applicable only to personal property. A will is not capable of deliberately creating an interest in real estate prior to the time of death of the testator. However, a will may be effectual to pass real estate, and it is only when the will describes a specific subject of gift with sufficient particularity to show that the subject interest is the subject of the act and not just a prospective event, but the date of the will refers to actual conditions. Hilts v. Mercer, 125 N. C. 71, 74, 34 S. E. 106.

Exception to General Rule.—Ordinarily a will will be construed as if it had been executed immediately prior to the death of the testator, and it is only when the will describes a specific subject of gift with sufficient particularity to show that the subject interest is the subject of the act and not just a prospective event, but the date of the will refers to actual conditions. Tyler v. Meadows, 215 N. C. 733, 3 S. E. (2d) 264.

Section Relates to Subject Matter, and Not the Objects of
the Will.—This section, making the will speak of the death, relates to the subject matter of disposition only, and does not in any manner interfere with the construction in regard to the objects of the gift. For this reason is that this is the right to prior declarator's speech as of the date of their execution, and not as of the date of a testator's death under the rule of construction promulgated by this section. Williams v. Nunn, 89 N. C. 547.

Devises of "the Whole of My Lands" Passes After-Acquired Property.—A devise of "the whole of my lands" to devisees, includes land acquired by the testator after the publication of the subject of his will, whether the devisee is heir or residuary legatee, in fact, whether a devisee or legatee would have been an heir at law of testator had he survived him, but the wife by a prior marriage are entitled to the personalty, since the wife would not have been an heir at law of testator had she survived him, but the children of the wife by a prior marriage have been a distributee of the personal estate of her husband had she survived him, and this section providing that in such case the legacy should not lapse but should pass to the surviving issue of the legatee, the statute clearly recognizing the distinction between real and personal property for the purposes of devolution. Farnell v. Dungan, 207 N. C. 174, 175, 148 S. E. 113.

Section a Prototype of English Statute.—This section enacted in 1844, is a copy of the English statute upon the same subject. The English statute provides for such devises as shall fail or be void: (1) by reason of such devise being contrary to law; (2) by reason of such devise being contrary to law; (3) or otherwise incapable of taking effect. Holton v. Jones, 133 N. C. 399, 405, 45 S. E. 765.

This section should not be construed with § 31-44.—Neither a present nor an immediate devise is a residuary devise, and it is not interrelated with the purpose of devolution. Beach v. Gladstone, 94 N. C. 298; Cuclalenson v. X., 106 N. C. 227.

Construction of Residuary Clause in General.—In a specific gift, you must look to see whether that particular item is the residuary gift is reduced to the level of a specific gift, and ceases to be a residuary gift. Faison v. Middleton, 171 N. C. 170, 173, 88 S. E. 141.

Construction of Residuary Clause to Prevent Intestacy.—A residuary devise is a devise that should be construed so as to prevent an intestacy as to any part of the testator's estate, unless there is an apparent intent to the contrary, plainly and unequivocally expressed in the writing. Faison v. Middleton, 171 N. C. 170, 173, 88 S. E. 141.

Intestacy Not Favored.—No one supposes that he has failed in his disposition to dispose of all of his property by his will, and the courts should endeavor to make out such an intention and to uphold the testamentary plan, so that the testator may not, as to some of his estate, have died intestate. Faison v. Middleton, 171 N. C. 170, 174, 88 S. E. 141.

whether a clause is a residuary clause is not dependent upon any particular form of expression but upon the intention of the testator, and where a will provides that after the termination of a life estate that the whole estate should be distributed among a specific class, where the legasy requests, distributed among a specific class, where the legacy of one of the class lapses by the death of the legatee prior to the testator's death, the amount of such legacy is thrown in the fund, under the testamentary plan, so that some item is excluded, so that, to use the language of one of the authorities, what hitherto has purported to be the residuary gift is reduced to the level of a specific gift, and ceases to be a residuary gift. Faison v. Middleton, 171 N. C. 170, 173, 88 S. E. 141.

CHAPTER 31—WILLS—CONSTRUCTION OF WILL
§ 31-42. Lapsed and void devises pass under residuary clause, unless a contrary intention shall appear. There will be no lapsed devise in such will carried in such devise in such will which shall fail or be void by reason of the death of the devisee in the lifetime of the testator, or by reason of such devise being contrary to law or otherwise incapable of taking effect, shall be included in the residuary devise (if any) contained in such will: Provided, there shall be no lapse of the devise or legacy by reason of the death of the devisee or legatee during the lifetime of the testator, if such devisee or legatee should have been an heir at law or distributee of such testator had he died intestate, and if such devisee or legatee shall leave issue surviving him; and if there is issue surviving, then the said issue shall have the devise or bequest named in the will (Rev., § 31-42; Code, § 2144; R. C., c. 119, s. 7; 1844, c. 58, s. 4; 1919, c. 28; C. S. 4166.)

In the Absence of Statute Heirs Prevail over Residuary Devise. In the absence of statute, upon general principles, the heir at law is favored as much as possible, even to the detriment of a residuary devisee; and, accordingly, a specific devisee named in the will, not found upon the "heir" and not the residuary legatee, in fact, whether a devisee lapse or was void ab initio, the residuary devise does not absorb it. Holton v. Jones, 133 N. C. 399, 403, 45 S. E. 765.

Rights of Collateral Heirs. Where the owner of real and personal property executed a will devising and bequeathing all his property, both real and personal, to his wife, the collateral heirs at law of the testator are entitled to the real property, the devise to the wife having lapsed by reason of the prior declarator's speech, upon the application to prevent such lapse of the devise, since the wife would not have been an heir at law of testator had she survived him, but the children of the wife by a prior marriage are entitled to the personalty, since the wife would not have been an heir at law of testator had she survived him, but the children of the wife by a prior marriage have been a distributee of the personal estate of her husband had she survived him, and this section providing that in such case the legacy should not lapse but should pass to the surviving issue of the legatee, the statute clearly recognizing the distinction between real and personal property for the purposes of devolution. Farnell v. Dungan, 207 N. C. 174, 175, 148 S. E. 113.

Lapsed Devises for Misdescription.—A general residuary devise carries lapsed and void legacies, and property which is the subject of a devise which fails by reason of a misdescription. 40 Cyc., 1563 to 1577; Gardner on Wills, 418; Faison v. Middleton, 171 N. C. 170, 173, 88 S. E. 141.

Subject-Matter of Void Legacy Is Included in Residuary Legacy. Under the provisions of this section, the property which is the subject-matter of a void legacy, is included within the residuary legacy provided by the will, and should be delivered by the executor to the residuary legatees.

§ 31-42
§ 31-43. General gift by will an execution of power of appointment.—A general devise of the real estate of the testator, or of his real estate in any place or in the occupation of any person mentioned in the will, or otherwise described in a general manner, shall be construed to include any real estate, or any real estate to which such description shall extend, as the case may be, which he may have power to appoint in any manner he may think proper; and shall operate as an execution of such power, unless a contrary intention shall appear by the will; and in like manner a bequest of the personal estate of the testator, or any bequest of personal property, described in a general manner, shall be construed to include any personal estate, or any personal estate to which such description shall extend, as the case may be, which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will. (Rev., s. 3143; Code, s. 2143; R. C., c. 119, s. 8; 1844, c. 5; C. S. 4167.)

Cross Reference.—See also, § 31-4.

Power Not Exercised in Express Terms—Construction of Entire Will.—Where the execution by will of a power is not exercised in express terms by reference to the power or the subject thereof, the construction must be given by looking to the whole instrument and giving effect to the intent therein manifested. Johnston v. Knight, 117 N. C. 122, 23 S. E. 92; Walsh v. Friedman, 219 N. C. 297, 21 S. E. (2d) 250.

Power Not Exercised by Residuary Power.—Unless Contrary Intention Shown.—Unless there is something to show a contrary intention on the part of a testator, a general residuary devise will operate as an execution of a power to dispose of any property by will. Johnston v. Knight, 117 N. C. 122, 23 S. E. 92.

§ 31-44. Gifts to children dying before testator pass to their issue.—When any person, being a child or other issue of the testator, to whom any real or personal estate shall be devised or bequeathed for any estate or interest not determinable at the death of the child, shall die in the lifetime of the testator, leaving issue, and any such issue of such person shall be living at the death of the testator, such devise or bequest shall not lapse, but shall take effect and vest a title to such estate in the issue surviving, if there be any, in the same manner, proportions and estates as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will. (Rev., s. 3143; Code, s. 2143; R. C., c. 119, s. 8; C. S. 4168.)

Former Law.—Prior to the year 1816, the law was such that if a devise or bequest were made by a testator to his child, and such child died in his lifetime, leaving issue, the devise or legacy would lapse and fall into the residuum, if there were any residuary clause in the will; or, if there were none, would be intestate property, and descend to the heirs-at-law, or be distributed among the next of kin of the testator, according to the nature of the property. Smith v. Smith, 58 N. C. 305, 307.

§ 31-45. After-born children share in testator's estate.—Children born after the making of the parent's will, and whose parent shall die without making any provision for them, shall be entitled to such share and proportion of the parent's estate as if he or she had died intestate, and the rights of any such after-born child shall be a lien on every part of the parent's estate, until his several share thereof is set apart in the manner prescribed in §§ 28-153 to 28-158. (Rev., s. 3143; Code, s. 2145; 1808-9, c. 113, s. 82; C. S. 4169.)

Editor's Note.—See 12 N. C. Law Rev. 403, for note on "Deviote by Child Adopted after Execution of Adopting Parent's Will."

Section Not Intended to Direct a Parent to Make Provision for Child.—This section is construed as not intending to control a parent as to the provision he should make for his child, but to apply when by inadvertence or mistake the after-born child has not been provided for. Unless the omission was intentional, or provision is made for the child, either under the will or some settlement or provision ultra, the after-born child takes his share, and the statute applies whether there was one or more children. Flanner v. Flanner, 160 N. C. 126, 75 S. E. 936.

"Without Making Any Provision" Constrained.—The true meaning of the section has been held in Meares v. Meares, 26 N. C. 192, and King v. Davis, 91 N. C. at pp. 142, 147, to be that "without making any provision" is not intended to be construed to mean that there must be a gift of certain property or thing for the children, for that would be merely adopting the popular misconception of "cutting one off with a shilling," but that "without making any provision" means any arrangement or circumstances tending to show that the testator had these children in mind when the will was made and without any indication that it was his purpose to disinherit them. Thomason v. Julian, 133 N. C. 399, 310, 45 S. E. 636.

Express Exclusion of Children Tantamount to Making Provision.—A will expressly excluding the children of the testator born after the execution thereof "makes a provision for them" within the meaning of this section and such children do not share in the estate as though the testator had died intestate. Thompson v. Julian, 133 N. C. 399, 310, 45 S. E. 636.

Inadequacy of Provision Immaterial.—If any provision is made for an after-born child, the court cannot say that it is inadequate. The statute only applies when no provision at all has been made. King v. Davis, 91 N. C. 142.

Knowledge of Testator as to Child En Vente Sa Mere Immaterial.—The beneficent provisions of this section are not affected by the presumptive knowledge of the father, from the condition of his wife, that at the time he made the will he must have anticipated the birth, but upon the fact that the child was born thereafter. Christian v. Carter, 193 N. C. 337, 137 S. E. 596.

It is the subsequent birth, not the father's knowledge, which effects the partial revocation. Id.

Under Section 29-1 and This Section Child Will Inherit Land Subjected to Dower.—A child for whom no provision was made, will, under the rule of descent, section 29-1, and under this section, inherit the real estate of which his father dies seized, subjected to the dower of the widow, his mother. Nicholson v. Nicholson, 190 N. C. 122, 129 S. E. 148.

Under this section where there is a devise to a wife "to do with as she thinks best for herself and the children," and a child is born two months after the testator's death, such child is not entitled to a share in the estate but is provided for as one of "the children" under the will in view of rule 7, § 29-1. Bowls v. Durham Realty, etc., Co., 189 N. C. 368, 127 S. E. 254.

Not Applicable to Adopted Children—Illegitimate Children.—This section applies only to natural born children of the testator, and does not apply to adopted children. Sorrell v. Sorrell, 193 N. C. 439, 137 S. E. 306. Illegitimate children subsequently adopted, however, fall within the class of natural children. King v. Davis, 91 N. C. 142.

Entire Will is Not Revoked.—While afterborn children not provided for in the will of their deceased parent may claim by inheritance their part of the estate, under this section, it does not amount to revocation of the entire will. Fawcett v. Fawcett, 191 N. C. 679, 132 S. E. 796.

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Chapter 32.

Fiduciaries.

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§ 32-1. Short title.—This chapter may be cited as the Uniform Fiduciaries Act. (1923, c. 85, s. 14; C. S. 1864(d).)

Editor's Note.—This and the following sections constitute the Uniform Fiduciaries Act which was recommended by the national conference of commissioners on uniform state laws in 1922.

The general purpose is to establish uniform and definite rules in place of divers and indefinite rules now prevailing as to the restrictions on fiduciary obligations, and to facilitate the performance by fiduciaries of their obligations, rather than to favor any particular class of persons dealing with them. In order to prevent occasional breaches of fiduciary duty it is suggested by the commissioners that fear that inadequate protection to beneficiaries will result is partially dissipated by the fact that the English courts have adopted similar rules which work well in practice.

With this general purpose in mind the law is framed so that its application is restricted to the liabilities of the persons dealing with fiduciaries and does not deal with the liabilities of the fiduciaries themselves. It contemplates only situations where the persons dealing with a fiduciary know him to be such so that questions relating to actual or constructive notice of the existence of the trust or other fiduciary obligations are not within the scope of the act. It was suggested by the commissioners that fear that inadequate protection to beneficiaries will result is partially dissipated by the fact that the English courts have adopted similar rules which work well in practice.

It should be observed that in none of the situations dealt with in this act is the standard of due care or negligence made the test of liability. While the act recognizes that there are instances when the person dealing with the fiduciary should be held liable, it proceeds upon the theory that this is true only when acting with actual knowledge or in bad faith, and in such instances only does the person deal with an actual or constructive agent.

Same—Prior Law.—Under the law of this State prior to this statute, the law as to the various classes of fiduciaries has varied just a little but it was held very generally that where one accepted the assets of the estate held in trust by the fiduciary in payment of an individual debt, he was charged with notice and considered a party to the wrong, and thus a dealer at his peril. So it has been held that in equity (in the early cases the rule at law was otherwise) the executor or administrator can make no valid sale or pledge of the assets as a security for or in payment of his own debt on the theory that the transaction itself gives the purchaser or mortgagee notice of the misapplication. Powell v. Jones, 36 N. C. 337, 338; Bradshaw v. Simpson, 41 N. C. 245, 246. Although the purchaser in good faith at a sale was protected, Gray v. Armistead, 41 N. C. 74. It was settled law, therefore, that when a person got from an administrator, or other person acting in a fiduciary capacity, property which they had no actual or constructive knowledge of the trust, it was probable that they had no actual or constructive notice of the existence of the trust; for, as the trustee has no right to sell without the permission of the court or interest of the parties, the purchaser was charged with notice. Power v. Armistead, 41 N. C. 231; Hendrick v. Gidney, 114 N. C. 543, 546, 19 S. E. 598.

The purchasers from fiduciaries who had no right to sell without prior permission of the court may be divided into two classes: those who had actual or constructive notice of the misapplication, and those who did not have such notice. When one purchases from a fiduciary and does not have actual or constructive notice of the fact that the fiduciary is not such as he represents himself to be, he is charged with constructive notice of the existence of the trust; for, as the trustee has no right to sell without permission of the court or interest of the parties, the purchaser was charged with notice. The decision in this case follows the rule in the earlier cases.

§ 32-2. Definition of terms.—1. In this chapter unless the context or subject-matter otherwise requires:

"Bank" includes any person or association of persons, whether incorporated or not, carrying on the business of banking.

"Fiduciary" includes a trustee under any trust, expressed, implied, resulting or constructive, executor, administrator, guardian, conservator, curator, receiver, trustee in bankruptcy, assignee for the benefit of creditors, partner, agent, officer of a corporation, public or private, public officer, or any other person acting in a fiduciary capacity for any person, trust or estate.

"Person" includes a corporation, partnership, or other association, or two or more persons having a joint or common interest.

"Principal" includes any person to whom a fiduciary as such owes an obligation.

2. A thing is done "in good faith" within the meaning of this chapter when it is in fact done
honestly, whether it be done negligently or not. (1923, c. 83, s. 1; C. S. 1864 (e).)

Cross Reference.—As to what constitutes the business of banking, see § 32-1.

Origin of Definitions.—"Bank."—The definition of "banks" contained in this section was taken from the Uniform Negotiable Instruments Act, section 25-1.

Origin of Definitions.—"Fiduciary."—As used hereinafter as here defined is a combination of the definitions in the Negotiable Instruments Act, G. S. § 25-1, the Uniform Warehouse Receipt Act, G. S. § 57-2, the Uniform Stock Transfer Act, G. S. § 55-102, the Uniform Partnership Act, G. S. § 59-32, and section 76 of the Uniform Sales Act (which latter act has not been adopted in North Carolina).

"Fiduciary."—The definitions of "fiduciary" and "principal" are both new with this act. However, it is well to observe that two classes of fiduciaries are contemplated: (1) Those holding property in their own name, and (2) those dealing with property which is held in the name of the principal. Different provisions are necessarily made in some of the following sections in regard to these two classes of fiduciaries.

Same.—"Good Faith."—The definition of "good faith" is taken verbatim from section 76 of the Uniform Sales Act; the Uniform Warehouse Receipt Act, G. S. § 57-2; section 52 of the Uniform Bills of Lading Act; the Uniform Stock Transfer Act, G. S. § 55-102. "Good Faith" is not defined in the N. L. L. sections 25-1 et seq.

It will probably be of interest to point out that in the tentative draft of the Uniform Commercial Code (second draft) it ended with a definition of "bad faith" in the following language: "And a thing is done in bad faith when it is in fact done dishonestly." This was omitted by a vote of the National Conference. The N. L. L. contains no definition of "bad faith."

The courts have held that the test of good faith is the subjective test of honesty, and not the objective test of due care. See Brannan's Neg. Inst. Laws, pp. 187 et seq.

§ 32-3. Application of payments made to fiduciaries.—A person who in good faith pays or transfers to a fiduciary any money or other property held in trust by the fiduciary, or by the principal authorized to receive, is not responsible for the proper application thereof by the fiduciary; and any right or title acquired from the fiduciary in consideration of such payment or transfer is not invalid in consequence of a misapplication by the fiduciary. (1923, c. 83, s. 2; C. S. 1864 (f).)

Editor's Note.—It was pointed out by the commissioners drafting this act in submitting it to the conference that it applies only when the fiduciaries are authorized to receive the property. Therefore, where a bank does not have authority to receive any property, the banks may be held to pay such property to the person having a prior or subsequent interest.

This section is based upon statutes existing in England, Alabama, Colorado, Delaware, Kansas, Massachusetts, Michigan, Minnesota, Missouri, Montana, New Jersey, New York, North Dakota, Ohio, Rhode Island, South Dakota, and Wisconsin.

It was stated in 1 N. C. Law Rev. 291 that this section accords with the North Carolina decisions, Tyrell v. Morris, 21 N. C. 559; Gray v. Armstead, 41 N. C. 74; Kails v. Weil, 164 N. C. 84; 80 S. E. 229, unless a change results from the elimination by the definition of "fiduciary" in section 55-102. The definitions, authoritative and ill-defined, between some classes of fiduciaries. Exum v. Bowden, 39 N. C. 281; Gray v. Armstead, supra.

§ 32-4. Registration of transfer of securities held by fiduciaries.—If a fiduciary in whose name are registered shares of stock, bonds or other securities of any corporation, public or private, or company or other association, or of any trust, transfers the same, such corporation or company or other association, or any of the managers of the trust, or its or their transfer agent, is not bound to inquire whether the fiduciary is committing a breach of his obligation as fiduciary in making the transfer, or to see to the performance of the fiduciary obligations, and is liable for registering such transfer only when registration of the transfer is made with actual knowledge that the fiduciary is committing a breach of his obligation as fiduciary in making the transfer, or with knowledge of such facts that the action in registering the transfer amounts to bad faith. (1923, c. 85, s. 3; C. S. 1864 (g).)

Editor's Note.—This section is based upon a Massachusetts statute which was patterned with the N. L. L. relating to trustees. See Gen. Laws, ch. 232, section 21, Cum. St. ch. 253, sect. 21. There are similar statutes in Delaware (Rev. Code 1935, section 3590); Kentucky (St. 1909, section 4169); Pennsylvania (Purdon's Dig. 3 ed. 4950, section 7), and a very recent statute in Illinois.

This section applied only when the stock or securities are registered in the name of the fiduciary and has no application when it is in the name of the principal. In cases where the fiduciary registered in the name of the decedent and the executor or administrator wished to transfer it to his own name or that of a third person, it does not, therefore, interfere with the provisions of the inheritance tax laws.

In submitting this section, the framers called attention to the various practices with respect to the manner of registering stock on the corporate registers. It was pointed out that in England by statute no notice of the trust is registered upon the books of the corporation, that similar provisions are made in some of the following sections in regard to these two classes of fiduciaries. Whether it be done negligently or not.

§ 32-5. Transfer of negotiable instrument by fiduciary.—If any negotiable instrument payable or indorsed to a fiduciary as such is indorsed by a fiduciary, or if any negotiable instrument payable or indorsed to his principal is indorsed by a fiduciary, or if any negotiable instrument is indorsed to a fiduciary or indorsed by his principal, it is not bound to inquire whether the fiduciary is committing a breach of his obligation as fiduciary in indorsing or delivering the instrument, and is not chargeable with notice that the fiduciary is committing a breach of his obligation as fiduciary unless he takes the instrument with actual knowledge of such breach or with knowledge of such facts that his action in taking the instrument amounts to bad faith. If, however, such instrument is transferred by the fiduciary in payment of or as security for a personal debt of the fiduciary to the actual knowledge of the creditor, or is transferred in any transaction known by the transferee to be for the personal benefit of the fiduciary, the creditor or other transferee is liable to the principal if the fiduciary in fact commits a breach of his obligation as fiduciary in indorsing or delivering the instrument. (1923, c. 85, s. 4; C. S. 1864 (h).)

Editor's Note.—This and the two following sections deal with paper drawn or indorsed by fiduciaries.

One of the primary purposes of this section is to bring the rule as to instruments negotiated by or to fiduciaries to notice of a defect in the Purdon's Digest section 25-62. Notwithstanding that section 25-62 provides that, to constitute notice of an infirmity in an instrument or defect in the title of the person negotiating it, the person to whom it is negotiated must have bad actual knowledge of the defect or infirmity or knowledge of such facts as to
make the taking amount to bad faith, the courts generally have ignored the N. I. L. and held that where the fiduciary relation is shown on its face, the payee or indorsee is bound to make inquiry. But if there is nothing upon the face of the instrument to indicate a deficiency, the holder in due course whether negligent or not unless he acted in bad faith. So courts unconsciously substituted the objective test of negligence for the subjective test of the holder in due course. The second section of § 32-6 contra the N. I. L. and thus sections supplement it.

North Carolina has followed the uniform application of the N. I. L. See Texaway Hotel Co., 162 N. C. 28, 3 S. E. 276. See also 1 N. I. L. Rev. 291.

In § 32-6 the cases are divided into two situations requiring different rules. (1) Where the instrument is given in a transaction not known by the taker to be for the principal benefit of the fiduciary, the creditor or other payee is liable to the principal if the fiduciary commits a breach of his obligations as fiduciary in fact. If a bank, drawing such instrument to the credit of the fiduciary in fact, acts in bad faith, the courts generally hold for the plaintiff. See § 53-59. The purpose of these sections is to lay down uniform rules making banks acting solely as depositories liable only to the creditor of the fiduciary and delivered to it in payment of withdrawals have been made, whether payable to the fiduciary personally, or payable to a third person and by him transferred to the fiduciary, and is thereafter transferred by the fiduciary, whether in payment of a personal debt of the fiduciary or otherwise, the transferee is not bound to inquire whether the fiduciary is committing a breach of his obligation as fiduciary in transferring the instrument, and is not chargeable with notice that the fiduciary is committing a breach of his obligation as fiduciary unless he takes the instrument with actual knowledge of such breach or with knowledge of such facts that his action in taking the instrument amounts to bad faith.

(2) The next situation is where the taker knows the instrument to be given for the personal benefit of the fiduciary. If the instrument is given in a transaction not known to the taker to be for the personal benefit of the fiduciary, such instrument in the name of his principal, fails to pay the check with actual knowledge that the fiduciary is committing a breach of his obligations as fiduciary in drawing the check or with knowledge of such facts that his action in taking the instrument amounts to bad faith.

Editor's Note.—See note under section 32-5.

§ 32-8. Deposit in name of fiduciary as such.

If a deposit is made in a bank to the credit of a fiduciary as such, the bank is authorized to pay the amount of the deposit or any part thereof upon the check of the fiduciary, signed with the name in which such deposit is entered, without being liable to the principal, unless the bank pays the check with actual knowledge that the fiduciary is committing a breach of his obligation as fiduciary in drawing the check or with knowledge of such facts that its action in paying the check amounts to bad faith.

Editor's Note.—See note under section 32-5.

Cross Reference.—As to deposits made in trust for infants, see § 55-59.

Cross Reference.—As to the three following sections deal with depositories of the funds of a fiduciary, see §§ 32-9 to 32-11.

Evidence Sufficient for Jury.—Admissions by defendant that it entered into contracts for the sale of certain lands to an individual and that in payment of the sum due upon the execution of the contracts it accepted checks drawn on the corporation, together with evidence that the individual had no authority to so use the corporate funds, that the corporation was not indebted to him, and that the transaction was not made for the corporation's benefit was sufficient to be submitted to the jury in an action by the receiver of the corporation under the provision of this section. LaVectia v. North Carolina Joint Stock Land Bank, 216 N. C. 35, 9 S. E. 2d (34-4).

Judgment on the Pleadings.—Allegations of defendant's acceptance of a corporate check in payment of individual obligation of the president does not entitle the plaintiff to judgment on the pleadings. LaVectia v. North Carolina Joint Stock Land Bank, 216 N. C. 28, 9 S. E. 2d 276.

Evidence Sufficient for Jury.—If a check or other bill of exchange is drawn by a fiduciary as such or in the name of his principal by a fiduciary empowered to draw such instrument in the name of his principal, payable to the fiduciary personally, or payable to a third person and by him transferred to the fiduciary, and is thereafter transferred by the fiduciary, whether in payment of a personal debt of the fiduciary or otherwise, the transferee is not bound to inquire whether the fiduciary is committing a breach of his obligation as fiduciary in transferring the instrument, and is not chargeable with notice that the fiduciary is committing a breach of his obligation as fiduciary unless he takes the instrument with actual knowledge of such breach or with knowledge of such facts that his action in taking the instrument amounts to bad faith.

(1923, c. 85, s. 6; C. S. 1944 32-8.)

Editor's Note.—See note under section 32-5.

§ 32-6. Check drawn by fiduciary payable to third person.

If a check or other bill of exchange is drawn by a fiduciary as such, or in the name of his principal by a fiduciary empowered to draw such instrument in the name of his principal, the payee is not bound to inquire whether the fiduciary is committing a breach of his obligations as fiduciary in drawing or delivering the instrument, and is not chargeable with notice that the fiduciary is committing a breach of his obligations as fiduciary unless he takes the instrument with actual knowledge of such breach or with knowledge of such facts that his action in taking the instrument amounts to bad faith. If, however, such a check is payable to the drawee bank and is delivered to it in payment of or as security for a personal debt of the fiduciary to it, the bank is liable to the principal if the fiduciary in fact commits a breach of his obligation as fiduciary in drawing or delivering the check.

(1923, c. 85, s. 7; C. S. 1864 32-6.)

Cross Reference.—As to deposits made in trust for infants, see § 55-59.

Editor's Note.—This and the three following sections deal with depositories of the funds of a fiduciary.

The purpose of these sections is to lay down uniform rules making banks acting solely as depositories liable only when they have actual knowledge of the fiduciary's breach of duty or when acting in bad faith. The purpose for which withdrawals have been made, whether payable to the fiduciary personally or as such, or to third persons. But a depository has been bound to make inquiry where the fiduciary pays a personal debt out of fiduciary funds deposited in the bank.

Editor's Note.—See note under section 32-5.
CHAPTER 33. GUARDIAN AND WARD

This and the two following sections are in accord with the tendency of the North Carolina decisions as indicated in Bank v. Clapp, 76 N. C. 482; Bank v. Insurance Co., 150 N. C. 770, 64 S. E. 902; Miller v. Bank, 176 N. C. 152, 96 S. E. 977. They are also in accord with the general weight of authority. U. S. Fidelity, etc., Co. v. Bank, 77 W. Va. 665, 88 S. E. 109; Duckett vy. Natl. Mechanics Bank, 56 Md. 400, 38 Atl. 983. See also 1 N. C. Law Rev. 291.

§ 32-9. Deposit in name of principal. — If a check is drawn upon the account of his principal in a bank by a fiduciary who is empowered to draw checks upon his principal's account, the bank is authorized to pay such check without being liable to the principal, unless the bank pays the check with actual knowledge that the fiduciary is committing a breach of his obligation as fiduciary in drawing such check, or with knowledge of such facts that its action in paying the check amounts to bad faith. If, however, such a check is payable to the drawee bank and is delivered to it in payment of or as security for a personal debt of the fiduciary to it, the bank is liable to the principal if the fiduciary in fact commits a breach of his obligation as fiduciary in drawing or delivering the check. (1923, c. 85, s. 8; C. S. 1864(1).)

Editor's Note.—See note under section 32-8.

§ 32-10. Deposit in fiduciary's personal account. — If a fiduciary makes a deposit in a bank to his personal credit of checks drawn by him upon an account in his own name as fiduciary or of checks payable to him as fiduciary or of checks drawn by him upon an account in the name of his principal if he is empowered to draw checks thereon, or checks payable to his principal and indorsed by him, if he is empowered to indorse such checks, or if he otherwise makes a deposit of funds held by him as fiduciary, the bank receiving such deposit is not bound to inquire whether the fiduciary is committing thereby a breach of his obligation as fiduciary; and the bank is authorized to pay the amount of the deposit or any part thereof upon the personal check of the fiduciary without being liable to the principal, unless the bank receives the deposit or pays the check with actual knowledge that the fiduciary is committing a breach of his obligation as fiduciary in making such deposit or in drawing such check, or with knowledge of such facts that its action in receiving the deposit or paying the check amounts to bad faith. (1923, c. 85, s. 9; C. S. 1864(m.).)

Editor's Note.—See note under section 32-9.

§ 32-11. Deposit in names of two or more trustees. — When a deposit is made in a bank in the name of two or more persons as trustees and a check is drawn upon the trust account by any trustee or trustees authorized by the other trustee or trustees to draw checks upon the trust account, neither the payee nor other holder nor the bank is bound to inquire whether it is a breach of trust to authorize such trustee or trustees to draw checks upon the trust account, and is not liable unless the circumstances be such that the action of the payee or other holder be such that the bank amounts to bad faith. (1923, c. 85, s. 10; C. S. 1864(n.).)

Cross Reference.—See note under § 32-8.

Editor's Note.—This section is limited in its application to trustees. It is a general rule that one trustee cannot bind his co-trustees unless authorized by him to do so, and that a trustee can delegate only such of his duties as are ministerial. It is questionable whether or not the drawing of a check is a ministerial duty as a general rule. Probably as to the principal it is, but not as to income. But be that as it may, neither the bank nor payees or other holders are put upon inquiry as to the authority. This section applies only to trustees and not to other classes of fiduciaries, and its application is limited to checks, according to the opinion of the drafters. See 1 N. C. L. Rev. 292, to the same effect.

§ 32-12. Cases not provided for in chapter. — In any case not provided for in this chapter the rules of law and equity, including the law merchant and those rules of law and equity relating to trusts, agency, negotiable instruments and banking, shall continue to apply. (1923, c. 85, s. 12; C. S. 1864(p.).)

§ 32-13. Uniformity of interpretation. — This chapter shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it. (1923, c. 85, s. 13; C. S. 1864(q.).)

Chapter 33. Guardian and Ward.


Sec. 33-1. Jurisdiction in clerk of superior court.
33-2. Appointment by parents; effect; powers and duties of guardian.
33-3. Mother’s guardianship on death of father.
33-4. Appointment on divorce of parents.
33-5. Appointment when father living.
33-6. Separate appointment for personal and estate; yearly support specified; payments allowed in accounting.
33-10. Interlocutory orders on revocation.
33-11. Resignation; effect; accounting on resignation.

Art. 2. Guardian’s Bond.

33-12. Bond to be given before receiving property.
33-13. Terms and conditions of bond; increased on sale of realty.
33-14. To be recorded in clerk’s office; action on bond.
33-15. Where several wards with estate in common, one bond sufficient.
33-16. Renewal of bond every three years; enforcement.
33-17. Relief of endangered sureties.
33-19. Liability of clerk for other defaults.

Art. 3. Powers and Duties of Guardian.

33-20. To take charge of estate.
§ 33-1. Creation and Termination of Guardianship.

§ 33-1. Jurisdiction in clerk of superior court. The clerks of the superior court within their respective counties have full power, from time to time, to take cognizance of all matters concerning orphans and their estates and to appoint guardians in all cases of infants, idiots, lunatics, inebriates, and inmates of the Caswell training school: Provided, that guardians shall be appointed by the clerks of the superior courts in the counties in which the infants, idiots, lunatics, or inebriates reside, unless the guardians be the next of kin of such incompetents or a person designated by such next of kin in writing filed with the clerk, in which case, guardians may be appointed by the clerk of the superior court in any county in which is located a substantial part of the estates belonging to such incompetents. (Rev., s. 1766; Code, s. 1951.)

Cross Reference.—As to guardianship of insane persons, see § 35-2 et seq.

Editor's Note.—The amendment of 1935 added the proviso at the end of this section.

In General.—The powers which the court of equity formerly had and exercised in regard to orphans and their estates are now conferred upon the clerk of the superior court by this section and section 33-6. Duffy v. Williams, 133 N. C. 95, 197 S. E. 548.

Place of Appointment.—The domicile of an infant is universally held to be the fittest place for the appointment of a guardian of his person and estate, although, for the protection of either, a guardian may be appointed in any state where the person or any property of the infant may be found. Clarke v. Clarke, 178 U. S. 186, 193, 20 S. Ct. 873, 44 L. Ed. 1028.

Under this section the appointment of a guardian in a county other than the one in which the ward's surviving parent resides or the ward's estate is situated is void. Duke v. Johnston, 281 N. C. 189 S. E. 2d 694.

Appointment by Legislature.—An act of the Legislature authorizing a certain person "to act as guardian of another without giving bond, is constitutional, and is in itself an appointment without intervention of the clerk. Henderson v. Bowd, 116 N. C. 795, 21 S. E. 692.

Matter of Discretion.—The appointment of a guardian is a matter of discretion, the exercise of which cannot be reviewed by the Supreme Court. Battle v. Vick, 15 N. C. 294.

Same—Choice of Infant.—The court in appointing a guardian was not bound by the choice of the minor, but could appoint the person, who, in his discretion, would best perform the duty. Wynne v. Always, 3 N. C. 38; Grant v. Whitsake, 5 N. C. 231.

Person Related to Ward.—Courts are empowered to appoint as guardian such person as they may think proper, without regard to the kinship of the guardian to the ward. Mills v. McAllister, 2 N. C. 303.

Custody of Child.—The jurisdiction of clerks of the superior court in the appointment of guardians of infants, etc., does not extend to a case where the petitioner asks for the control of another. In re Lewis, 88 N. C. 31.

Removal of Guardian.—A ward may not bring an action against a guardian such person as they may think proper, without regard to the kinship of the guardian to the ward. In re Lewis, 88 N. C. 31.

§ 33-2. Appointment by parents; effect; powers and duties of guardian.—Any father, though he be a minor, may, by deed executed in his lifetime and with the written consent and privy examination of the mother, if she be living, or by his last will and testament in writing, if the mother be dead, dispose of the custody and tuition of any of his infant children, being unmarried, and
whether born at his death or in ventre sa mere, for such time as the children may remain under twenty-one years of age, or for any less time. Or in case the father is dead and has not exercised his said right of appointment, or has willfully abandoned his wife, then the mother, whether of full age or minor, may do so. Every such appointment shall be good and effectual against any person claiming the custody and tuition of such child or children. Every guardian by deed or will shall have the same powers and rights and be subject to the same liabilities and regulations as other guardians: Provided, however, that in the event it is so specifically directed in said deed or will such guardian so appointed shall be permitted to qualify and serve without giving bond, unless the clerk of the superior court having jurisdiction of said guardianship shall find as a fact and adjudge that the interest of such minor or incompetent would be best served by requiring such guardian to give bond. (Rev., ss. 1762, 1763, 1764; Code, ss. 1562, 1563, 1564; R. C., c. 54, § 1762; 1763, c. 69, § 1565-9, c. 291; 1881, c. 64: 1911, c. 120; Ex. Sess. 1920, c. 51; 1941, c. 26; C. S. 2151.)

Cross References.—As to habeas corpus for custody of children, see §§ 17-39 and 17-40. As to adoption of children, see § 42-1 et seq.

Editor's Note.—In the second sentence of this section the words "in ventre sa mere" were added by Public Laws, Ex. Sess. 1920, c. 21. The 1941 amendment added the proviso.

For comment on the 1941 amendment, see 19 N. C. L. Rev. 479.

Rights of Both Parents Recognized.—In this section and in others, the Legislature has recognized the human as well as the natural rights of the father and mother, and the superior court, vested in the guardian and the subordinate, the present and the inchoate, rights of the father and the mother, and has wisely provided that both the parents shall have adequate opportunity to be heard and, except in rare cases, shall give their consent before the legal relation is severed or the domestic circle is broken. Truelove v. Parker, 191 N. C. 430, 436, 132 S. E. 295.


And this right is superior to the claims of every one, except those to whom he may have committed their custody and tuition by deed, or unless he is found to be unfit for their care and custody. Latham v. Ellis, 116 N. C. 30, 20 S. E. 1032.

The parents have, prima facie, the right to the custody and control of their infant children as a natural and substantive right not lightly to be denied or interfered with by action of the courts; but this right is not universal and absolute and may be modified and disregarded by the court when it is made to appear that the welfare of the children clearly requires it. Brickell v. Hines, 179 N. C. 254, 102 S. E. 209; In re Warren, 178 N. C. 43, 100 S. E. 76; Atkinson v. Downing, 175 N. C. 244, 95 S. E. 487; In re Means, 176 N. C. 307, 97 S. E. 39; State v. Burnett, 179 N. C. 735, 102 S. E. 711.

Father Should Not Be Regarded as Wrongdoer When He Acts in Good Faith with Child's Money.—Under this section the father is natural guardian for his minor children he should not be regarded as a trespasser or a wrongdoer when he acts in good faith with his child's money and makes purchases for its benefit. Lifsey v. Bullock, 11 F. Supp. 728.

Appointment by Deed or Will.—A father can not appoint a guardian for his children, nor impose on any one the duties and responsibilities in this behalf, unless by deed executed in his lifetime, or by his last will and testament, in writing. Peyton v. Smith, 22 N. C. 325.

No one has a right to the guardianship of an infant, except him who is the infant's testamentary guardian or as appointed by the father by deed or by the court. Long v. Rhymes, 6 N. C. 122.

Same.—Interpretation.—Where it can clearly be collected from the will of a father that certain persons are thereby appointed to have the custody of the persons and the estate of his children, until they arrive at age, such an appointment will be held to constitute them guardians, as though the appropriate term had been used. Peyton v. Smith, 22 N. C. 325.

Applies Only to Own Children.—A testator cannot appoint a testamentary guardian except to his own children. Camp v. F. T. Martin, 90 N. C. 615.

Same.—Grandchildren.—This section, allowing a father to appoint a guardian by deed or will to his children, does not authorize a grandfather so to appoint a guardian for his grandchildren. Williamson v. Jordan, 45 N. C. 46.

§ 33-3. Mother's guardianship on death of father.

In case of the death of the father of an infant, the mother of such child surviving such father shall immediately become the natural guardian of such child to the same extent and in the same manner, plight and condition as the father would be if living; and the mother in such case shall have all the powers, rights and privileges, and be subject to all the duties and obligations of a natural guardian. But this shall not be construed as abridging the powers of the courts over minors and their estates and over the guardians of wards. (Rev., s. 1765; Code, s. 1565; 1883, c. 364; C. S. 2152.)

Mother Entitled to Custody.—If a child's mother is a suitable person she is entitled to its custody even though some other person may be more suitable. Ashby v. Page, 156 N. C. 338; 11 S. E. 261, citing Mitchell v. Mitchell, 67 N. C. 307.

Same.—Cannot Dispose of Child.—It may be questioned, whether in this State a mother is entitled to the custody of her child, though a minor, so as to confer upon another the right to have the custody and control thereof. In re Lewis, 88 N. C. 31, 33.

§ 33-4. Appointment on divorce of parents.—When parents are divorced and a child is entitled to any estate, the court granting the divorce must certify that fact to the clerk of the superior court, to the end that he may appoint a fit and proper person to take the care and management of such estate, whose powers and duties shall be the same in all respects as other guardians, except that a guardian so appointed shall not have any authority over the person of such child, unless the guardian be the father or mother. (Rev., s. 1770; Code, s. 1571; R. C., c. 54, s. 4; 1838, c. 16; 1868-9, c. 201, s. 9; C. S. 2153.)

Cross Reference.—As to custody of children generally in case of divorce, see § 50-43.

§ 33-5. Appointment when father living.—The clerk of the superior court may appoint a guardian of the estate of any minor, although the father of such minor be living. And the guardian so appointed shall be governed in all respects by the laws relative to guardians of the estate in other cases, but shall have no authority over the person of such minor. (Rev., s. 1771; Code, s. 1572; R. C., c. 54, ss. 4, 7; 1806, c. 707; 1868-9, c. 201, s. 10; C. S. 2154.)

Cross Reference.—As to appointment of guardian when child born to parents in marriage is under the jurisdiction of juvenile court is thereby promoted, see § 110-37.

§ 33-6. Separate appointment for person and estate yearly support specified; payments allowed in accounting.—Instead of a general guardianship to one person, the clerk of the superior court may commit the tuition and custody of the person to one and the charge of his estate to another, whenever at any time during minority, inebriety, idiocy or lunacy, it appears most conducive to the proper care of the orphan's, inebriate's, idiot's, or lunatic's estate, and to his suitable maintenance, nurture and education. In such cases the clerk must order what yearly sums
of money or other provisions shall be allowed for the support and education of the orphan, or for the maintenance of the idiot, lunatic or inebriate, and may prescribe the time in which and manner in which the same shall be paid; but such allowance may, upon application and satisfactory proof made, be reduced or enlarged, or otherwise modified, as the ward's condition in life and the kind and value of his estate may require. All payments made by the guardian of the estate to the tutor of the person, according to any such order, shall be deemed just disbursements and be allowed in the settlement of his accounts; but for the payment thereof by the one and the receipt thereof by the other merely, no commissions shall be allowed to either, though commissions may be allowed to the tutor of the person on his disbursements only. (Rev., ss. 1767, 1768, 1769; Code, ss. 1567, 1568, 1569; R. C., c. 54, s. 3; 1810, C. 34; 1868-9, c. 201, ss. 6, 7; C. S. 2155.)

Cross References.—As to expenses and disbursements credited to guardian, see § 33-42. As to commissions, see §§ 33-43.

§ 33-7. Proceedings on application for guardianship.—On application to any clerk of the superior court for the custody and guardianship of any infant, idiot, lunatic, inebriate, or inmate of the Caswell training school, it is the duty of such clerk to inform himself of the circumstances of the case on the oath of the applicant, or of any other person, and if none of the relatives of the infant, idiot, inebriate, lunatic, or inmate of the Caswell training school are present at such application, the clerk must assign, or for any other good cause he may assign, a day for the hearing; and he shall thereupon direct notice thereof to be given to such of the relatives and to such other persons, if any, as he may deem it proper to notify. On the hearing he shall ascertain, on oath, the amount of the property, real and personal, of the infant, idiot, inebriate, lunatic, or inmate of the Caswell training school, and the value of the rents and profits of the real estate, and he may grant or refuse the application, or commit the guardianship to some other person, as he may think best for the interest of the infant, idiot, inebriate, lunatic, or inmate of the Caswell training school. (Rev., ss. 1772; Code, s. 1620; C. C. P., s. 174; 1917, c. 41, s. 2; C. S. 2156.)

In General.—When a guardian is appointed he must assert his right to the custody of his ward by a civil action against the persons in charge of him, while they in turn, if so advised, can take proper steps to assert their rights in the court. In re Barker, 210 N. C. 617, 188 S. E. 205.

Habeas Corpus Not Proper.—Except as between parents, under section 17-39, the right of the custody of a child cannot be determined under the writ of habeas corpus, the object of that writ is to remove an illegal restraint. In re Parker, 144 N. C. 170, 172, 55 S. E. 878.

Application Should Be in Writing.—The interests of minors are under the care of the court, and to the end that the same may be protected in suits brought by or against them, the court should see that the next friend or guardian ad litem be appointed upon due consideration of an application in writing, and not upon a simple suggestion. Morris v. Gentry, 89 N. C. 248, 249.

Applicant Not to File Notice.—Failure to notify the relative in custody of the child of proceedings to appoint a guardian is an irregularity, under this section, which does not render the appointment of the guardian void, though it is not communicated to such relative. In re Parker, 144 N. C. 170, 172, 55 S. E. 878.

While the failure to notify the relatives of an alleged incompetency of the hearing to determine the incompetence is an irregularity, it does not render the appointment of a guardian in the proceedings void, but gives the relatives an opportunity to attack such appointment, and where, upon such attack, the court finds upon supporting evidence that the guardian appointed is a fit and suitable person, the relatives are not entitled to the removal of the guardian. In re Barker, 210 N. C. 617, 188 S. E. 205.

§ 33-8. Letters of guardianship.—The clerk of the superior court must issue to every guardian appointed by him a letter of appointment, which shall be signed by him and sealed with the seal of his office. (Rev., ss. 1773; Code, s. 1621; C. C. P., c. 475; C. S. 2157.)

The appointment of a guardian can be shown only by the records in the office of the clerk of the Superior Court by which the appointment was made, by letters of appointment issued by the clerk as required by this section, and parol evidence tending to show appointment is incompetent. Buncombe County v. Cain, 210 N. C. 766, 188 S. E. 399.

§ 33-9. Removal by clerk.—The clerks of the superior court have power, on information or complaint made, at all times to remove guardians and appoint successors, to make and establish rules for the better administration of the affairs of minors, and for the better education and maintenance of wards; and it is their duty to do so in the following cases:

1. Where the guardian wastes or converts the money or estate of the ward to his own use.
2. Where the guardian in any manner mismanages the estate.
3. Where the guardian neglects to educate or maintain the ward in a manner suitable to his or her degree.
4. Where the guardian is legally disqualified to act as a person would be to be appointed administrator.
5. Where the guardian or his sureties are likely to become insolvent or nonresidents of the state.

Application Should Be in Writing.—The use of a guardian of the funds of his ward for his own use is sufficient to warrant his removal. Ury v. Brown, 129 N. C. 270, 40 S. E. 4.

Discretion of Clerk.—The choosing of a guardian by the court is a discretion vested in the court, subject to such control of the court as is necessary to protect the minor. In re Barker, 210 N. C. 617, 188 S. E. 205.

Removal without Cause Error.—An order by a superior court clerk in cause pending before him for the removal of a testamentary guardian, where none of the provisions of this section are alleged nor found as a fact by the clerk, is improperly made, and will be set aside upon proceedings properly instituted to that end. Sanderson v. Sanderson, 79 N. C. 369.


Funds in Jeopardy.—A testamentary guardian ought not to be removed without a showing of such waste, insolvency, misconduct that the ward will be unable to recover the balance due on the final settlement. Sanderson v. Sanderson, 79 N. C. 369.

A ward may not bring an action in the Superior Court by his next friend to remove her guardian and appoint another, the Superior Court in such instance being without jurisdiction. Moses v. Moses, 234 N. C. 657, 169 S. E. 273.

Removal beyond State.—Where a guardian to an infant, appointed by a county court in this State, removed to another state, taking with him a part of the property of the ward, the ward will be unable to recover the balance due on the final settlement. Sanderson v. Sanderson, 79 N. C. 369.

In all cases where the letters of a guardian are revoked, the clerk of the superior court may, from time to time, pending any controversy in respect
to such removal, make such interlocutory orders and decrees as will tend to the better securing the estate of the ward, or other party seeking relief by such revocation. (Rev., s. 1775; Code, s. 1607; 1868-9, c. 201, s. 44; C. S. 2130.)

§ 33-11. Resignation; effect; accounting on resignation.—Any guardian wishing to resign his trust may apply in writing to the superior court, setting forth the circumstances of his case. If, at the time of making the application, he also exhibits his final account for settlement, and if the clerk of the superior court is satisfied that the guardian has been faithful and has truly accounted, and if a competent person can be procured to succeed in the guardianship, or the clerk of the superior court may be appointed receiver of the estate of the ward, and if so appointed the clerk of the superior court may accept the resignation of the guardian and discharge him from the guardianship. But the guardian so discharged and his sureties are still liable in relation to all matters connected with the trust before the resignation. (Rev., s. 1776; Code, s. 1608; 1868-9, c. 201, s. 45; 1921, c. 555; C. S. 2140.)

Cross References.—See also, §§ 36-9 et seq. As to appeal from the clerk's decision, see §§ 36-13 and 36-14. As to final account by the resigning guardian, see §§ 33-41 and 36-15. As to effective date of resignation, see § 36-16. As to appointment of a successor, see § 36-17.

Editor's Note.—In the second sentence of this section the words "for the clerk of the superior court may be appointed receiver of the estate of the ward and if so appointed were added by Public Laws, 1921, ch. 95.

§ 33-12. Bond to be given before receiving property.—No guardian appointed for an infant, idiot, lunatic, insane person or inebriate, shall be permitted to receive property of the infant, idiot, lunatic, insane person or inebriate until he shall have given sufficient security, approved by a judge, or the court, to account for and apply the same under the direction of the court. (Rev., s. 1777; Code, s. 1573; C. C. P., s. 357; C. S. 2161.)

Cross References.—As to giving bond in surety company, see §§ 58-13 and 58-14.

Editor's Note.—In the fourth sentence of this section the words "for the clerk of the superior court may be appointed receiver of the estate of the ward and if so appointed were added by Public Laws, 1921, ch. 95.

Presumption of Giving of Bond.—When the fact that a guardian was appointed is admitted, a presumption arises that a guardian bond was given, since such a bond is a prerequisite to the appointment. Kell v. Maget, 18 N. C. 414.

Same.—No Denial Permissible.—Where there is evidence that one had been appointed and had acted as guardian, neither he nor his administrators can deny that he was guardian on the ground that he had not given bond. Latham v. Wilcox, 99 N. C. 367, 6 S. E. 711.

Omission by the clerk to take the bond required on the appointment does not impair the efficacy of the appointment. Howerton v. Sexton, 104 N. C. 75, 10 S. E. 148, cited in note in 33 L. R. A., N. &., 762.

Liability.—A guardian and his bondsmen are liable for all moneys due the ward which he has collected or ought to have collected. Loftin v. Cobb, 126 N. C. 58, 35 S. E. 230.

Same.—Guardian's Administrator Appointed.—Where the administrator of a lunatic becomes guardian, he and his bondsmen become liable for any balance due from the solvent estate of the former guardian. Loftin v. Cobb, 126 N. C. 58, 35 S. E. 230.

Notes.—Parties to Action on Bond.—Where an assistant clerk of the Superior Court has been appointed guardian of the estate of a minor by the clerk and has given bond and has defaulted, causing loss to the estate of the minor, upon the minor's coming of age he and the new guardian appointed may sue upon the guardianship bond and where he does so neither the clerk of the Superior Court nor his sureties on his bond is a necessary party, so far as his action is concerned. Phipps v. Royal Indemnity Co., 201 N. C. 551, 161 S. E. 69.

§ 33-13. Terms and conditions of bond; increased on sale of realty.—Every guardian of the estate, before letters of appointment are issued to him, must give a bond payable to the state, with two or more sufficient sureties, to be acknowledged before and approved by the clerk of the superior court, and to be jointly and severally bound. Where such bond is executed by personal sureties the penalty in such bond must be double, at least, the value of all personal property and the rents and profits issuing from the real estate of the ward, which value is to be ascertained by the clerk of the superior court by the examination, on oath, of the applicant for guardianship, or any other person, but where such bond shall be executed by a duly authorized surety company, the penalty in such bond may be fixed at not less than one hundred thousand dollars, in a sum equal to the value of all the personal property and rents and profits from real estate exceeds the sum of one hundred thousand dollars, in a sum equal to the value of all the personal property and rents and profits from real estate, plus ten per cent of the value of all the personal property and rents and profits from real estate belonging to the estate. The bond must be conditioned that such guardian shall faithfully execute the trust reposed in him as such, and obey all lawful orders of the clerk or judge touching the guardianship of the estate committed to him. If, on application by the guardian, the court or judge shall decree a sale for any of the causes prescribed by law of the property of such infant, idiot, lunatic or insane person, before such sale be confirmed, the guardian shall be required to file a bond as now required in double the amount of the real property so sold, except where such bond is executed by a duly authorized surety company, in which case the penalty of said bond need not exceed one and one-fourth times the amount of said real property so sold. (Rev., ss. 323, 1778; Code, s. 1574; R. C., c. 54, s. 5; 1702, c. 69, s. 7; 1825, c. 1285, s. 2; 1833, c. 17; 1908-9, c. 201, s. 11; 1874-5, c. 914-1925, c. 151; 1911, c. 595; C. S. 2162.)

Local Modification.—Craven: 1935, c. 147.

Cross References.—As to statute of limitations on the bond, see §§ 1-59 and 1-52. As to renewal of bond, see §§ 33-16. As to action on bond, see §§ 33-14 and notes. As to reduction of guardian's bond upon his delivery of registered securities to the clerk of court, see § 36-4. As to liability of clerk for taking insufficient bond, see § 33-18.

Editor's Note.—The proviso in regard to bonds where the value of the personal property and rents and profits from real estate exceeds the sum of one hundred thousand dollars was added by Public Laws 1925, c. 131.

Editor's Note.—Section 185 of the Public Laws of 1935 changed the penalty as specified in the second sentence in this section and added the exception appearing at the end of the section relating to cases where bond is executed by surety company.

This section contemplates that the bond shall be signed and acknowledged by the guardian as principal, as well as by the sureties. Cheshire v. Howard, 207 N. C. 566, 571, 178 S. E. 348.

Not Strictly a Record.—A guardian's bond is not strictly
a record of the court, although the fact that it was made and accepted may therefore be brought on the bond after its loss or destruction, without any previous application to the court to restore it as a record. Harrell v. Hare, 70 N. C. 658, 660.

Failure to Collect Money.—Where a guardian ought to receive a certain amount of money and does not, but takes something else, his own bond for instance, in place of the money, he and his sureties are liable. Avent v. Womack, 72 N. C. 397.

Bank Intermingling Trust Funds.—The bank, as guardian, in not investing the funds of its ward, but intermingling it with other funds of its bank, was faithless to the trust reposed in it, and, under the terms of this section, its bondsman must suffer the loss for such faithlessness. Roebuck v. National Surety Co., 300 N. C. 196, 156 S. E. 531.

For the bank intermingling the funds of its ward, no larger account could have been made to the bank, which was made as shown on its annual account was admissible against it. Jan as shown of his annual account was admissible against him. Jones v. Pierce, 197 N. C. 348, 349, 148 S. E. 418.

§ 33-14. To be recorded in clerk's office; action on bond. — The bond so taken shall be recorded in the office of the clerk of the superior court appointing the guardian; and any person injured by a breach of the condition thereof may prosecute a suit thereon, as in other actions. (Rev., 1779; Code, s. 1575; R. C., c. 54, s. 5; 1868-9, c. 291, s. 12; C. S. 2163.)

Acceptance without Guardian's Signature is Irregularity. — The acceptance and approval of the bond by the clerk of the Superior Court without the signature of the guardian as principal is an irregularity, but such irregularity does not render the bond void either as to the principal or as to his sureties. Cheshire v. Howard, 207 N. C. 356, 375, 175 S. E. 348.

Jurisdiction. — The clerk has no jurisdiction of a suit on a guardian's bond unless the guardian is a resident of the county. Rowland v. Thompson, 65 N. C. 110.

In Name of State. — An action on a guardian's bond should be in the name of the State, for the benefit of the plaintiff, and the sureties, if any, are persons acting in the capacity of sureties for the bond, and not in the name of the ward, and not in the name of the State, for the benefit of the plaintiff. (Rev., s. 1780; Code, s. 1576; R. C., c. 54, s. 8; 1822, c. 1161; 1868-9, c. 201, s. 13; C. S. 2164.)

Proper Relator.—Under the old system, a trustee appointed by the court of equity was a proper relator in an action on a guardian's bond to recover a trust fund. Jones v. Brown, 67 N. C. 475, distinguishing State v. Lightfoot, 26 N. C. 306; Governor v. Deaver, 25 N. C. 56; Waugh v. Miller, 33 N. C. 235. See also State v. Pettie v. Roisseau, 94 N. C. 355.

A creditor of a guardian is not a proper relator in an action upon the guardian's bond. McKinnon v. McKinnon, 81 N. C. 201.

Condition Set Out. — In an action on a guardian's bond, it is necessary that conditions of the bond which are alleged to have been broken should be set forth in the complaint. McKinnon v. McKinnon, 81 N. C. 201.

Evidence. — Evidence of a balance in the hands of a guardian as shown of his annual account was admissible against him. Jones v. Deaver, 58, 35 S. E. 230.

Same. — Bond Must Be Proved. — A guardian's bond is not a record, and, before it can be read in evidence in any case, it must be proved like all other bonds. Butler v. Durham, 38 N. C. 589.

Defenses. — The same defense which might be made to an action at law or suit in equity, brought in the name of the ward himself against the guardian, is good in an action brought on the guardian's bond. Clark v. Cordon, 30 N. C. 383.

Same. — Prior Settlement. — A full settlement of a suit brought by a ward on a guardian's bond, made after the ward becomes of age, in the presence of the ward's mother, and by the advice of her counsel, and a final judgment thereon, is a bar to a subsequent action on the bond. Dean v. Bagdale, 80 N. C. 215.

Same. — Statute of Limitations. — An action by the ward against the sureties on the bond of the guardian is barred after three years from the time the ward becomes twenty-one years old if the guardian makes no final settlement, and within the penalty of the bond, and to be discharged on payment of the damages sustained. Anthony v. Estes, 101 N. C. 541, § 8 E. 547.

Same. — Measure of Damages. — The measure of damages in an action upon a guardian's bond for a failure to perform any duty required of him is the amount of the principal received, with compound interest at six per cent until the ward arrives at full age. Topping v. Windley, 99 N. C. 4, 5 S. E. 14.

§ 33-15. Where several wards with estate in common, one bond sufficient. — When the same person is appointed guardian to two or more minors, idiots, lunatics or insane persons possessed of one estate in common, the clerk of the superior court may take one bond only in such case, upon which each of the minors or persons for whose benefit the bond is given, or their heirs or personal representatives, may have a separate action. (Rev., s. 1789; Code, s. 1576; R. C., c. 54, s. 8; 1822, c. 1161; 1868-9, c. 201, s. 13; C. S. 2164.)

§ 33-16. Renewal of bond every three years; enforcing renewal. — Every guardian shall renew his bond before the clerk of the superior court every three years, during the continuance of the guardianship. The clerk of the superior court shall issue a citation to require such guardian to renew his bond, requiring such guardian to renew his bond within twenty days after service of the citation; and on return of the citation duly served and failure of the guardian to comply therewith, the clerk shall remove him and appoint a successor: Provided, that this section shall not apply to a guardian whose bond is executed by a duly authorized surety company. (Rev., ss. 324, 1781, 1782; Code, ss. 1581, 1582; R. C., c. 54, s. 10; 1782, c. 69, s. 15; 1868-9, c. 201, ss. 15, 19; 1943, c. 167; C. S. 2165.)

Editor's Note. — The 1943 amendment added the proviso.

Same. — Clerk's Liability. — The question of the clerk's liability for failure to enforce the renewal of the guardian's bond has caused some conflicting decisions. In Lee v. Watson, 29 N. C. 289, it was decided by a divided court that, "the clerk and his sureties are responsible for neglect in failing to enforce renewal of the bond, and were bound to make compensation to the orphans for any loss they sustained thereby." Later in Jones v. Biggs, 46 N. C. 354, on the same question a divided court decided that the clerk was not liable. That the clerk and his sureties are not liable was also decided in Sullivan v. Lowe, 54 N. C. 500, the opinion being per curiam, and this is the law today.

Where a guardian gives several successive bonds for the faithful discharge of his trust, the sureties on each bond standing in the same capacity, and each bond being secured by a surety on another bond; the only qualification to the rule being that the sureties are bound to contribution only according to the amount of the principal in each class is bound. Thornton v. Barbour, 204 N. C. 383, 595, 169 S. E. 153; Jones v. Hays, 38 N. C. 502.

§ 33-17. Relief of endangered sureties. — Any surety of a guardian, who is in danger of sustaining loss by his suretyship, may file his complaint
before the clerk of the superior court where the guardianship was granted, setting forth the circumstances of his case and demanding relief; and thereupon the guardian shall be required to answer the complaint within twenty days after service of the summons. If, upon the hearing, the clerk of the superior court deem the surety entitled to relief, the same may be granted by compelling the guardian to give a new bond, or to indemnify the surety against apprehended loss, or by the removal of the guardian from his trust; and in case the guardian fail to give a new bond or security to indemnify when required to do so within reasonable time, the clerk of the superior court must enter a peremptory order for his removal, and his authority as guardian shall thereupon cease. (Rev., s. 1783; Code, s. 1606; R. C., c. 54, s. 35; 1762; c. 69, ss. 21, 22; 1868-9, c. 201, s. 43; C. S. 2166.)

Giving New Bond with Other Sureties.—A surety to a guardian's bond is not discharged from responsibility for giving a new bond with other sureties. Jones v. Blanton, 41 N. C. 115.

Liability of New Sureties.—When, under this section, new sureties are ordered to be given, the sureties given by the new sureties extend to the entire guardianship, retrospective as well as prospective. Such a bond is at least an additional and cumulative security for the ward. Rev. v. Bell, 18 N. C. 475.

Where Counter-Security Given.—Where the sureties of a guardian obtained an order for counter-security, and at that time the guardian owed his ward, and never afterwards returned an account nor made a payment, no presumption of satisfaction at that or any subsequent time arose from the fact that he was then able to pay the sum he owed; and the sureties on the first bond were liable for it, though the order for counter-security expressly released them. Foye v. Bell, 18 N. C. 475.

The clerk is not empowered by any express statute to release sureties, upon bonds approved by him, especially at a time when the principal is in default. This section provides a remedy for dissatisfied sureties upon guardians bonds, but release is not one of the remedies therein contemplated. Thornton v. Barbour, 204 N. C. 383, 587, 169 S. E. 151.

§ 33-18. Liability of clerk for insufficiency bond.—If any clerk of the superior court shall commit the estate of an infant, idiot, lunatic, insane person or inebriate to the charge or guardianship, and shall fail within taking good and sufficient security for the same as directed by law, such clerk shall be liable, on his official bond, for the loss, or by the removal of the guardian from his authority, or by the removal of the guardian from his trust; and in case the guardian fail to give a new bond or security to indemnify when required to do so within reasonable time, the clerk of the superior court must enter a peremptory order for his removal, and his authority as guardian shall thereupon cease. (Rev., s. 1783; Code, s. 1606; R. C., c. 54, s. 35; 1762; c. 69, ss. 21, 22; 1868-9, c. 201, s. 43; C. S. 2166.)

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Compromise of Claim.—A ward is not bound by a compromise of his guardian and which later became insolvent does not will be inferred and the compromise will be set aside without a specific finding of actual fraud. Bunch v. Foreman

Effect of Failure.—The giving of the bonds required of guardians and administrators is not essential to the validity of the appointment itself; the failure to take the bond, however, subjects the officer whose duty it is to see that it is made, to all damages sustained by the ward for the non-performance of his official duty. Jones v. Briggs, 46 N. C. 364.

§ 33-19. Liability of clerk for other defaults.—If any clerk of the superior court shall willfully or negligently do, or omit to do, any other act prohibited, or other duty imposed upon him by law, by which act or omission the estate of any ward suffers damage, he shall be liable therefor as directed in § 33-18. (Rev., s. 1785; Code, s. 1615; 1868-9, c. 201, s. 52; C. S. 2165.)

Editor's Note.—Former Provision.—Formerly the clerk was required to make a record of any compromise attempted of the docket the names of the justices who were present at the granting of a guardianship; and he was also required to make the same entry on the guardian's bond. The purpose of requiring such record was an easy means of determining which of the justices were on the bench in the event that they had been guilty of such negligence in respect to the compromise attempted of the docket. In bonds as to the action of the infant according to the provisions of the statute, State v. Koonce, 51 N. C. 379, 380.

Art. 3. Powers and Duties of Guardian.

§ 33-20. To take charge of estate. — Every guardian shall take possession, for the use of the ward, of all his estate, and may bring all necessary actions therefor. (Rev., s. 1786; Code, s. 1588; R. C., c. 54, s. 21; 1762; c. 69, s. 3; 1868-9, c. 201, s. 25; C. S. 2169.)

Cross References.—As to power of guardians to lend portions of the estates of their wards, see § 24-4. As to the personal liability of the guardian for stock held for the use of the ward, see §§ 53-40 to 53-49; as to voting as stockholder, see §§ 55-113, 105-153, and 105-154. As to payment of taxes, see § 105-412. As to investment and deposit of funds generally, see § 36-1 et seq. As to estate of deceased, see §§ 53-55 to 53-60; in bonds guaranteed by United States, see § 33-44; in mortgages of federal housing administration, etc., see § 53-61.

In General.—The rule of diligence established by the decided cases is that a guardian in the management of his ward's estate must act in good faith and with that care and judgment which an ordinary prudent man would exercise in his own affairs. Covington v. Leak, 67 N. C. 363, 364; Tracy v. Wilson, 74 N. C. 368, 369; State v. Mebane, 63 N. C. 315; Litton v. Wilcox, 83 N. C. 21, 26.

The rights and powers of guardians are considered as strictly local; and not as entitling them to exercise any authority over the person or personal property of their wards in other states. Lamar v. Mico, 112 S. U. S. 452, 470, 5 S. Ct. 231, 26 L. Ed. 753.

Payment of funds to a guardian by Veterans' Bureau under War Risk Insurance Act vests title in the ward and quiets the rights of any person thereafter claiming personal for real security; and, if he does it bonafide, he is not being an amount due the U. S. Government, the Government having discharged its obligation by payment to the guardian. In re Home Savings Bank, 204 N. C. 454, 463, 168 S. E. 688.

Under this section the guardian can select the forum, as there is no statute to the contrary. Lawson v. Langley, 214 N. C. 23, 197 S. E. 299.

Power to Bind Ward by Contract.—A contract made by a guardian within his authority, will be binding upon his ward upon his attaining full age. United States Mortgage Co. v. Spence, 188 U. S. 313; 39 S. Ed. 672, 33 S. L. Ed. 341.

Recovery of Realty. — A guardian having no title to the land of his ward, it is not his duty to sue for the recovery of realty. Cross v. Craven, 188 U. S. 331, 26 S. E. 940.

Guardian as Exchange Property. — A guardian, having personal surety for a debt due to his ward, may exchange that personal for real security; and, if he does it bona fide, he is not responsible to his ward. Christians v. Wright, 38 N. C. 271, 7 S. E. 374.

Compromise of Claim.—A ward is not bound by a compromise of his guardian of the former's claim for damages to the estate of the ward, for the performance of the duties of the court to which the guardian should account; and in no event when the compromise is due to the gross negligence of the guardian, or in bad faith, and is manifestly unfair to the estate of the ward, and for the performance of his duty; and when such are found to be the facts, legal fraud will be inferred and the compromise will be set aside without a specific finding of actual fraud. Bunch v. Foreman Blades Lumber Co., 174 N. C. 8, 93 S. E. 374.

Statute of limitations upon discovery of fraud, see John-
§ 33-21. How sales and rentals made. — All sales and rentings by guardians shall be publicly made, between the hours of nine o'clock A. M. and four o'clock P. M., after twenty days notice posted at the courthouse and four other public places in the county. But, upon petition by the guardian, the clerk of the superior court of the county in which the land is situated, or of the county wherein the guardian has qualified, may make an order, on satisfactory evidence, upon the oath of at least two disinterested freeholders acquainted with the said land, that the best interests of the said ward will be subserved by a private renting of said land, allowing the guardian to rent the land privately. The terms of all such rentings shall be reported to the said clerk of the superior court and be approved by him. The proceeds of all sales of personal estate and rentings of real property, except the rentings of lands leased for agricultural purposes, when not for cash, shall be secured by bond and executed by guardians. Although such security shall not be necessary to the sale or renting of lands leased for agricultural purposes, the proceeds of all sales of personal estates and real estate by a guardian shall be made publicly, and, upon the terms therein prescribed, are peremptory and leave no discretion to such guardians. Pate v. Kennedy, 104 N. C. 234, 10 S. E. 188.

Same.—Not Discretionary with Guardian.—The provisions of this section that all sales or renting of personal and real property by a guardian shall be made publicly, and, upon the terms therein prescribed, are peremptory and leave no discretion to such guardians. Does not apply to sales made under section 33-22, the lessee may not hold the land for the lessee's purposes, nor for his false warranty thereof. Coxe v. Whitmire Motor Sales Co., 190 N. C. 833, 130 S. E. 841.

§ 33-22. When lands may be leased. — The guardian may lease the lands of an infant for a term not exceeding the end of the current year in which the infant shall become of age, or die in nonage. But no guardian, without leave of the clerk of the superior court, shall lease any land of his ward without impeachment of waste, or for a term of more than three years, unless at a rent not less than three per centum on the assessed taxable value of the land. (Rev., s. 1789; Code, s. 1590; 1891, c. 83; 1901, c. 97; R. C., c. 54, s. 26; 1793, c. 391; C. S. 2171.)

Public Renting Required.—This section implicitly declares it to be to the interest of the wards to rent the lands publicly. Loss v. Whitmore, 119 N. C. 431, 23 S. E. 646.

Same.—Not Discretionary with Guardian.—The provisions of this section that all sales or renting of personal and real property by a guardian shall be made publicly, and, upon the terms therein prescribed, are peremptory and leave no discretion to such guardians. Pate v. Kennedy, 104 N. C. 234, 10 S. E. 188.

Same.—Purpose of Provision.—The purpose of these precise and stringent regulations is to give notice to the public of the time, place and terms of such “sales and rentings,” and thus encourage and promote competition and obtain better prices and higher rents for the property sold or let, and, also, to prevent the exercise of possible bad judgment, imprudence, lack of caution, collusion and fraud on the part of guardians. Pate v. Kennedy, 104 N. C. 234, 216, 10 S. E. 188.

Same.—Effect of Violation.—Where a lease by the guardian of his ward's lands was not publicly made, as required by this section, he, not approved by the clerk of the superior court, as required by section 33-22, the lessee may not hold the ward's estate liable for the false representation of the guardian's agent as to the value of the leased property for the lessor's prices, nor for his false warranty thereof. Coxe v. Whitmire Motor Sales Co., 190 N. C. 833, 130 S. E. 841.

Same.—Application.—This section, requiring sales by guardians, does not apply to sales made by the guardian by direction of the superior court in exercise of its general jurisdiction in equity. Barcello v. Hapgood, 118 N. C. 712, 24 S. E. 124. The section restricts the guardian and not the court. Id.

Court May Order Private Sale.—It is not irregular or erroneous to order the sale of an infant's land to be made privately by the guardian. Barcello v. Hapgood, 118 N. C. 712, 24 S. E. 124.

§ 33-23. When guardians to cultivate lands of wards. — Where any parent of a minor child qualifies as guardian of such child, and the ward owns or is entitled to the possession of any real estate used or which may be used for agricultural purposes, such guardian may make application to the clerk of the superior court of the county wherein the land is situated for permission to cultivate it, and the petition shall set forth the nature, extent and location of the same. It shall then be the duty of the clerk to appoint three disinterested resident freeholders, who shall go upon the land and, after being sworn to act impartially, assess the annual rental value thereof. The commissioners shall report their proceedings and findings to the clerk within ten days after the notification of their appointment, and if the clerk shall deem the same to be the interest of the ward he shall make an order allowing the guardian to cultivate the land for a term not exceeding three years at the annual rental value assessed by the commissioners to be paid to the ward by the guardian. The term, however, shall not extend beyond the minority of the minor. The commissioners shall receive as compensation for said services the same fees as are allowed commissioners in partition of real estate. (1909, c. 177; C. S. 1917, c. 1247.)

Cross Reference.—As to compensation of commissioners in partition of real estate, see § 1-408.

§ 33-24. Guardians' powers enlarged to permit cultivation of ward's lands or continuation of ward's business.—In addition to the powers given to guardians under the general laws of the State, all guardians may, upon presentation of satisfactory evidence, with approval of the clerk of superior court, which approval must be concurred in by the resident judge or other regular or special judge holding courts in the district, cause lands to be cultivated and make such contracts with reference thereto as said guardian may deem to be to the best interest of his ward's estate, and under the direction of the clerk of superior court, with the approval of the resident judge or other regular or special judge holding courts in the district, continue to operate any business or business enterprise of his ward and make such contracts, agreements, and settlements with reference thereto as the clerk of superior court, with the approval of said resident judge or other regular or special judge holding courts in the district, may determine necessary or find to be to the best interest of the estate. (1935, c. 24.)


§ 33-25. Guardians and other fiduciaries authorized to buy real estate foreclosed under mortgage executed to them.—On application of the guardian or other fiduciary of any idiot, inebriate, lunatic, non compos mentis or any person incompetent from want of understanding to manage his own affairs for any cause or reason, or any minor or infant, or any other person for whom such guardian or fiduciary has been appointed, by pe-
tion, verified upon oath, to the superior court, showing that the purchase of real estate is necessary to avoid a loss to the said ward's estate by reason of the inadequacy of the amount bid at foreclosure sale; and under a mortgage or deed of trust securing the re-payment of funds previously loaned the mortgagor by said guardian or other fiduciary, and that the interest of the ward would be materially promoted by said purchase the proceeding shall be conducted as in other cases of special proceedings; and the truth of the matter alleged in the petition being ascertained by satisfactory proof, or by affidavit of three disinterested freeholders over twenty-one years of age who reside in the county in which said land lies, a decree may thereupon be made that said real estate be purchased by such person; but no purchase of real estate shall be made until approved by a judge of the superior court, nor shall the same be valid, nor any conveyance of the title made, unless confirmed and directed by a judge, and action only in compliance with the terms and conditions set out in said order and judgment. (1935, c. 156.)

§ 33-26. Plate and jewelry to be kept.—All plate and jewelry shall be preserved and delivered to the ward at age, in kind, according to weight and quantity. (Rev., s. 1791; Code, s. 1795; 1865, c. 74; 1868-9, c. 201, s. 34; C. S. 2173.)

§ 33-27. Personal representative of guardian to pay over to clerk.—In all cases where a guardian of any minor child or of an idiot, lunatic, inebriate or insane person dies, it is competent for the executor or administrator of such deceased guardian, at any time after the grant of letters testamentary or of administration, to pay into the office of the clerk of the superior court of the county where such deceased guardian was appointed, any moneys belonging to any such minor child, idiot, lunatic, inebriate, and any such payment shall have the effect to discharge the estate of said deceased guardian and his sureties upon his guardian bond to the extent of the amount so paid. (Rev., s. 1794; Code, s. 1622; 1881, c. 301, s. 2; C. S. 2176.)

Cross Reference.—As to a mortgage to guardian, see § 45-19.

No Action between Administrators.—The administrator of a deceased ward is not entitled to recover, in an action against the administrator of the deceased guardian, any money which came into the guardian's hands as proceeds of real estate belonging to the ward sold under a decree of court for partition. Allison v. Robinson, 78 N. C. 61.

§ 33-28. Collection of claims; duty and liability.—Every guardian shall diligently endeavor to collect, by all lawful means, all bonds, notes, obligations or moneys due his ward when any debtor or his sureties are likely to become insolvent, on pain of being liable for the same. (Rev., s. 1795; Code, s. 1595; R. C., c. 54, s. 23; 1762, c. 69, s. 10; 1868-9, c. 201, s. 30; C. S. 2177.)

Cross Reference.—As to compound interest on obligations due to guardians, see § 34-4. As to criminal liability of guardians for non-payment of funds, see § 14-90.

General Liability.—A guardian is liable not only for what he does receive, but for what he ought to receive; and if he oufrightly or wilfully neg- lects his duties and does not, but takes something else, his own bond for instance, in the place of money, he and his sureties are liable. Avent v. Womack, 72 N. C. 33.

Same—Diligence and Good Faith.—A guardian is responsible, not only for what he receives, but for all he might have received by the exercise of ordinary diligence and the highest degree of good faith. Armfield v. Brown, 73 N. C. 61.

A guardian, who acted in good faith and was not guilty of culpable negligence, was held not to be responsible for omitting to collect a note during the late war, when it appeared that both of the two obligors were solvent during the war, and were made insolvent by its results. Love v. Louisa, 69 N. C. 70.

Need Not Resort to Extraordinary Remedies.—Guardians are not responsible for losses to their wards attributable to their not having resorted to new and extraordinary remedies if the result of the same is doubtful. White v. Robinson, 64 N. C. 698.

Accepting Unsecured Note.—A guardian who accepts an unsecured note in payment of a debt due his ward is guilty of laches, and is not entitled to the amount of such note. Covington v. Leak, 65 N. C. 594.

Power to Collect and Compromise Debts.—It is held in the U. S. Supreme Court that a guardian, unless restricted by statute, may collect or compromise and release debts due to the ward, subject to the liability to be called to account if he has acted without due regard to the ward's interest. May v. Equitable Life Assurance Society, 152 U. S. 499, 503, 38 L. Ed. 523.

Accepting Smaller Sum.—Where a guardian accepts from an administrator a smaller sum than the wards' share in the estate, the wards may, at their option, sue the guardian or the administrator for the deficiency. Alexander v. Alexander, 120 N. C. 472, 27 S. E. 121.

Failure to Ascertain Amount Due.—Where a guardian carelessy and without deliberation accepts a fund from an insolvent debtor an amount less than they are entitled to receive from a fund, he is liable to the wards for the difference. Culp v. Sandford, 112 N. C. 604, 16 S. E. 761, distinguishing Gutton v. Wilson, 63 N. C. 21, and other decisions cited.

Failure to Sue before Insolvency.—Where a guardian fails to sue on note due his ward's estate until the parties thereto are insolvent, he is liable for his negligence. Diggins v. Phyth, 113 N. C. 102, 18 S. E. 96.

Failure to Sue—Surety Knowing of Obligor's Insolvency.—Where a guardian waited six months after the principal in a note held by him as guardian died insolvent before he sued the surety, who also became insolvent before the suit was brought, the surety having known the whole time of the true condition of the obligors, it was held that by his laches he made himself responsible for the loss of the debt. Williamson v. Williams, 59 N. C. 63, distinguishing Guppy v. Ivey, 53 N. C. 370; Davis v. Marcum, 57 N. C. 189.

§ 33-29. Liability for lands sold for taxes.—If any guardian suffer his ward's lands to lapse or become forfeited or be sold for nonpayment of taxes or other dues, he shall be liable to answer for the full value thereof to his ward. (Rev., s. 1796; Code, s. 1595; R. C., c. 54, s. 27; 1762, c. 69, s. 14; 1868-9, c. 201, s. 32; C. S. 2178.)

§ 33-30. Liability for costs.—All fees and costs of the superior court for issuing orders, citations, summonses or other process against guardians for their supposed defaults shall be paid by the party found in default. (Rev., s. 1797; Code, s. 1611; 1868-9, c. 201, s. 48; C. S. 2179.)

Cross Reference.—As to oswelry to be paid by guardian, see § 46-12.

Art. 4. Sales of Ward's Estate.

§ 33-31. Special proceedings to sell; judge's approval required.—On application of the guardian by filed petition verified upon oath, to the superior court, showing that the interest of the ward would be materially promoted by the sale or mortgage of any part of his estate, real or personal, the proceeding shall be conducted as in other cases of special proceedings; and the truth of the matter alleged in the petition being ascertained by satisfactory proof, a decree may thereupon be made that a sale or mortgage be had by the person in such way and on such terms as may be most advantageous to the interest of the ward; but no sale or mortgage shall be made until approved by the judge of the court, nor
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shall the same be valid, nor any conveyance of the title made, unless confirmed and directed by the judge, and the proceeds of the sale or mortgage shall be exclusively applied and secured to such ends as the court shall specify. The guardian may not mortgage the property of his ward for a term of years in excess of the term fixed by the court in its decree. The word "mortgage" whenever used herein shall be construed to include deeds in trust. (Rev., s. 1798; Code, s. 1603; R. C., c. 54, §§ 211, 1621, 1622; 1827, c. 35, 1606-89; C. 201, s. 39; 1917, c. 238, s. 1; 1923, c. 67, s. 1; C. S. 2180.)

Cross References.—As to sale of estate of an idiot, insane, or lunatic, see §§ 35-10 and 35-11. As to release of land condemned under the powers of eminent domain, see § 35-22.

Editor's Note.—In the next to the last sentence in this section a change was made by Public Laws 1923, ch. 67, section 1. The former provision was that a guardian could not mortgage his ward's property for a term of years "exceeding the minority of the ward." This limitation was stricken out and the term made dependent upon the decree of the court.

Not Applicable to Settlement or Partition.—This section does not apply either to the settlement of estates or to partition. Clark v. Carolina Holmes, 189 N. C. 703, 128 S. E. 20, 29.

Presumption That Statutory Requirements Have Been Met.—Although this section must be strictly complied with, where those requirements are met the mortgage of the guardian's ward's land, and the clerk has entered an order thereon, for which order has been approved by the court, there is a presumption that the statutory requirements have been met. Quick v. Federal Land Bank, 208 N. C. 562, 181 S. E. 746.

Where the guardian's application for a loan stated that the proceeds thereof were to be used to purchase live stock necessary to the proper operation of the farm, to erect buildings on the land, and to provide improvements as defined by the Board of Agriculture, the court, under the presumption that the provisions of this section were followed, the mortgage is valid and binding upon the ward's estate as to the funds used for permanent improvements on the land, but as to the funds used to purchase live stock the mortgage is void as to the wards, such fund not having been used to materially promote their interest, and the mortgage on the wards' estate in remainder, to the extent of the proceeds used to purchase live stock should be set aside upon their petition therefor filed upon their coming of age.

Jurisdiction.—The previous court of equity had authority upon the ex parte petition of the plaintiffs, while they were infants, suing by their mother as next friend, to order and approve execution of a mortgage on same by the guardian for a period exceeding the minority of the wards, such statutory power, together with the inherent jurisdiction of the court over the estates of infants, give courts of equity plenary jurisdiction to order and approve a mortgage to a guardian to execute a lease on the real estate belonging to his wards for a period exceeding the guardianship term for the wards, upon its finding that such power would be to the best interest of the wards. Charles Stores Co., 215 N. C. 380, 1 S. E. (2d) 848, 121 A. L. R. 147.

Must Be Represented.—The court may sell the land of minors for better investment, when they are properly represented before the court. Hutchinson v. Hutchinson, 136 N. C. 671, 56 S. E. 149.

Impounded by Court.—The next friend of an infant ought always to be appointed by the court, and really he is an officer of the court, under its supervision and control. Tate v. Mott, 96 N. C. 19, 2 S. E. 176.

Removal.—The court has power, for good cause shown, to remove the next friend of an infant litigant, and appoint another as often as may be necessary. Tate v. Mott, 96 N. C. 19, 2 S. E. 176.

Power of Representative.—The power of a guardian to make disposition of his ward's real estate is very carefully regulated and a sale is not allowed except on petition filed, and the order is confirmed by all the judges of the court, upon approval of the judge. Morton v. Lumber Co., 127 N. C. 163, 106, 100 S. E. 322.

Representative May Be a Party.—The guardian or next friend of an infant is not properly speaking a party to the action, although his name appears in the record. Tate v. Mott, 96 N. C. 19, 2 S. E. 176.

Notice to Infant Unnecessary.—It is not essential that the infant should know that an action has been brought in his favor by a next friend, as his incapacity to judge for himself is presumed, but the court may inquire into the propriety of the action and take such steps as may be necessary. Tate v. Mott, 96 N. C. 19, 2 S. E. 176.

Sale May Be Private.—The sale by order of the court may be either public or private, see section 41-11, and suits for the sale of contingent interests, see section 41-11.

S. E. 402. As to procedure for the sale of contingent interests, see section 41-11.

Equity Court May Authorize Lease Extending Beyond Per- iode of Minority.—Since the superior courts in proper instances have authority to order a sale of infants' real estate and to order and approve execution of a mortgage on same by the guardian for a period exceeding the minority of the wards, such statutory power, together with the inherent jurisdic- tion of the court over the estates of infants, give courts of equity plenary jurisdiction to order and approve a mortgage to a guardian to execute a lease on the real estate belonging to his wards for a period exceeding the guardianship term for the wards, upon its finding that such power would be to the best interest of the wards.

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 Barberio v. Hapgood, 118 N. C. 712, 24 S. E. 124. Section 31-21 does not apply when the sale is by order of court.

Guardian Cannot Purchase.—It is well settled that a guardian cannot purchase at his own sale, and that all such purchases may be treated as invalid, at the option of the wards, even when no unfairness in the sale and purchase has been shown. Practice of the Superior Courts, 201 N. C. 576, 194 A. S. 426.

Guardian Appointed by Court.—Where a guardian obtains a decree of a court of equity for the sale of his ward's land, it must appear upon the record to be for any loss in consequence of such sale, that he willfully practiced a deception on the court by false allegations and false evidence, or by industriously concealing material facts. Harrison v. Bradley, 60 N. C. 13.

When Guardian Liable.—Where a guardian obtains a decree of a court of equity for the sale of his ward's land, it must appear upon the record to be for any loss in consequence of such sale, that he willfully practiced a deception on the court by false allegations and false evidence, or by industriously concealing material facts. Harrison v. Bradley, 60 N. C. 13.

Where an order confirming a sale of lands for partition does not provide for the disbursement of the funds, and the sum received is properly paid into court and properly disbursed to the parties, the share of the minors therein being less than one hundred dollars and being paid to their mother for their benefit, under § 2-33, the sale was not void. Ex parte McDougall, 14 N. C. 531, 4 S. E. 426.

Where Order Violated.—It is proper for the court, before intervening rights have accrued, upon affidavit of one who has been adjudged an idiot in proceedings before the clerk, and a guardian is appointed, to grant a temporary restraining order, with notice to show cause, and at the hearing thereof to continue the order to the final hearing, when it appears the guardian has not the interest in lands of his ward and made title thereto, without complying with the terms of the order of sale, contrary to the provisions of the order of sale. In re Propriety of N. C. 532, 57 S. E. 434.

Proof Required.—It is held that in addition to the verified petition of the guardian, the clerk shall require other satisfactory proof of the truth of the matter alleged, such as to justify discharging the functions of a chancellor, where sales of this character do not include a provision for proceedings in courts of equity, always referred the petition to the clerk and master, who took evidence and reported their conclusions to the court. It is usual, since these large and important equitable functions are conferred upon

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the clerk, to accompany the petition with affidavits showing the necessity for the sale. The practice is to be modified, and should not, without good cause, be departed from. In re Propst, 144 N. C. 562, 567, 57 S. E. 345.

Sale Without Probate Court.—Where a sale of real estate is made by the court, without any means to ascertain the necessity for a sale, excepted to be made, and that it should be “first advertised at the court house and three other public places,” and no bid be received, and the sale is ordered to be made, the same is void, it was held, that it was not to error to set aside the sale and direct another. In re Dickerson, 111 N. C. 108, 114, 15 S. E. 1025.

An emergency judge has no power to approve and confirm an order of the court for the sale or mortgage of lands by guardian. An emergency court is not holding court in the county. Ipock v. North Carolina Joint Stock Land Bank, 206 N. C. 791, 175 S. E. 127.

Approval Nunc Pro Tunc.—Where a guardian executed a notice of sale of the estate of his wards approved by a foreign judge, without the approval of the judge, and the judge later approved the order the nunc pro tunc, the defect was cured so as to make the sale valid. Wilcock v. Armour Fertilizer Works, 205 N. C. 311, 170 S. E. 333. Pick v. North Carolina Joint Stock Land Bank, 206 N. C. 791, 797, 175 S. E. 127.

No guardian may be authorized to join with the life tenant in executing a mortgage on lands in which his wards own the remainder in order to make conveyance, it was held, that it was not to error to set aside the sale and direct another. In re Dickerson, 111 N. C. 108, 114, 15 S. E. 1025.

When Foreign Guardian May Sell.—Where a foreign guardian has complied with the provisions of sections 33-48 and 33-49 which authorize him to withdraw the estate of his wards to the place of their residence and to a court of foreign jurisdiction to sell the same proceeds, and the same proceedings may be had against the personal or real estate as may be sufficient to discharge such debt or demand; and the order of the court shall particularly specify what property is to be sold and the terms of sale; but no real estate shall be sold under this section, in any case, without the revision and confirmation of the order therefor by the judge of the superior court. The proceeds of sale under this section shall be considered as assets in the hands of the guardian for the benefit of creditors, in like manner as assets in the hands of a personal representative; and the same proceedings may be had against the guardian with respect to such assets as might be taken against an executor, administrator or collector in similar cases. (Rev., ss. 1800, 1801: Code, ss. 1601, 1605; R. C., c. 54, s. 34; 1790, c. 311, s. 5; 1868-9, c. 201, ss. 41, 42; C. S. 2182.)

Ascertainment That Debts Are Due.—The court should first ascertain that there are debts due from the ward, which render the sale of the property expedient, and they should also select the part or parts of his property which can be disposed of with least injury to the ward. Leary v. Fletcher, 23 N. C. 295.

An order authorizing a guardian, under certain circumstances, to sell the land of his ward, must first show that it was adjudged that there were debts due from the ward, and then specify what particular land is to be sold for their payment. Spruill v. Davenport, 48 N. C. 42.

Same—Amount Need Not Be Shown.—The amount of the debts, or to whom due, need not be set forth in the order. See Trueblood, 48 N. C. 96; Spruill v. Davenport, 48 N. C. 42.

Sale—Void When Debt Not Shown.—A sale of a ward’s land without the judgment of the court is void, and must first show that it was adjudged that there were debts due from the ward, which render the sale of the property expedient, and they should also select the part or parts of his property which can be disposed of with least injury to the ward. Cofield v. McLean, 49 N. C. 15.

Specifying Land to Be Sold.—An order that the guardian shall sell the land of his ward, or so much thereof as will be sufficient to discharge his debts, is fatally defective and void, and vests no title in those who bought at the sale.

Where the order "to sell the land of the ward named in the petition, adjoining the lands of A., B., and others, the heirs-at-law was improperly admitted a party defendant. Such claims shall be set up in this proceeding. Boddin v. Sanderlin, 90 N. C. 546.

Proceeds Subject to Attachment.—Money from the sale of land which belonged to wards is subject to attachment in the hands of the clerk after the confirmation of the sale. Leroy v. Jacobosky, 136 N. C. 443, 48 S. E. 796.

Priority in Payment.—When a guardian of an infant, under an order of court, sells his ward's land for payment of debts of the ancestor, he is bound to observe the same priority in the payment of the debts as an administrator or executor in applying the personal assets. Merchant v. Sanderlin, 25 N. C. 503.

Sale of Lunatic's Property.—A guardian of a lunatic may, by order of the court, rightfully sell the personal property of his ward for the payment of his debts, provided there be no fraud in the proceeding. Howard v. Thompson, 30 N. C. 367. As to sale or renting of lunatics' estates, see sec. 35-10 et seq.

§ 33-34. To sell perishable goods on order of clerk.—Every guardian shall sell, by order of the clerk of the superior court, all such goods and chattels of his ward as may be liable to perish or be the worse for keeping. Every such order shall be entered in the order record of the superior court and must contain a descriptive list of the property to be sold, with the terms of sale. (Rev, s. 1787; Code, s. 1589; R. C., c. 54, s. 22; 1762, c. 69, s. 10; 1508-9, c. 201, s. 26; C. S. 2170.)

§ 33-35. When timber may be sold.—In case the land cannot be rented for enough to pay the taxes and other dues thereof, and there is not money sufficient for that purpose, the guardian, with the consent of the clerk of the superior court, may annually dispose of or use so much of the lightwood, and box or rent so many pine trees, or sell so much of the timber on the same, as may raise enough to pay the taxes and other duties thereon, and no more. (Rev., s. 1790; Code, s. 1596; R. C., c. 54, s. 27; 1762, c. 69, s. 14; 1868, c. 201, s. 14; C. S. 2170.)

Sale without Order of Court.—Where a guardian sold timber on the land of his ward without an order of the court, as required by this section, and took a note for the purchase money, the maker of such note cannot sue on such note, and the court may declare the contract set up the failure of the guardian to observe the statutory mandate. Evans v. Williamson, 79 N. C. 86.

Art. 3. Returns and Accounting.

§ 33-36. Return within three months.—Every guardian, within three months after his appointment, shall exhibit an account, upon oath, of the estate of his ward, to the clerk of the superior court; but such time may be extended by the guardian, within three months after his appointment, to set out the manner in which he has invested the ward's estate, and the nature of the securities held as guardian. State v. Gooch, 97 N. C. 186, 1 S. E. 653.

What Set Out.—It is the duty of a guardian in making his annual returns to set out the manner in which he has invested the ward's estate, and the nature of the securities held as guardian. State v. Gooch, 97 N. C. 186, 1 S. E. 653.

Accounts Prima Facie Correct.—The ex parte settlements made by guardians, executors and administrators with the assets having jurisdiction of such matters, are, when accepted by the court, prima facie correct, and while not conclusive upon creditors or next of kin, and strict proof and specific allegations of errors are not required as in actions to surcharge a stated account, nevertheless the burden is on the party attacking them to establish, by a preponderance

§ 33-37. Procedure to compel return.—In cases of default to exhibit the return required by § 33-36, the clerk of the superior court must issue an order requiring the guardian to file such return forthwith, or to show cause why an attachment should not issue against him. If, after due service of the order, the guardian does not, on the return day of the order, file such return, or obtain further time to file the same, the clerk of the superior court shall issue an attachment against him, and commit him to the common jail of the county till he files such return. (Rev., s. 1803; Code, s. 1578; R. C., c. 54, s. 12; 1762, c. 69, s. 15; 1868-9, c. 201, s. 15; C. S. 2184.)

Cross Reference.—As to suits for accounting at term, see § 28-147.

§ 33-38. Additional assets to be returned.—Whenever further property of any kind, not included in any previous return, comes to the hands or knowledge of any guardian, he must cause the same to be returned within three months after the possession or discovery thereof; and the making of such return of new assets, from time to time, may be enforced in the same manner as prescribed in § 33-37. (Rev., s. 1804; Code, s. 1579; 1868-9, c. 201, s. 16; C. S. 2185.)

§ 33-39. Annual accounts.—Every guardian shall, within twelve months from the date of his qualification or appointment, and annually, so long as any of the estate remains in his control, file in the office of the clerk of the superior court an inventory and account, under oath, of the amount of property received by him, or invested by him, and the manner and nature of such investment, and his receipts and disbursements for the past year in the form of debit and credit. He must produce vouchers for all payments. The clerk of the superior court may examine on oath such accounting party, or any other person, concerning the receipts, disbursements or any other matter relating to the estate; and having carefully reviewed and audited such account, if he approve the same, he must indorse his approval thereon, which shall be deemed prima facie evidence of correctness. (Rev., s. 1805; Code, s. 1617; R. C., c. 54, ss. 11, 12; 1762, c. 69, ss. 9, 15; 1871-2, c. 46; C. S. 2186.)

Cross References.—As to clerk's power to audit the account of guardian, see § 2-16. As to vouchers being evidence of disbursement, see § 28-119.

Definition of "Account."—An account is defined to be "a statement in writing of debts and credits, or of receipts and payments; a list of items of debts and credits with their respective dates." Black's Dictionary, p. 17. In this section the word is used in this ss. 50, and when not only an account, but payment or settlement is intended, additional words are used to express that idea. State v. Dunn, 134 N. C. 663, 1 S. E. 668, 46 S. E. 949.

Good Faith Essential.—There is no trust known to the law which so urgently calls for good faith as that which subsists between the guardian and his ward; and no higher evidence can be offered of that good faith than perfect candor, full information, and minute, detailed accounts. Moore v. Askew, 85 N. C. 199, 202.

What Set Out.—It is the duty of a guardian in making his annual returns to set out the manner in which he has invested the ward's estate, and the nature of the securities which he holds as guardian. State v. Gooch, 97 N. C. 186, 1 S. E. 653.

Accounts Prima Facie Correct.—The ex parte settlements made by guardians, executors and administrators with the assets having jurisdiction of such matters, are, when accepted by the court, prima facie correct, and while not conclusive upon creditors or next of kin, and strict proof and specific allegations of errors are not required as in actions to surcharge a stated account, nevertheless the burden is on the party attacking them to establish, by a preponderance

Ward Can Demand Annual Statement.—A ward is entitled to demand of his guardian an annual statement of the manner and nature of his investments of his estate. Moore v. Askew, 55 N. C. 199.

Account as Evidence.—The annual account of a guardian is entitled to presumptive evidence against him, and presumptive evidence against his sureties. Loftin v. Cobb, 126 N. C. 38, 35 S. E. 210.

§ 33-40. Procedure to compel accounting.—If any guardian omit to account, as directed in § 33-39, or renders an insufficient and unsatisfactory account, the clerk of the superior court shall forthwith order such guardian to render a full and satisfactory account, as required by law, within twenty days after service of the order. Upon return of the order, duly served, if such guardian fail to appear or refuse to exhibit such account, the clerk of the superior court may issue an attachment against him for contempt and commit him till he exhibits such account, and may likewise remove him from office. And in all proceedings hereinafter the defaulting guardian will be liable personally for all the proceeds, including the costs of service of all notices or writs incidental to, or thereby accruing, or the amount of the costs of such proceeding may be deducted from any commissions which may be found due said guardian on settlement of the estate. Where a corporation is guardian, the president, cashier, trust officer or the person or persons having charge of the particular estate for said corporation, or the person to whom the duty of making reports of said estate has been assigned by the officers or directors of said corporation, may be proceeded against and committed to jail as herein provided as if he or they were the guardian or guardians personally: Provided, it is found as a fact that the failure or omission to file such account or to obey the order of the court in reference thereto is willful on the part of the officer charged therewith: Provided further, the corporation itself may also be fined and/or removed as punishment for failure to file its final account with the receipts of the ward, in full settlement, to complete the record in his office, for the section states such account "will be recorded." Sell v. Shuggart, 135 N. C. 185, 189, 47 S. E. 484.

"Audit" Explained.—When the section directs that the clerk shall "audit" the account, it implies that he shall purify and make it proper, which he is held to be just and convenient in such cases. Rowl nd v. Thompson, 64 N. C. 714, 717.

Jurisdiction.—The clerk of the superior court has jurisdiction of such a proceeding, between the guardian and ward's personal representative. McLean v. Breeze, 113 N. C. 390, 18 S. E. 694; McNeill v. Hodges, 105 N. C. 52, 11 S. E. 265; Rowland v. Thompson, 65 N. C. 110.

The superior court had no original jurisdiction of an action for an account by an existing guardian of infant children of the guardian's wards. Application for a new guardian action should have been brought in the court of probate (now the clerk). Sudderth v. McCombs, 65 N. C. 186.

Same.—Appeal.—From the judgment of the clerk an appeal will lie to the superior court of the state of the facts obtained jurisdiction of the cause will retain it until it is finally disposed of. Rowland v. Thompson, 65 N. C. 110.

Settlement as Defense.—Where in a suit on a guardianship account it appears that the account between the guardian and ward had been settled, and that the guardian gave his own bond to the ward, which was received by the latter in satisfaction of the balance due, and he then gave his guardian a receipt for the balance due, it was held that this was a sufficient defense to the suit on the guardian bond. State v. Cordon, 30 N. C. 179.

Action Barred in Ten Years.—Ten years after the ward becomes of age bars an action by him against his guardian for settlement. Dunn v. Beaman, 126 N. C. 366, 36 S. E. 529.

When Action Barred as to Sureties.—An action for breach of the guardianship bond based upon this section is barred as to the sureties after three years from the date the guardian should have made payment, and the fact that the guardian continued to pay the ward interest on the amount due the ward for several years after the ward's majority does not affect the running of the statute as to the sureties. State v. Fountain, 205 N. C. 217, 171 S. E. 85. See Cooley v. Scarlett, 214 N. C. 31, 197 S. E. 623.

Judgment Is an Estoppel.—The clerk of the superior court, having jurisdiction of a proceeding to compel a guardian for a settlement, a judgment rendered therein is not estoppel to an action in the superior court between the same parties and upon the same question, and can not be attacked collaterally, but can be impeached for fraud only by a direct proceeding for that purpose. Donnelly v. Wilcox, 113 N. C. 458, 18 S. E. 339.

Distributees May Have Accounting.—The express trust existing between the guardian and ward terminates at death of the latter, and the ward's distributees may give letters of administration taken out and call for an accounting. Lowder v. Hathcock, 150 N. C. 438, 439, 64 S. E. 194.

Effect of Wrongful Settlement.—Where a guardian surrenders his office in March to one whom he supposed to be his legal successor and made a settlement with him, though he was not regularly appointed guardian until March, the settlement was valid, but in all cases, in good faith, it was held that the management of the fund from March to December must be treated as an exercise of an agency of the former guardian, whose bond is responsible for the resulting therefrom. Jennings v. Copeland, 90 N. C. 572.

§ 33-42. Expenses and disbursements credited to guardian.—Every guardian may charge in his annual account all reasonable disbursements and expenses of his office. It is to be borne in mind that the guardian may not disburse money or make payments to himself, or to his sureties, out of the profits of the ward's estate, for his education and maintenance, the guardian shall be allowed and paid for the same out of the profits of the estate in any other year; but such disbursements must, in all cases, be suitable to the degree and circumstances of the estate of the ward. (Rev., s. 1808;
Code, s. 1619; R. C., c. 54, s. 28; 1762, c. 69, ss. 18, 19; 1799, c. 536, § 2; 1868-9, c. 201, s. 49; C. S. 2189.)

Cross References.—As to payments allowed in accounting, see § 33-66. As to expense of bond being lawful expense, see § 43-52.

In General.—A guardian should be charged with what he receives, and credited with what he pays out, when it does not appear that he collected anything prematurely, or kept on hand any unreasonable sum. Freeman v. Wilson, 74 N. C. 368.

Paying Debts Due.—When the guardian in good faith pays debts that ought to be paid, and by so doing the ward's estate, for no prudent purpose, will be allowed credit for disbursements of assets in his business, in McLean v. Breeze, 113 N. C. 390, 392, 18 S. E. 694; Adams v. Thomas, 83 N. C. 557.

Earning Incomes of Estate.—In paying the accounts of a guardian, he cannot, except under rare circumstances, be allowed disbursements beyond the income of his ward. Caffey v. McMichael, 64 N. C. 507; Johnston v. Haynes, 68 N. C. 14.

A guardian will not be permitted to use more than the accruing profits of his ward's estate in the maintenance and education of the ward, except with the sanction of the court, or in case of urgent necessity. Tharington v. Tharington, 99 N. C. 118, 5 S. E. 414.

Same—Clerk May Allow.—The clerk of the superior court may allow a guardian credit for money necessarily expended in the education of the ward, though the amount exceeded the income and was made without the permission of the clerk. Duffy v. Williams, 113 N. C. 195, 45 S. E. 140.

Same—Lunatic's Debts.—Where, in the settlement of the guardian's account, the lunatic is dead and his only child is of age, and it appears that the guardian, in good faith, paid debts due the ward, without applying to the court for leave, is not entitled to charge the ward with it. Shaw v. Cogle, 63 N. C. 377.


But fees paid by a guardian to the counsel for services rendered in obtaining an unfair settlement with the ward, and in aiding the guardian to cover up the fraud, cannot be allowed the latter in his settlement. Johnston v. Haynes, 68 N. C. 599.

Father as Guardian.—A father, or his trustee, in settling his accounts as guardian for his children, has no right to charge the children with the amount expended for their education, as Willer v. Turner, 37 N. C. 473.

A father, though be the natural guardian of his minor child's estate, is not ordinarily permitted to charge for his maintenance, and, if able, he is himself bound to maintain his own pusiness where he was guilty of gross negligence in not managing his ward's business with skill, in McLean v. Breeze, 113 N. C. 390, 392, 18 S. E. 694.

Stepfather as Guardian.—Where a stepfather becomes guardian to his stepchild, he is not entitled to charge for board and other necessaries furnished to his ward antecedently to his appointment as guardian; the infant being incompetent to contract therefor. Barnes v. Ward, 45 N. C. 579.

Payments to Mother for Board of Wards after Majority.—A guardian is not entitled to commissions on payments made for his ward for goods bought of a firm of which the guardian was a member, but not on charges for board while the ward lived in his family. Williamson v. Williams, 59 N. C. 62.

Rate of Commissions. — Reasonable commissions will always be allowed to a guardian unless in cases of fraud or very culpable negligence. The rate will depend upon a variety of circumstances, such as the amount of the estate, the trouble in managing it, whether fees have been paid to counselor for assisting him in the management, the last of which will not be more than 10 per cent. Shutt v. Carloss, 36 N. C. 558.

Same—Gross Negligence.—A guardian is not entitled to commissions on money collected and used by him in his own business where he was guilty of gross negligence in its management. Towle v. Dey, 65 N. C. 590.

When Ward Boards with Guardian.—A guardian is entitled to commissions on payments made for his ward for goods bought of a firm of which the guardian was a member, but not on charges for board while the ward lived in his family. Williamson v. Williams, 59 N. C. 62.

Art. 6. Public Guardians.
§ 33-45. Bond of public guardian; increasing bond.—The public guardian shall enter into bond with three or more sureties, approved by the clerk in the penal sum of six thousand dollars, payable to the state of North Carolina, conditioned faithfully to perform the duties of his office and obey all lawful orders of the superior court or other courts touching said guardianship of all wards, money or estate that may come into his hands. Whenever the aggregate value of the real and personal estate belonging to his several wards exceeds one-half the bond herein required the clerk of the superior court shall require him to enlarge his bond in amount so as to cover at least double the aggregate amount under his control as guardian. (Rev., ss. 321, 322; Code, ss. 1557, 1558; 1874-5, c. 221, ss. 2, 3; C. S. 2192.)

§ 33-46. Powers, duties, liabilities, compensation.—The powers and duties of said public guardian shall be the same as other guardians, and he shall be subject to the same liabilities as other guardians under the existing laws, and shall receive the same compensation as other guardians. (Rev., s. 1761; Code, s. 1561; 1874-5, c. 221, ss. 6, 7; C. S. 2193.)

Cross Reference.—As to payment of money due minor insurance beneficiary to public guardian, see § 2-52.

§ 33-47. When letters issue to public guardian.—The public guardian shall apply for and obtain letters of guardianship in the following cases:

1. When a period of six months has elapsed from the discovery of any property belonging to any minor, idiot, lunatic, insane person or inebriate, without guardian.

2. When any person entitled to letters of guardianship shall request in writing the clerk of the superior court to issue letters to the public guardian; but it is lawful and the duty of the clerk of the superior court to revoke said letters of guardianship at any time after issuing the same upon application in writing by any person entitled to qualify as guardian, setting forth a sufficient cause for such revocation. (Rev., s. 1760; Code, s. 1561; 1874-5, c. 221, ss. 6, 7; C. S. 2194.)

Art. 7. Foreign Guardians.

§ 33-48. Right to removal of ward's personalty from state.—Where any ward, idiot, lunatic or insane person, residing in another state or territory, or in the District of Columbia, or Canada, or other foreign country, is entitled to any personal estate in this state, or personal property substituted for realty by decree of court, or to any part of the proceeds from the sale of real estate, whether the same be in the hands of any person, guardian residing in this state, or of any executor, administrator or other person holding for the ward, idiot, lunatic or insane person, or if the same (not being adversely held and claimed) be not in the lawful possession or control of any person, the guardian of the ward, idiot, lunatic or insane person, duly appointed at the place where such ward, idiot, lunatic or insane person resides, or in the event no guardian has been appointed the court or officer of the court authorized by the laws of the state or territory or for the District of Columbia or Canada or other foreign country to receive moneys belonging to any infants, idiots, lunatics or insane persons when no guardian has been appointed, any person, may apply to have such estate removed to the hands of any guardian, idiot, lunatic or insane person by petition filed before the clerk of the superior court of the county in which the property or some portion thereof is situated; which shall be proceeded with as in other cases of special proceedings. (Rev., s. 1816; Code, ss. 1598, 1601; R. C., c. 54, s. 29; 1820, c. 1044; 1842, c. 38; 1868-9, c. 201, ss. 35, 38; 1874-5, c. 168; 1913, c. 86, s. 1; 1937, c. 307; C. S. 2195.)

Cross Reference.—See also § 36-6 et seq.

Editor's Note.—The 1937 amendment made provision for the event "infant" has been appointed." It also substituted "infant" for "ward" in a subsequent part of the section.

In General.—Where it appeared that the property in this State of a ward residing in another state consisted of good bonds and stocks, purchased in the hands of the last guardian, a part of which arose from the sale of land, and the ward was nearly of age, and there was no special necessity made to appear for making a transfer of the property, the court of equity, in the exercise of its discretion, refused to order a transfer of the estate to the hands of a guardian appointed in such other state. Douglas v. Caldwell, 59 N. C. 20.

Local Guardian Next Friend.—When any ward is domiciled in another state, and no foreign guardian has been duly appointed in the state of his residence and that of his wards, and has filed a certified copy of his appointment, with a bond sufficient both as to the amount and the surety, the court of equity, in the exercise of its discretion, refused to order a transfer of the estate of his wards and in conformity with this section and section 33-49, with his petition to the clerk of the court, as required by these statutes, it is not necessary that a local guardian be appointed, but the court in that State, before which the matter is properly pending, may order that the foreign guardian be permitted to withdraw the estate of his wards to the place of foreign jurisdiction. Cilley v. Geinzer, 183 N. C. 528, 111 S. E. 865.

Foreign Guardian as Next Friend.—A guardian appointed in another state has no authority to represent his wards in suits and proceedings in this State, but when he brings suit for them as guardian it will be treated as if he were their next friend. Tate v. Mott, 96 N. C. 19, 2 S. E. 69.

When Guardian Must Be Resident.—Where the infant grandchildren of the testator take upon a contingency, as directed by the will, properly probated here, it is required by the law of the state of residence of the ward, according to our law, unless the funds have been properly removed to another state, under this section and section 33-49, and the law of this State governs the interpretation of the will, the testator domiciled here, Cilley Geinzer, 183 N. C. 714, 110 S. E. 61.

A guardian in another state of nonresident wards may proceed to obtain possession of the property bequeathed to the wards and in the hands of an executor in this State under a will duly probated here under the provisions of this section; § 36-7, relating to property in the hands of a trustee residing in this State, is not applicable. Fidelity Trust Co. v. Walton, 198 N. C. 790, 153 S. E. 401.

§ 33-49. Contents of petition; parties defendant.

—The petitioner must show to the court a copy of his appointment as guardian and bond duly authenticated, and must prove to the court that the bond is sufficient, as well in the ability of the sureties as in the financial ability of the sureties to protect the estate of his wards and in conformity with this section and section 33-49, and the law of this State governs the interpretation of the will, the testator domiciled here. Cilley Geinzer, 183 N. C. 714, 110 S. E. 61.

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Cross Reference.—As to who may be defendants, see § 1-69.
Art. 8. Estates without Guardian.

§ 33-50. Duty of grand jury as to orphans and guardians.—The grand jury of every county is charged with and shall present to the superior court the names of all orphan children that have no guardian or are not bound out to some trade or employment. They shall further inquire of all abuses, mismanagement and neglect of all such guardians as are appointed by the clerk of the superior court. The clerk of the superior court shall, at each term of the superior court, lay before the grand jury a list of all the guardians acting in his county or appointed by him. (Rev., s. 1810; Code, s. 1609; R. C., c. 54, s. 18; 1762, c. 69, s. 17; 1868-9, c. 201, s. 46; C. S. 2197.)

§ 33-51. Solicitor to apply for receiver for orphans' estates.—Whenever the name of an orphan, having any estate and for whom no suitable person will become guardian, is presented by a grand jury, the clerk of the superior court must give notice thereof forthwith to the solicitor of the state for the judicial district, who shall apply in behalf of the orphan a list of all the guardians acting in his county where such presentment was made, to the end that a receiver be appointed. (Rev., s. 1811; Code, s. 1610; R. C., c. 54, s. 19; 1816, c. 43; 1868-9, c. 201, s. 47; C. S. 2198.)

§ 33-52. Solicitor to prosecute bond of guardian removed without a successor.—Whenever any guardian is removed, and no person is appointed to succeed in the guardianship, the clerk of the superior court shall certify the name of such guardian, or of himself as guardian, to the grand jury of the judicial district, who shall apply in behalf of the orphan to the judge of the superior court of the county where such presentment was made, to the end that a receiver be appointed. (Rev., s. 1812; Code, s. 1584; R. C., c. 54, s. 14; 1844, c. 41; 1868-9, c. 201, s. 21; C. S. 2199.)

Infant Not a Party.—The action required by this section to be taken by the solicitor, in the cases provided for, is properly an action brought by him for the benefit of the ward, the guardian having been removed, and the infant is not a necessary, perhaps not a proper, party to it. Becton v. Becton, 56 N. C. 419; Temple v. Williams, 91 N. C. 82.

Allowance Pendente Lite.—During the pendency of an action under this section a guardian and the sureties on his bond by his ward for an account and settlement, and while the same is under reference and before the report of the referee is complete and finally acted on, and before any of the ward's estate is in possession of the court, the superior court has no power to order the guardian and his sureties to the solicitor, for securing the estate of the ward. (Rev., s. 1812; Code, s. 1584; R. C., c. 54, s. 14; 1844, c. 41; 1868-9, c. 201, s. 21; C. S. 2199.)

§ 33-53. Judge to appoint receiver; his rights and duties.—The judge of the superior court, either residing in or presiding over the courts of the district, before whom such action is brought, shall have power to appoint the clerk of the superior court or some discreet person as a receiver to take possession of the ward's estate, to collect all moneys due to him, to secure, lend, invest or apply the same for the benefit and advantage of the ward, under the direction and subject to such rules and orders in every respect as the said judge may from time to time make in regard thereto; and the accounts of such receiver shall be returned, audited and settled as the judge may direct. The receiver shall be allowed such amounts for his time, trouble and responsibility as seem to the judge reasonable and proper; and such receivership may be continued until some suitable person can be procured to take the guardianship. (Rev., s. 1813; Code, s. 1585; R. C., c. 54, s. 15; 1844, c. 41, s. 2; 1868-9, c. 201, s. 23; C. S. 2200.)

Cross Reference.—As to receivers, see § 1-501 et seq. When Appointed.—The mere poverty of the executrix does not authorize the court, against the will of the testator, to appoint a receiver of the estate of an infant. Fairbain v. Fisher, 57 N. C. 395.

The appointment of a receiver for an insane person's estate should be made only on the motion of the solicitor, after the wife and one or more adult children, if there are such, or some near relative or friend, have been before the judge at chambers or in term. In re Hybart, 118, C. 159, 66 S. E. 988.

Clerk Appointed.—Under this section the court has authority to appoint a clerk of the superior court receiver of an infant's estate. Waters v. Melson, 112 N. C. 89, 16 S. E. 918.

Same.—The Order.—Where, in an order of court appointing "J. A. M., clerk of the superior court," receiver of the infant's estate, the clerk was not named as receiver and the "clerk of the superior court," it was held that the intention of the court to appoint M. as receiver in his official capacity was not indicated. Waters v. Melson, 112 N. C. 89, 16 S. E. 918.

Same.—Does Not Have Guardian's Power.—A receiver appointed to take charge of a ward's estate when the guardian is removed, is not invested with the powers of a guardian, but acts under the control of the court until another guardian is appointed. Temple v. Williams, 91 N. C. 82.

General Liability.—As a general rule, a receiver is responsible for his own neglect only, and is protected when he acts in entire good faith. State v. Gooch, 97 N. C. 186, 1 S. E. 653.

Same.—Similar to Guardian's.—When a receiver is appointed to take charge of an infant's estate who has no guardian, and is directed to lend out the money and pay the income over to the ward, he will be held to the same accountability as a guardian. State v. Gooch, 97 N. C. 186, 1 S. E. 653.

Failure of Bank.—A receiver may keep money in a bank as a safe place of deposit, or may use the bank as a means of transmitting money to distant places, and if he uses reasonable diligence, he will not be held liable if the bank fails. State v. Gooch, 97 N. C. 186, 1 S. E. 653.

Where a receiver is appointed to take charge of an infant's estate and invest the same, and report to the court annually, and he deposited a portion of the money in a bank in another state to his credit as receiver, on which deposit he was paid interest by the bank, which afterwards failed, it was held that the receiver was liable for the loss, as he had failed to report to the court the manner in which he invested the infant's estate, although he had acted in the best faith. State v. Gooch, 97 N. C. 186, 1 S. E. 653.

Official Bond Liable—Former Provisions.—The liability of a receiver who acts in whole or in part as receiver of an infant's estate and remits the same, is not only for the breach of his official bond and its purposes but for any breach of his official duties as a receiver, and hence not embraced by his official bond and its purposes. Kerr v. Brandon, 84 N. C. 128; State v. Odum, 86 N. C. 432; Syme v. Bunting, 91 N. C. 48, 52; State v. Boone, 108 N. C. 78, 83, 12 S. E. 897.

Same—Sureties.—But now when the clerk of the superior court is appointed to take charge of the wards' estate under this section, he takes and holds the funds by virtue of his office as clerk, and his sureties upon his official bond as such officer are liable for any failure of duty on his part in that respect. State v. Upchurch, 110 N. C. 62, 14 S. E. 642.

The sureties on the clerk's official bond are liable for any breach of his duties as receiver. Waters v. Melson, 112 N. C. 89, 16 S. E. 918.

Action against Receiver.—It is not necessary to obtain
leave of the court before commencing an action for failure of the clerk to fulfill his duty when appointed receiver under this section. State v. Upchurch, 110 N. C. 63, 14 S. E. 642.

Same—Burden of Proof.—The burden is upon a receiver and his sureties to show that he used due diligence in investing the money in his hands. Waters v. Melson, 112 N. C. 89, 16 S. E. 918.

Same—Present Law.—Where the appointment of a receiver is conferred upon the clerk under the statute authorizing the court to commit the estate of an infant to "some discreet person," it was held that the same is protected by his bond as clerk. State v. Odum, 86 N. C. 432.

§ 33-54. When receiver to pay over estate.—When another guardian is appointed, he may apply by motion, on notice, to the judge of the superior court for an order upon the receiver to pay over all the money, estate and effects of the ward; and if no such guardian is appointed, then the infant, on coming of age, or in case of his death, his executor, administrator or collector, and the heir or personal representative of the idiot, lunatic or insane person, shall have the like remedy against the receiver. (Rev., s. 1814; Code, s. 1815; C. C. P., s. 2201.)

§ 33-55. Duties of solicitor.—The solicitor shall prosecute the action and take all necessary orders therein. (Rev., s. 1815; Code, s. 1587; R. C., c. 54, s. 17; 1844, c. 41, s. 4; 1868-9, c. 201, s. 24; C. S. 2201.)

Settlement Not Conclusive.—A settlement made with a receiver, even if had under direction of the court, is not conclusive against the ward, but only raises a presumption that the account and settlement are correct. Such presumption may be disproved. Temple v. Williams, 91 N. C. 23.

§ 33-56. Appointment.—When it shall be made to appear to the satisfaction of the clerk of the superior court, or a judge of the superior court having jurisdiction of the appointment of guardians, that any person has disappeared from the community of his residence, and his whereabouts remains unknown in such community for a period of three (3) months, and cannot, after diligent inquiry, be ascertained; and that such person has property in the state and property rights within its jurisdiction which may be affected by his absence, or may need protection and administration; and that such person has made no provision for the management of his affairs; such clerk of the superior court or judge of the superior court may appoint a guardian of the estate and property of such person as may, by law be done in the case of minors and persons non compos mentis, and with the like powers and duties with respect to such estate. (1933, c. 49, s. 1.)

Editor's Note.—See 11 N. C. L. Rev. 231, for discussion and review of this section.

§ 33-57. Jurisdiction.—The clerk of the superior court of the county of the last residence of such absent person shall have prior rights to jurisdiction of such appointment, but the appointment may be made by the clerk of the superior court of any county in the state where such person has property, after the expiration of six months from the time of such disappearance, if no prior appointment has been made. (1933, c. 49, s. 2.)

§ 33-58. Powers and duties; bond. — The guardian, so appointed, shall have all the powers and duties with respect to the property and estate of such absent person as are now, or may be hereafter, conferred by law upon guardians generally; and before entering into the discharge of the duties of his guardianship, he shall be required to enter into such bond as is now required by law in such cases, for the faithful performance of his trust and for the accounting of the property, moneys and assets of the estate coming into his hands as guardian. (1933, c. 49, s. 3.)

Cross Reference.—As to bond of guardians generally, see § 33-12 et seq.

§ 33-59. General laws applicable.—The public laws relating to guardianships, and particularly this chapter, as far as by their terms they may be applicable, and as far as they are not modified by this article, shall apply to guardians so appointed. (1933, c. 49, s. 3.)

§ 33-60. Other managerial powers conferred.—In addition to the powers given to guardians under the general laws of the state, such guardians may, by approval of the court, apply funds in his hands to the satisfaction of obligations of such absent person, renew notes and other obligations, pledge property for loans necessary in carrying on or liquidating the affairs of such absent person; cause lands to be cultivated, where such business was previously carried on, and make such contracts with reference thereto as he may deem to the best interest of the estate, and, under the direction of the court and with its approval, continue to operate any business or business enterprise of such person, and make such contracts, agreements and settlements in reference thereto as may be necessary, or to the best interests of the estate. (1933, c. 49, s. 4.)

§ 33-61. Discharge of guardian upon return of missing person.—Upon the return of such absent person, and within six months from the filing of the petition by such person to be restored to his property and to the management of his estate, the clerk of the superior court having jurisdiction of the said guardianship shall require a settlement of the estate by the guardian so appointed, and shall cause to be turned over to such person all of the said estate then in his hands as guardian and, after the payment of such reasonable costs and commissions as may be authorized by law, and, upon the filing of a financial account by the said guardian, he shall be discharged. (1933, c. 49, s. 5.)

§ 33-62. Guardian not liable except for misconduct.—No action shall be maintained against such guardian, or the sureties on his bond, by reason of his appointment, taking over and managing the property of such absent person, or any of his acts with respect to the said estate, where it appears that they were done under authority of this article, but only for recovery because of the misconduct in office of the bad faith of such guardian, or the waste of the assets of the estate through mismanagement, amounting to gross carelessness or in violation of the law. (1933, c. 49, s. 6.)
Chapter 34. Veterans' Guardianship Act.

Sec. 34-1. Title.—This chapter shall be known as "The Veterans' Guardianship Act." (1929, c. 33, s. 1.)

§ 34-2. Definitions.—In this chapter:

The term "person" includes a partnership, corporation or an association.

The term "Bureau" means the United States Veterans' Bureau or its successor.

The terms "estate" and "income" shall include only moneys received by the guardian from the Bureau and all earnings, interests and profits derived therefrom.

The term "benefits" shall mean all moneys payable by the United States through the Bureau.

The term "Director" means the Director of the United States Veterans' Bureau or his successor.

The term "State Service Officer" means such person indicating the necessity for the same.

The term "ward" means a beneficiary of the Bureau.

The term "guardian" as used herein shall mean any person acting as a fiduciary for a ward. (1929, c. 33, s. 2.)

§ 34-3. Appointment of guardian for wards entitled to benefits from United States Veterans' Bureau.—Whenever, pursuant to any law of the United States or regulation of the Bureau, the Director requires, prior to payment of benefits, that a guardian be appointed for a ward, such appointment shall be made in the manner herein-after provided. (1929, c. 33, s. 3.)

§ 34-4. Guardian may not be named for more than five wards; exceptions; banks and trust companies, or where wards are members of same family.—Except as hereinafter provided it shall be unlawful for any person to accept appointment as guardian of any ward if such proposed guardian shall at that time be acting as guardian for five wards. If any case, upon presentation of a petition by an attorney of the Bureau under this section alleging that a guardian is acting in a fiduciary capacity for more than five wards and requesting his discharge for that reason, the court, upon proof substantiating the petition, shall require a final accounting forthwith from such guardian and shall discharge such guardian in said case.

The limitations of this section shall not apply where the guardian is a bank or trust company acting for the wards' estates only. An individual may be guardian of more than five wards if they are all members of the same family. (1929, c. 33, s. 4.)

§ 34-5. Petition for appointment of guardian.—A petition for the appointment of a guardian may be filed in any court of competent jurisdiction by or on behalf of any person who under existing law is entitled to priority of appointment. If there be no person so entitled or if the person so entitled shall neglect or refuse to file such a petition within thirty days after mailing of notice by the Bureau to the last known address of such person indicating the necessity for the same a petition for such appointment may be filed in any court of competent jurisdiction by or on behalf of any responsible person residing in this State.

The petition for appointment shall set forth the name, age, place of residence of the ward, the names and places of residence of the nearest relative, if known, and the fact that such ward is entitled to receive moneys payable by or through the Bureau and shall set forth the amount of moneys then due and the amount of probable future payments.

The petition shall also set forth the name and address of the person or institution, if any, having actual custody of the ward.

In the case of a mentally incompetent ward the petition shall show that such ward has been rated incompetent on examination by the Bureau and in accordance with the laws and regulations governing the Bureau. (1929, c. 33, s. 5.)

§ 34-6. Certificate of Director prima facie evidence of necessity for appointment.—Where a petition is filed for the appointment of a guardian of a minor ward a certificate of the Director, or his representative, setting forth the age of such minor as shown by the records of the Bureau and the fact that the appointment of a guardian is a condition precedent to the payment of any moneys due the minor by the Bureau, shall be prima facie evidence of the necessity for such appointment. (1929, c. 33, s. 6.)

§ 34-7. Same in regard to guardianship of mentally incompetent wards.—Where a petition is filed for the appointment of a guardian of a
mentally incompetent ward a certificate of the Director, or his representative, setting forth the fact that such person has been rated incompetent by the Bureau on examination in accordance with the laws and regulations governing such Bureau, and that the fact of an appointment is a condition precedent to the payment of any moneys due such person by the Bureau, shall be prima facie evidence of the necessity for such appointment. (1929, c. 33, s. 7.)

§ 34-8. Notice of filing of petition.—Upon the filing of a petition for the appointment of a guardian, under the provisions of this chapter, the court shall cause such notice to be given as provided by law. (1929, c. 33, s. 8.)

§ 34-9. Qualifications of guardian; surety bond. —Before making an appointment under the provisions of this chapter the court shall be satisfied that the guardian whose appointment is sought is a fit and proper person to be appointed. Upon the appointment being made the guardian shall execute and file a surety bond to be approved by the court in an amount not less than the sum then due and estimated to become payable during the ensuing year. The said bond shall be in the form and be conditioned as required of guardians appointed under the guardianship laws of this state. The court shall have power from time to time to require the guardian to file an additional bond. No bond shall be required of the banks and trust companies licensed to do trust business in North Carolina. (1929, c. 33, s. 9.)

Cross Reference.—As to bond required of guardians appointed under the guardianship laws of this state, see § 33-12 et seq.

§ 34-10. Guardian's accounts to be filed; hearing on accounts.—Every guardian, who shall receive on account of his ward any moneys from the bureau, shall file with the court annually, on the anniversary date of the appointment, in addition to such other accounts as may be required by the court, a full, true, and accurate account under oath of all moneys so received by him, of all disbursements thereof, and showing the balance thereof in his hands at the date of such account and how invested. A certified copy of each of such accounts filed with the court shall be sent by the guardian to the office of the bureau having jurisdiction over the area in which such court is located.

At the time such account is filed the clerk of superior court shall require the guardian to exhibit to the court all investments and bank statements showing cash balance and the clerk of superior court shall certify on the original account and the certified copy which the guardian sends the bureau that an examination was made of all investments and cash balance and that same are correctly stated in the account. If objections are raised to such accounting, the court shall fix a time and place for the hearing thereon not less than fifteen days nor more than thirty days from the date of filing such objections, and notice shall be given by the court to the aforesaid bureau office and state service officer by mail not less than fifteen days prior to the date fixed for the hearing. Notice of such hearing shall also be given to the guardian. (1929, c. 35, s. 10; 1933, c. 262, s. 1.)

Editor's Note.—Public Laws of 1933, c. 262, omitted the last two sentences of this section as it formerly read and inserted the last three sentences of the present section in lieu thereof. The next to the last and the last sentence as they now read are practically the same as the omitted provision. The third from the last sentence is new with the amendment. See 11 N. C. Law Rev. 232, for summary of this section.

§ 34-11. Failure to file account cause for removal.—If any guardian shall fail to file any account of the moneys received by him from the Bureau on account of his ward within thirty days after such account is required by either the court or the Bureau, or shall fail to furnish the Bureau a copy of his accounts as required by this chapter, such failure shall be grounds for removal. (1929, c. 33, s. 11.)

§ 34-12. Compensation at 5 per cent; additional compensation; premiums on bonds.—Compensation payable to guardians shall not exceed 5 per cent of the income of the ward during any year. In the event of extraordinary services rendered by a guardian the court may, upon petition and after hearing thereon, authorize additional compensation therefor, payable from the estate of the ward. Notice of such petition and hearing shall be given the proper office of the Bureau and the State Service Officer in the manner provided in § 34-10. No compensation shall be allowed on the corpus of an estate received from a preceding guardian. The guardian may be allowed from the estate of his ward reasonable premiums paid by him to any corporate surety upon his bond. (1929, c. 33, s. 12.)

Where the clerk entered an order allowing a guardian additional compensation for extraordinary services and the Veterans Administration failed to perfect its appeal from the clerk's order, and thereafter applied to the judge of the Superior Court for a writ of certiorari, the petition for certiorari was denied upon the court's finding of laches and demerit. In re Snakegrove, 200 N. C. 679, 182 S. E. 335.

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

(a) United States government bonds.
(b) State of North Carolina bonds issued since the year one thousand eight hundred seventy-two.
(c) By loaning the same upon real estate securities in which the guardian has no interest, such loans not to exceed fifty per cent (50%) of the actual appraised or assessed value, whichever may be lower, and said loans when made to be evidenced by a note, or notes, or bond, or bonds, under seal of the borrower and secured by first mortgage or first deed of trust. Said guardian before making such investment on real estate mortgages shall secure a certificate of title from some reputable attorney certifying that the same is the first lien on real estate and also setting forth the tax valuation thereof for the current year: Provided, said guardian may purchase with said funds a home or farm for the sole use of said ward or his dependents upon petition and order of the clerk of superior court, said order to be approved by the resident or presiding judge of the superior court, and provided further that copy of said petition shall be forwarded to said bureau before consideration thereof by said court.

It shall be the duty of guardians who shall have funds invested other than as provided for [116]
in this section to liquidate same within one year from the passage of this law: Provided, however, that upon the approval of the judge of the superior court, either residing in or presiding over the courts of the district, the clerk of the superior court may authorize the guardian to extend from time to time, the time for sale or collection of any such investments; that no extension shall be made to cover a period of more than one year from the time the extension is made.

The clerk of the superior court of any county in the state or any guardian who shall violate any of the provisions of this section shall be guilty of a misdemeanor, punishable by fine or imprisonment or both in the discretion of the court. (1929, c. 33, s. 13; 1933, c. 262, s. 2.)

Editor's Note.—Prior to the amendment by Public Laws 1933, c. 262, this section merely provided that the guardian should invest the funds as allowed by the law or approved by the court.

Purchase of home for use of dependent sister, see Patrick v. Branch Bkg., etc., Co., 216 N. C. 525, 55: EB. (2d) 724.

§ 34-14. Application of ward's estate.—A guardian shall not apply any portion of the estate of his ward for the support and maintenance of any person other than his ward, except upon order of the court after a hearing notice of which has been given the proper officer of the Bureau and the State Service Officer in the manner provided in § 34-10. (1929, c. 33, s. 14.)

§ 34-15. Certified copy of record required by Bureau to be furnished without charge.—Whenever a copy of any public record is required by the Bureau or State Service Officer to be used in determining the eligibility of any person to participate in benefits made available by such Bureau, the official charged with the custody of such public record shall without charge provide the applicant for such benefits or any person acting on his behalf or the representative of such Bureau or State Service Officer with a certified copy of such record. (1929, c. 33, s. 15.)

§ 34-16. Commitment to Veterans' Administration, etc., for care or treatment. (1) Whenever, in any proceeding under the laws of this state for the commitment of a person alleged to be of unsound mind or otherwise in need of confinement in a hospital or other institution for his proper care, it is determined after such adjudication of the status of such person as may be required by law that commitment to a hospital for mental disease or other institution is necessary for safekeeping or treatment and it appears that such person is eligible for care or treatment by the Veterans' Administration or other agency of the United States government, the court, upon receipt of a certificate from the Veterans' Administration or such other agency showing that facilities are available and that such person is eligible for care or treatment therein, may commit such person to said Veterans' Administration or other agency. The person whose commitment is sought shall be personally served with notice of the pending commitment proceeding in the manner as provided by the law of this state; and nothing in this section shall affect his right to appear and be heard in the proceedings. Upon commitment, such person, when admitted to any facility operated by any such agency within or without this state shall be subject to the rules and regulations of the Veterans' Administration or other agency. The chief officer of any facility of the Veterans' Administration or institution operated by any other agency of the United States to which the person is so committed shall, with respect to such person, be vested with the same powers as superintendents of state hospitals for mental diseases within this state with respect to retention of custody, transfer, parole or discharge. Jurisdiction is retained in the committing or other appropriate court of this state at any time to inquire into the mental condition of the person so committed, and to determine the necessity for continuance of his restraint, and all commitments pursuant to this section are so conditioned.

(2) The judgment or order of commitment by a court of competent jurisdiction of another state or of the District of Columbia, committing a person to the Veterans' Administration, or other agency of the United States government for care or treatment shall have the same force and effect as to the committed person while in this state as a final judgment from which is situs in the court entering the judgment or making the order of commitment, and the courts of the committing state, or of the District of Columbia, shall be deemed to have retained jurisdiction of the person so committed for the purpose of inquiring into the mental condition of such person, and of determining the necessity for continuance of his restraint; as is provided in subsection (1) of this section with respect to persons committed by the courts of this state. Consent is hereby given to the application of the law of the committing state or district in respect to the authority of the chief officer of any facility of the Veterans' Administration, or of any institution operated in this state by any other agency of the United States to retain custody, or transfer, parole or discharge the committed person.

(3) Upon receipt of a certificate of the Veterans' Administration or such other agency of the United States that facilities are available for the care or treatment of any person heretofore committed to any hospital for the insane or other institution in the care or treatment of persons similarly afflicted and that such person is eligible for care or treatment, the superintendent of the institution may cause the transfer of such person to the Veterans' Administration or other agency of the United States for care or treatment. Upon effecting any such transfer, the committing court or proper officer thereof shall be notified thereof by the transferring agency. No person shall be transferred to the Veterans' Administration or other agency of the United States if he be convicted of a felony or of any other offense, or if he has been acquitted of the offense solely on the ground of insanity, unless prior to transfer the court or other authority originally committing such person shall enter an order for such transfer after appropriate motion and hearing.

Any person transferred as provided in this section shall be deemed to be committed to the Veterans' Administration or other agency of the United States pursuant to the original commitment. (1929, c. 33, s. 16; 1943, c. 492.)

Cross Reference.—As to rules and regulations for state hospitals and powers exercised by the superintendents thereof, see chapter 35.

Editor's Note.—The 1943 amendment rewrote this section.

§ 34-17. Discharge of guardian.—When a minor
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ward for whom a guardian has been appointed under the provisions of this chapter or other laws of this state shall have attained his or her majority, and if incompetent shall be declared competent by the Bureau and the court, and when any incompetent ward, not a minor, shall be declared competent by said Bureau and the court, the guardian shall upon making a satisfactory accounting be discharged upon a petition filed for that purpose. (1929, c. 33, s. 17.)

§ 34-18. Construction of chapter.—This chapter shall be construed liberally to secure the beneficial intents and purposes thereof and shall apply only to beneficiaries of the Bureau. (1929, c. 33, s. 18.)

Chapter 35. Insane Persons and Incompetents.

Art. 1. Inebriates.

Sec.
35-1. Inebriates defined.

Art. 2. Guardianship and Management of Estates of Incompetents.

35-2. Inquisition of lunacy; appointment of guardian.
35-4. Restoration to sanity or sobriety; effect; how determined.
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35-50. Appeal to supreme court.
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Art. 8. Temporary Care and Restraint of Inebriates, Drug Addicts and Persons Insane.

35-58. Hospitals and sanatoriums may restrain and treat alcohol and drug addicts.
35-59. Use of restraining devices limited.
35-60. Civil liability for corrupt admissions.
Art. 1. Inebriates.

§ 35-1. Inebriates defined. — Any person who habitually, whether continuously or periodically, indulges in the use of intoxicating liquors, narcotics or drugs to such an extent as to stupify his mind and to render him incompetent to transact ordinary business with safety to his estate, or who renders himself, by reason of the use of intoxicating liquors, narcotics or drugs, dangerous to himself or person or property, or who, by the frequent use of liquor, narcotics or drugs, renders himself cruel and intolerable to his family, or fails from such cause to provide his family with reasonable necessities of life, shall be deemed an inebriate:

Provided, the habit of so indulging in such use is at the time of inquisition of at least one year's standing. (Rev., s. 1892; Code, s. 1671; 1891, c. 15, s. 7; 1903, c. 543; 1879, c. 329; C. S. 2234.)

Cited in In re Anderson, 132 N. C. 243, 246, 43 S. E. 469.

Art. 2. Guardianship and Management of Estates of Incompetents.

§ 35-2. Inquisition of lunacy; appointment of guardians. — Any person, in behalf of one who is deemed an idiot, inebriate, or lunatic, or incompetent from want of understanding to manage his mind and to render him incompetent to transact his own affairs by reason of the excessive use of intoxicating drinks, or other cause, may file a petition before the clerk of the superior court of the county where such supposed idiot, inebriate or lunatic resides, setting forth the facts, duly verified by the oath of the petitioner; whereupon such clerk shall issue an order, upon notice to the supposed idiot, inebriate or lunatic, to the sheriff of the county, commanding him to summon a jury of twelve men to inquire into the state of such supposed idiot, inebriate or lunatic. Upon the return of the sheriff summoning said jury, the clerk of the superior court shall swear and organize said jury and shall preside over said hearing, and the jury shall make return of their proceedings under their hand to the clerk, who shall file and record the same; and he shall proceed to appoint a guardian of any person so found to be an idiot, inebriate, lunatic, or incompetent person by inquisition of a jury, as in cases of orphans.

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

The jury shall make return of their proceedings under their hand to the clerk, who shall file and record the same; and he shall proceed to appoint a guardian of any person so found to be an idiot, inebriate, lunatic, or incompetent person by inquisition of a jury, as in cases of orphans.

The effect of this section is to provide that the proceedings in case of insanity of a citizen of another state, or of an alien, see § 122-64. As to service of summons upon an insane person, see § 1-97, et seq. As to bond required upon the finding of a jury of idiocy or lunacy; and later classes are "inebriates and those who are incompetent for want of understanding to manage their own affairs, by reason of the excessive use of intoxicating drinks or other cause." These additions were made originally in the Code of Civil Procedure, and have been brought forward in subsequent codes.

This section was amended in 1919, Acts 1919, ch. 54, and the right of appeal given to the parties. In 1921, Acts 1921, ch. 156, sec. 1, this section was again amended and the latter portion, regarding the commitment of incompetents to the State hospital, was added. The Act of 1929 added the changes to this section.

Public Laws 1913, c. 192, added the last two sentences abolishing advanced fees of sheriffs and juries.

The effect of this section is to provide that the proceeding may be commenced by the filing of the petition, and that the inquisition may be held upon the notice thereto provided being served upon the alleged incompetent, thereby dispensing with the necessity of issuing a summons. The notice to an incompetent to appear at the time and place named to present evidence and show cause, if any, why he should not be declared incompetent serves every function of a summons. In re Barker, 201 N. C. 617, 620, 188 S. E. 205.

General Consideration. — This section clearly makes four classes of persons for whom guardians may be appointed.
namely, idiots, lunatics, inebriates, and those who are incompetents from want of understanding to manage their own affairs, because of the excessive use of intoxicating drinks or other cause.

(1) An idiot or natural fool is one that has no understanding from his native understanding, but of whom the excessive use of intoxicating

(2) A lunatic one who has possessed reason, but through disease, grief, or other cause has lost it. The term is especially applicable to one who has lucid intervals and manifest control of the law; the recover his reason.

(3) An inebriate is defined in

(4) The fourth class of persons mentioned in this section must really be embraced under the head of lunatics, that is, those who are incompetent from want of understanding to manage their own affairs must be complete. As in lunacy, there must be a total privation of understanding; mere weakness of mind will not be sufficient to place a person in the relation of a lunatic. These four classes are not mentioned in the statute. In re Anderson, 132 N. C. 243, 246, 43 S. E. 649.

Distribution as to Jurisdiction.—The effect of this action has been to confer upon the clerks original and exclusive jurisdiction to issue writs from time to time, as may be necessary, for the purpose of ascertaining, by the inquisition of a jury, whether a party be an idiot or a lunatic, or if, having been found to be a lunatic, whether he has become of sound mind again; and to make all orders that may be necessary upon the return of the inquisition. After an idiot or lunatic has thus been found to be such, and put under guardianship of the court, he has only such jurisdiction over his estate, both real and personal, and has power to direct the sale of the same, or any part thereof, and to make all necessary orders for the application of the proceeds to the necessities of the idiot or lunatic and his family. Dowell v. Jacks, 58 N. C. 417, 419.

An affidavit filed in accordance with this section, concerning the alleged lunacy of a person, the subject of an inquisition of lunacy, is incompetent from want of understanding to manage his own affairs, because of the excessive use of intoxicating bricks or other cause. The order of commitment be without warrant of law, the Superior Court obtains jurisdiction upon appeal from the denial of the motion before the clerk to strike out the order, which motion expressly requested that the cause "be reinstated upon the docket." In re Dewey, 206 N. C. 714, 175 S. E. 161.

Presence of Party.—The alleged lunatic has a right to be present at the inquest, and if this right be denied him, it is good cause for setting aside the inquisition. But where an inquisition, taken by order of a court of competent jurisdiction, is returned by such court, it is to be respected like other judgments of a court, until it be reversed or superseded. Bethes v. McLennon, 23 N. C. 253, cited in note in 23 L. R. A. 742.

A finding of the jury that a person, the subject of an inquisition of lunacy, is incompetent from want of understanding to manage his own affairs is such as to require the clerk to appoint a guardian for him, whatever the cause may be, whether it be incompetency found in the inquisition or not. This is true even where the jury finds that the defendant is not a lunatic or idiot. In re Anderson, 132 N. C. 243, 43 S. E. 649. An inquisition of incompetency to understand is prima facie evidence of incompetency, and the certificates of the Regional Medical Officer of the United States Veterans' Bureau shall be all the proof required as to the incapacity of said veteran to receive such funds and to the necessity of a guardian. Guardians for such veterans shall be subject to the same provisions of law as guardians of idiots, inebriates, lunatic, and incompetent persons in this State.

Any guardian or trustee appointed prior to April 3, 1939, under the provisions of this section of certificate issued by the superintendent of any hospital licensed and supervised by the State of North Carolina, and any and all proceedings based thereon are hereby validated. (Rev. ss. 1891, 4609; Code, § 1927, c. 292; 1927, c. 160; 1930, c. 320; C. S. 2296).

Editor's Note.—The 1927 amendment added the latter part of the first paragraph relating to the appointment of guardians for World War Veterans. The 1939 amendment inserted after the word "Columbia" in the fifth line the words "or in any hospital for insane in this State or in any State, territorial or Governmental asylum or hospital for the insane in this State, or in any other state or territory, or in the District of Columbia, or in any hospital licensed and supervised by the State of North Carolina, the certificate of the superintendent of such hospital declaring such veteran to be insane, and memory, which certificate shall be sworn to and subscribed before the clerk of the Superior Court or any notary public, or the clerk of any court of record in the county, in which such hospital is situated and certified under the seal of court, shall be sufficient evidence to authorize to appoint a guardian for such idiot, lunatic or insane person.

Further, the clerks of the different counties of this State are also authorized to appoint guardians for any person entitled to the benefits of the World War Veterans' Act of nineteen hundred and twenty-four as amended, where it shall appear from the certificate of the Regional Medical Officer of the United States Veterans' Bureau of North Carolina that the disability or incompetency declared by the United States Government as incompetent to receive the funds to be paid to him under said Acts of Congress, and such certificate shall be all the proof required as to the incapacity of said veteran to receive such funds and as to the necessity of a guardian. Guardians for such veterans shall be subject to the same provisions of law as guardians of idiots, inebriates, lunatic, and incompetent persons in this State.

§ 35-3. Guardian appointed on certificate from hospital for insane.—If any person is confined in any State, territorial or Governmental asylum or hospital for the insane in this State, or in any other state or territory, or in the District of Columbia, or in any hospital licensed and supervised by the State of North Carolina, the certificate of the superintendent of such hospital declaring such veteran to be insane, and memory, which certificate shall be sworn to and subscribed before the clerk of the Superior Court or any notary public, or the clerk of any court of record in the county, in which such hospital is situated and certified under the seal of court, shall be sufficient evidence to authorize to appoint a guardian for such idiot, lunatic or insane person.

§ 35-4. Restoration to sanity or sobriety; effect; how determined.—When any insane person or inebriate becomes of sound mind and memory, or becomes competent to manage his property, he is authorized to manage, sell and control all his property in as full and ample a manner as he could do before he became insane or inebriate, and a petition in behalf of such person may be filed in the superior court of the county of his residence, or before the clerk of the superior court of the county wherein such person is confined or held; provided, however, that in all cases where a guardian has been appointed the
cause of action shall be tried in the county where the guardianship is pending, and said guardian shall be made a party to such action before final determination thereof, setting forth the facts, duly verified by the oath of the petitioner. (This petition may be filed by the petitioner formally adjudged to be insane, lunatic, inebriate or incompetent; or by any friend or relative of said person; or by the guardian of said person), whereupon the clerk shall issue an order, upon notice to the person alleged to be no longer insane or inebriate, to the sheriff of the county, commanding him to summon a jury of six freeholders to inquire into the sanity of the alleged sane person, formerly a lunatic, or the sobriety of such alleged restored person, formerly an inebriate. The jury shall make return of their proceedings under their hands to the clerk, who shall file and record the same, and if the jury find that the person whose mental or physical condition inquired of is of sound mind and memory, or is no longer an inebriate, or the case may be, the said person is authorized to manage his affairs, make contracts and sell his property, both real and personal, as if he had never been insane or inebriate. (Rev., s. 1893; Code, s. 1672; 1901, c. 191; 1903, c. 80; 1879, c. 324, s. 4; 1937, c. 311; 1941, c. 145; C. S. 2287.)

Editor's Note.—The 1937 amendment inserted in this section the words appearing in parenthesis.

The 1941 amendment provided for filing the petition in the county where such guardianship is pending, and said guardian has been appointed, in which case the petition is to be filed in the county where such guardianship is pending. A commitment under this act may be brought before the judge at chambers or in term. Zewe v. Ware, 182 N. C. 555, 109 S. E. 568.

Removal of Guardian.—Ex parte proceedings to remove a guardian of an insane person, without notice to such guardian, are void. Sims v. Sims, 121 N. C. 297, 28 S. E. 407. See Rev. 486.

Constitutionality of Section.—The constitutional provision preserving the right to a trial by jury applies only to cases in which the prerogative existed at common law or by statute at the time the Constitution was adopted, and this section, requiring that only six freeholders be summoned to inquire into the sanity of the person alleged to be insane, is constitutional, not requiring a jury of twelve. Groves v. Ware, 182 N. C. 555, 109 S. E. 568.

Appeal.—Petitioner, who had been adjudged non compos mentis under section 35-2, filed this petition under this section, requiring that only six freeholders be summoned to inquire into the sanity of the person alleged to be insane, and the clerk's order was voided for the discharge of her guardian and the possession of her property. Upon the finding of the jury she was adjudged no longer insane and the prayers of her petition granted. Her guardian appealed to the superior court. It was held that the appeal should have been dismissed, since this section does not provide for appeal. Whether the clerk's order could be reviewed by the superior court pursuant to a writ of certiorari, and whether the clerk's order was void ab initio on the ground that the person adjudged insane cannot file a petition under this section, held not presented for decision, but semble, the clerk's order was voidable and not void, and it was error for the superior court to dismiss the proceeding. In re Sylviant, 212 N. C. 97, 191 S. E. 422.

A guardian of an incompetent may not appeal from the finding of the jury or the order of the clerk entered thereon declaring such person sane and competent in proceedings under this section, the court having no interest adverse to such declaration and there being no right of appeal given him by statute. In re Dry, 216 N. C. 427, 5 S. E. (2d) 142.

§ 35-5. Legal rights restored upon certificate of sanity by superintendent of hospital. — Any person who has been declared of unsound mind and memory by reason of the excessive use of intoxicating drink or other causes, and said person is the maker or one of the makers, a surety or one of the indorsers of any note, bond, or other obligation for the payment of money, which is due or past due at the time of the appointment of the guardian, or shall thereafter become due prior to the settlement of the estate of said ward, the guardian of said ward's estate is hereby authorized and empowered to execute, as such guardian, a new note, bond, or other obligation for the payment of money, in the same capacity as the ward was obligated, for the same amount or less, but not greater than the sum due on the original obligation. Such new note shall be in lieu of the original obligation of the ward, whether made payable to the original holder or to
another. Such guardian is authorized and empowered to renew said note, bond, or other obligation for the payment of money from time to time; and said note, bond, or other obligation so executed and renewed shall be binding upon the estate of said ward to the same extent and in the same manner and with the same effect that the original bond, note, or other obligation executed by the ward was binding upon his estate: Provided, the time for final payment of the note, bond, or other obligation for the payment of money, or any renewal thereof by said guardian shall not extend beyond a period of two years from the qualification of the original guardian as such upon the estate of said ward. (1927, c. 45, s. 1.)

§ 35-9. Guardian not liable.—The execution of any note, bond or other obligation for the payment of money mentioned in § 35-8 by the guardian of the inebriate, lunatic, or incompetent, shall not be held or construed to be binding upon the said guardian personally. (1927, c. 45, s. 2.)

Art. 3. Sales of Estates. § 35-10. Clerk may order sale, renting or mortgage.—When it appears to any clerk of the superior court by report of the guardian of any idiot, inebriate, or lunatic, that his personal estate has been exhausted, or is insufficient for his support, and that he is likely to become chargeable on the county, the clerk may make an order for the sale, mortgage or renting of his personal or real estate, or any part thereof, in such manner and upon such terms as he may deem advisable. Such order shall specify particularly the property thus to be disposed of, with the terms of renting or sale or mortgage, and shall be entered at length on the records of the court; and all sales and rentals and conveyances by mortgages or deeds in trust made under this section shall be valid to convey the interest and estate directed to be sold or conveyed by mortgage or deed in trust, and the title thereof shall be conveyed by such person as the clerk may appoint on confirming the sale; or the clerk may direct the guardian to file his petition for such purpose. (Rev., s. 1896; Code, s. 1674; R. C. c. 57, s. 4; 1801, c. 589; 1931, c. 184, s. 1; C. S. 2891.)

Cross References.—See annotations under § 35-11. As to manner in which sales and rentals shall be made, see § 33-21 et seq., and § 33-31.

Editor's Note.—The Act of 1931 amended this and § 35-11 to permit the mortgaging, under order of the Clerk of the Superior Court, of the personal or real estate of any idiot, inebriate, or lunatic in order that such incompetent may be adequately supported, his debts paid, or his property disposed of if such disposal be to his best interests. Under the former law the property could only be sold or rented. 9 N. C. Law Rev. 592.

Judicial Character of Sales.—Sales of real property of a lunatic in proceedings before the proper probate judge or clerk of the superior court of North Carolina acting as a probate court are judicial sales. Rexford v. Brunswick-Balke-Collender Co., 181 Fed. 462.

§ 35-11. Purposes for which estate sold or mortgaged; parties; disposition of proceeds.—When it appears to the clerk, upon the petition of the guardian of any idiot, inebriate, or lunatic, that a sale or mortgage of any part of his real or personal estate is necessary for his maintenance, or for the discharge of debts unavoidably incurred for his maintenance, or when the clerk is satisfied that the interest of the idiot, inebriate or lunatic would be materially and essentially promoted by the sale or mortgage of any part of such estate; or when any part of his real estate is required for public purposes, the clerk may order a sale thereof to be made by such person, in such way and on such terms as he shall adjudge. The clerk, if he be deemed proper, may direct to be made parties to such petition the next of kin or presumptive heirs of such nonsane person or inebriate. And if on the hearing the clerk orders such sale or mortgage, the same shall be made and the proceeds applied and secured, and shall descend and be distributed in such manner as is provided for the sale of infants' estates decreed in like cases to be sold on application of their guardians, as directed in the chapter entitled Guardian and Ward. The word "mortgage" whenever used herein shall be construed to include deeds in trust. (Rev., s. 1897; Code, s. 1675; R. C., c. 57, s. 5; 1931, c. 184, s. 2; C. S. 2892.)

Cross References.—As to sale of estates of wards generally, see § 33-31 et seq. As to release of lands condemned under the eminent domain, see § 40-22.

Jurisdiction of Superior Courts in Sale of Prior Debts.—The superior courts have jurisdiction to hear and determine an action instituted by a creditor of a lunatic for the recovery of a debt pre-existing the lunacy. Blake v. Respass, 77 N. C. 193.

Clerk Has No Power to Pay Prior Debts of Lunatic.—This section confers no power upon the clerk to provide for the payment of the debts of a lunatic contracted prior to the lunacy. Blake v. Respass, 77 N. C. 193.

How Property Sold for Pre-Existing Debt.—Property of a lunatic may be sold by the order of a committee of a court in its equitable jurisdiction, for the payment of pre-existing debts. Rexford v. Brunswick-Balke-Collender Co., 181 Fed. 462.

Sale of Lunatic's Contingent Interest.—This section does not confer jurisdiction on the clerks of courts to order the sale of contingent interests of lunatics, in lands; and suits to sell such interests, when the circumstances of the lunatic require it, should be determined in the superior court, in its equitable jurisdiction. Smith v. Witter, 174 N. C. 616, 94 S. E. 402.

Clerk's Jurisdiction Not Affected by Petition for Sale. The probate court having jurisdiction, it shall not be lawful for a petition for the allotment of a maintenance for a lunatic and his family to discharge debts unavoidably incurred for that purpose, or for the disaffirmance of a sale of real estate to provide a fund thereof, and also to make provisions for the care and preservation of the lunatic's estate, it was not ousted of jurisdiction because the guardian's petition also prayed for a sale to provide for the payment of pre-existing debts. Rexford v. Brunswick-Balke-Collender Co., 181 Fed. 462.

Title of Purchaser.—A purchaser of real property at a sale held by a lunatic's commissioner under a probate order is not chargeable with errors or irregularities in the proceedings; it is sufficient, if the court had jurisdiction of the parties and subject-matter, that the commissioner acted under a decree purporting to confer power of sale. Rexford v. Brunswick-Balke-Collender Co., 181 Fed. 462.

How Judgment against Lunatic Satisfied.—If the lunatic has property which cannot be reached by execution, or for which the execution has been in some way stayed, such property shall be distributed in like manner as is provided for the sale of infants' estates decreed in like cases to be sold on application of their guardians, as directed in the chapter entitled Guardian and Ward.

Sale of land of wife of lunatic upon petition.—When the wife of a lunatic owns real estate in her own right the sale which will promote her interest, a sale of the same may be made upon the order of the clerk of the superior court of the county where the land lies, under the petition of the wife of said lunatic and the guardian of the lunatic husband, and the proceeds of said sale shall be paid to the wife of said lunatic.
cross references.—see also, § 52-5. as to conveyance of land by the husband of an insane wife, see §§ 39-14, 30-9, and 47-15.

section not mandatory.—the remedies given by this section and sec. 52-5 are in the alternative, and optional by the wife as to which may be pursued. lancaster v. lancaster, 178 n. c. 22, 100 s. e. 120.

§ 35-13. mortgage or sale of estates held by the entireties; special proceeding before clerk.—in all cases where a husband and wife shall be seized of property as an estate by the entireties, and the wife or the husband or both shall be or become mentally incompetent to execute a conveyance of the estate so held, and the interest of said parties shall make it necessary or desirable that such property be mortgaged or sold, it shall be lawful for the mentally competent spouse and/or the guardian of the mentally incompetent spouse, and/or the guardians of both (where both are mentally incompetent) to file a petition with the clerk of the superior court in the county where the lands are located, setting forth all facts relative to the status of the owners, and showing the necessity or desirability of the sale or mortgage of said property, and the clerk, after first finding as a fact that either the husband or wife, or both, are mentally incompetent, shall have power to authorize the interested parties and/or their guardians to execute a mortgage, deed of trust, deed, or other conveyance of such property, provided it shall appear to said clerk's satisfaction that same is necessary or to the best advantage of the parties, and not prejudicial to the interest of the mentally incompetent spouse. (1935, c. 59, s. 1.)

editor's note.—for a complete analysis of this article, see 11 n. c. law rev. 376.

§ 35-15. general law applicable; approved by judge.—the proceedings herein provided for shall be conducted under and shall be governed by laws pertaining to special proceedings, and it shall be necessary for any sale or mortgage or other conveyance herein authorized to be approved by the resident judge or the judge holding the courts in the judicial district wherein the property is located. (1935, c. 59, s. 2.)

cross reference.—as to general law on special proceedings, see § 1-393 et seq.

§ 35-16. proceeding valid in passing title.—any mortgage, deed, or deed of trust executed under authority of this article by a regularly conducted special proceeding as provided shall have the force and effect of passing title to said property to the same extent as a deed executed jointly by husband and wife, where both are mentally capable of executing a conveyance. (1935, c. 59, s. 3.)

§ 35-17. clerk may direct application of funds; purchasers and mortgages protected.—in all cases conducted under this article it shall be competent for the court, in its discretion, to direct the application of funds arising from a sale or mortgage of such property in such manner as may appear necessary or expedient for the protection of the interest of the mentally incompetent spouse: Provided, however, this section shall not be construed as requiring a purchaser or any other party advancing money on the property to see to the proper application of such money, but such purchaser or other party shall acquire title unaffected by the provisions of this section. (1935, c. 59, s. 4.)

§ 35-18. prior sales and mortgages validated.—any and all special proceedings under which estates by the entireties have been sold or mortgaged prior to march 5, 1935, under circumstances contemplated in this article are hereby in all respects ratified and confirmed, provided that such proceeding or proceedings are otherwise regular and conformable to law. (1935, c. 59, s. 5.)

art. 5. surplus income and advancements.

§ 35-19. income of insane widowed mother used for children's support.—when a father dies leaving him surviving minor children and a widow who is the mother of such children, but leaving no sufficient estate for the support and maintenance of such minor children, and the mother is or becomes insane and is so declared according to law, and such insanity continues for twelve months thereafter, and she has an estate which is placed in the hands of a guardian or other person, as provided by law, the estate of such insane mother shall in such cases as are provided for in § 35-20 be made liable for the support, maintenance and education of the class of persons mentioned in said section to the same extent, in the same manner and under the same rules and regulations as applies to estates of fathers thereunder. (rev., s. 1899; 1905, c. 546; c. s. 2295.)

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

The evidence tended to show that petitioner is the sister of a World War veteran, that prior to the time he was drafted he gave her what assistance he could for her support, and that he sent her money after he was in the army, that he is unmarried and has no other dependents, that he became incurably insane and was placed in a government hospital where he is being taken care of without charge, that his guardian has on hand $22,046.81, representing payments on his War Risk Insurance, and that petitioner is destitute and without means of support. Held: The clerk of the superior court, with the approval of the resident judge or presiding judge, or the clerk, has the power, upon proper findings from the evidence, to order guardian to purchase a home in the name of the incompetent for the use of petitioner, and to advance petitioner a reasonable sum monthly for her support. Patrick v. Branch Bkg., etc., 236 N. C. 525, 5 S. E. (2d) 724.

Cited in In re Jones, 211 N. C. 704, 191 S. E. 511.

§ 35-21. Advancement to adult child or grandchild.—When such nonsane person is possessed of a real or personal estate in excess of an amount more than sufficient to abundantly and amply support himself with all the necessaries and suitable comforts of life and has no minor children nor immediate family dependent upon him for support, education or maintenance, such advancements may be made out of such excess of the principal of his estate to such child or grandchild of age for the better promotion or advancement in life or in business of such child or grandchild: Provided, that the order for such advancement shall be approved by the resident or presiding judge of the district who shall find the facts in said order of approval. (1935, c. 136, s. 1.)

§ 35-22. For what purpose and to whom advanced. — Such advancements shall be ordered only for the better promotion in life of such as are of age, or married, and for the maintenance, support and education of such as are under the age of twenty-one years and unmarried; and in all cases the sums ordered shall be paid to such persons as, in the opinion of the clerk, will most effectually execute the purpose of the advancement. (Rev., s. 1901; Code, s. 1678; R. C., c. 57, s. 10; C. S. 2297.)

§ 35-23. Distributees to be parties to proceeding for advancement.—In every application for such advancements, the guardian of the nonsane person and all such other persons shall be parties as would at that time be entitled to a distributive share of his estate if he were then dead. (Rev., s. 1902; Code, s. 1679; R. C., c. 57, s. 11; C. S. 2298.)

§ 35-24. Advancements to be equal; accounted for on death.—The clerk, in ordering such advancements, shall, as far as practicable, so order the same as that, on the death of the nonsane person, his estate shall be distributed among his distributees in the same equal manner as if the advancements had been made by the person himself; and on his death every sum advanced to a child or grandchild shall be an advancement, and shall bear interest from the time it may be received. (Rev., s. 1903; Code, s. 1680; R. C., c. 57, s. 12; C. S. 2299.)

§ 35-25. Clerk may select those to advance.—When the surplus aforesaid or advancement from the principal estate is not sufficient to make distribution among all the parties, the clerk may select and decree advancement to such of them as may most need the same, and may apportion the sum decreed in such amounts as are expedient and proper. (Rev., s. 1904; Code, s. 1681; R. C., c. 57, s. 13; 1925, c. 136, s. 2; C. S. 2300.)

§ 35-26. Advancements to be secured against waste.—It is the duty of the clerk to withhold advancements from such persons as will probably waste them, or so to secure the same, when they may have families, that it may be applied to their support and comfort; but any sum so advanced shall be regarded as an advancement to such persons. (Rev., s. 1905; Code, s. 1682; R. C., c. 57, s. 14; C. S. 2301.)

§ 35-27. Appeal; removal to superior court.—Any person made a party may appeal from any order of the clerk; or may, when the pleadings are finished, require that all further proceedings shall be had in the superior court. (Rev., s. 1906; Code, s. 1683; R. C., c. 57, s. 15; C. S. 2302.)

Cited in In re Cook, 228 N. C. 384, 11 S. E. (2d) 142.

§ 35-28. Advancements only when insanity permanent. — No such advancement shall be allowed under this chapter but in cases of such permanent and continued insanity as that the nonsane person shall be judged by the nonsane person as to be incapable, notwithstanding any lucid intervals, to make advancements with prudence and discretion. (Rev., s. 1907; Code, s. 1684; R. C., c. 57, s. 16; C. S. 2303.)

§ 35-29. Decrees suspended upon restoration of sanity.—Upon such insane person being restored to sanity, every order made for advancements shall cease to be further executed, and his estate shall be discharged of the same. (Rev., s. 1908; Code, s. 1685; R. C., c. 57, s. 17; C. S. 2304.)

Art. 6. Detention, Treatment, and Cure of Inebriates.

§ 35-30. "Inebriate" defined.—For the purposes of this article, the word "inebriate" is defined to be a person habitually so addicted to alcoholic drinks or narcotic drugs as to be a proper subject for restraint, care, and treatment. (1921, c. 156, s. 2; C. S. 2304(a).)

§ 35-31. Petition for examination; warrant for hearing; action without petition; evidence.—Upon petition of any two of the following persons, to-wit, the wife, husband, parent, child, committee of the estate of an inebriate, or next friends of such person, or, if there be no such persons, then of two citizens of the county wherein the alleged inebriate resides, the clerk of the superior court of the county in which the said alleged inebriate resides shall issue his warrant requiring the inebriate, on
The petition shall not be considered unless it sets forth that the person named therein is an inebriate within the scope of this article, and unless it be accompanied by the affidavits or affidavit of at least two reputable physicians, stating that they have examined the alleged inebriate, and that he is a proper subject for restraint, care, and treatment, or the clerk may, on his own initiative, where he has information and reasonable grounds to believe that a particular person is an inebriate and is a fit subject for restraint, care, and treatment, cause such person to be brought before him and proceed to hear and try the question of whether or not he is an inebriate within the definition of § 35-30. If two reputable physicians shall certify before him that such person is an inebriate, he may commit such an inebriate as herein provided to the department of the state hospital at Raleigh for the care and treatment of such inebriate. (1921, c. 156, s. 3; 1941, c. 226; C. S. 2304(b).)

Editor's Note.—The 1941 amendment rewrote the first sentence of this section so as to permit the petition to be filed by any two citizens in the absence of those specified.

§ 35-32. Commitment for treatment; discharge.
—If after such hearing the clerk is satisfied that the alleged inebriate is a proper subject for restraint, care, and treatment, he shall commit the inebriate to the department for inebriates at the state hospital in Raleigh, where he shall be treated, subject to the same rules and regulations as provided for the treatment and care of curable insane persons, and he shall be discharged therefrom under the same rules and regulations. (1921, c. 156, s. 4; C. S. 2304(c).)

§ 35-33. Inquiry as to estate of inebriate; minors; costs; expenses.—After the clerk shall determine that an inebriate is a fit subject to be committed to the department for inebriates as aforesaid, he shall go further and inquire as to whether said inebriate is indigent or not in such way that he has not in his own right sufficient estate or property to bear the cost and expense of his restraint, care, and treatment while in the institution. If he is so indigent, then he shall inquire further whether or not the petitioning wife or husband has sufficient estate to pay such costs. If the inebriate is a minor he shall determine whether his particular guardian or parent has sufficient estate of the inebriate or his own, if a parent, to pay such costs. In any of these instances, if sufficient estate or property is found to pay such costs, the clerk shall adjudge the payment from such estate, and in all cases, if the petitioning parent has property sufficient to pay, he shall be adjudged to pay costs of the treatment of his minor child. But if in none of these cases sufficient property is found to pay such costs and expenses, the inebriate shall be declared indigent and the actual cost and expense of restraint, care, and treatment of indigent inebriates as herein defined shall be borne and paid by the county from which the inebriate is committed: Provided, that there shall not be included in such cost and expense any charge except for board and clothing. (1921, c. 156, s. 5; C. S. 2304(d).)

§ 35-34. Inebriate submitting himself for treatment.—Any inebriate within the definition of § 35-30 who wishes to submit himself for care and treatment in the department for inebriates at the state hospital in Raleigh, may be received therein as a patient upon his presentation of himself personally at the institution and making arrangements with the superintendent for the actual cost of his detention and treatment. He shall signify his desire in writing, and promise therein to submit himself to the rules and regulations for the government of the institution. When this is done he shall be detained therein and given adequate care and attention. After he has been so detained for thirty days he may secure his release and discharge by ten days notice in writing to the superintendent, or to any one of the assistant physicians in charge of such institution: Provided, said physician or physicians are satisfied that said inebriate has sufficiently recovered to return to his home and not become a menace or charge to society. (1921, c. 156, s. 6; C. S. 2304(e).)

§ 35-35. Department for inebriates. — It shall be the duty of trustees and superintendent of the state hospital at Raleigh to set apart a department for such inebriates on or before the first day of May, one thousand nine hundred and twenty-two: Provided that, if in the course of care and treatment of said inebriates it develops that they have criminal, mental, or other symptoms indicating they can not be properly taken care of in this department, the superintendent of the hospital is hereby authorized to transfer such patients to any other department under his care, that, in his opinion, the circumstances may justify. (1921, c. 156, s. 7; 1933, c. 341; C. S. 2304(f).)

Editor's Note.—Public Laws of 1933, c. 341, added the proviso relating to inebriates in the state hospital at Raleigh.

Art. 7. Sterilization of Persons Mentally Defective.

§ 35-36. State institutions authorized to sterilize mental defectives.—The governing body or responsible head of any penal or charitable institution supported wholly or in part by the state of North Carolina, or any subdivision thereof, is hereby authorized and directed to have the sterilization performed upon any mentally diseased, feebleminded or epileptic inmate or patient thereof, as may be considered best in the interest of the mental, moral, or physical improvement of the patient or inmate, or for the public good: Provided, however, that no operation described in this section shall be lawful unless and until the provisions of this article shall first be complied with. (1933, c. 224, s. 1.)

Editor's Note.—See 11 N. C. Law Rev. 254, for full review of this and following sections.

Constitutionality.—The Act of 1929, c. 34, entitled, "an act to provide for the sterilization of the mentally defective and feebleminded inmates of charitable and penal institutions of the state of North Carolina," was held unconstitutional, being in violation of the provisions of the Fourteenth Amendment, § 1, of the Constitution of the United States, and of the State Constitution, Art. I, § 17, there being no provision in the statute giving a person ordered to be sterilized notice and a hearing or afforded an opportunity to appeal to the courts. Brewer v. Valk, 204 N. C. 186, 167 S. E. 638. The defect does not exist in the present statute. See § 35-46.

§ 35-37. Operations on mental defectives not in institutions.—It shall be the duty of the board
of commissioners of any county of North Carolina, at the public cost and expense, one of the operations described in § 35-35, performed upon any mentally diseased, feeble-minded or epileptic resident of the county, not an inmate of any public institution, upon the request and petition of the superintendent of public welfare or other similar public official performing in whole or in part the functions of such superintendent, or of the next of kin, or the legal guardian of such mentally defective person: Provided, however, that no operation described in this section shall be lawful unless and until the provisions of this article shall be first complied with. (1933, c. 224, s. 2.)

§ 35-38. Restrictions on such operations.—No operation under this article shall be performed by other than a duly qualified and registered North Carolina physician or surgeon, and by him only upon a written order signed after complete compliance with the procedure outlined in this article by the responsible executive head of the institution or board, or the superintendent of public welfare, or other similar official performing in whole or in part the functions of such superintendent, or the next of kin or legal guardian having custody of the feebleminded, mentally defective or epileptic inmate, patient or non-institutional individual. (1933, c. 224, s. 3.)

§ 35-39. Prosecutors designated; duties.—If the person upon whom the operation is to be performed is an inmate or patient of one of the institutions mentioned in § 35-36, the executive head of such institution or his duly authorized agent shall act as prosecutor of the case. The county superintendent of public welfare may act as prosecutor or petitioner in instituting sterilization proceedings in the case of any feeble-minded, epileptic, or mentally diseased person who is on parole from a state institution, and in the case of any such person who is an inmate of a state institution, when authorized to do so by the superintendent of such institution. If the person upon whom the operation is to be performed is an inmate or patient of a charitable or penal institution supported by the county, the executive head of such institution or his duly authorized agent, or the county superintendent of welfare or such other official performing in whole or in part the functions of such superintendent of the county in which such county institution is situated, shall act as petitioner in instituting proceedings before the eugenics board. If the person to be operated upon is not an inmate of any such public institution, then the superintendent of welfare or such other official performing in whole or in part the functions of such superintendent of the county of which said inmate, patient, or non-institutional individual is to be sterilized is a resident, shall be the prosecutor. It shall be the duty of such prosecutor promptly to institute proceedings as provided by this article in any or all of the following circumstances:

1. When in his opinion it is for the best interest of the mental, moral or physical improvement of the patient, inmate, or non-institutional individual to be operated upon, to procreate a child or children who would have a tendency to serious physical, mental, or nervous disease or deficiency.

2. When in his opinion it is for the public good that such patient, inmate or non-institutional individual be operated upon.

3. When in his opinion such patient, inmate, or non-institutional individual would be likely, unless operated upon, to procreate a child or children who would have a tendency to serious physical, mental, or nervous disease or deficiency.

4. When requested to do so in writing by the next of kin or legal guardian of such patient, inmate or non-institutional individual.

5. In all cases as provided for in § 35-35. (1933, c. 224, s. 4; 1935, c. 463, s. 1; 1937, c. 243.)

Cross Reference.—As to necessity of sterilization of one adjudged insane before issuance of marriage license, see § 51-12.

Editor's Note.—The 1935 amendment inserted the third sentence of this section, and the 1937 amendment inserted the second sentence.

§ 35-40. Eugenics board of N. C. created.—There is hereby created the eugenics board of North Carolina. All proceedings under this article shall be begun before the said eugenics board. This board shall consist of five members and shall be composed of: (1) the commissioner of public welfare of North Carolina, (2) the secretary of the state board of health of North Carolina, (3) the chief medical officer of an institution for the feebleminded or insane of the state of North Carolina, not located in Raleigh, (4) the chief medical officer of the state hospital at Raleigh, (5) the attorney general of the state of North Carolina. Any one of these officials may for the purpose of a single hearing delegate his power to act as a member of said board to an assistant: Provided, said delegation is made in writing, to be included as a part of the permanent record in said case. The said board shall from time to time elect a chairman from its own membership and adopt and from time to time modify rules governing the conduct of proceedings before it, and from time to time select the member of the said board designated above as the chief medical officer of an institution for the feebleminded or insane of the state of North Carolina not located in Raleigh. (1933, c. 224, s. 5.)

§ 35-41. Quarterly meetings. — The board of eugenics shall meet at least quarterly in each year in Raleigh for the purpose of hearing all cases that may be brought before it and shall continue in session with appropriate adjournments until all current applications and other pending business have been disposed of. The members shall receive no additional compensation for their services. (1933, c. 224, s. 6.)

§ 35-42. Secretary of board and duties.—The board shall appoint a secretary not a member of the board who shall conduct the business of the board between the times of the regular meetings. Such secretary shall receive all petitions, keep the records, call meetings, and in general act as the executive of said board in such matters as may be delegated to him by said board. (1933, c. 224, s. 7.)

§ 35-43. Proceedings before board. — Proceedings under this article shall be instituted by the petition of said petitioner to the eugenics board. Such petition shall be in writing, signed by the petitioner and duly verified by his affidavit to the best of his knowledge and belief. It shall set forth the facts of the case and the grounds of his opinion. The petition shall also contain a statement of the mental and physical status of the patient verified by the affidavit of at least one physi-
or can by reasonable investigation be learned by
said prosecutor, they or either of them, as the

case may be, shall be served likewise with a copy
of said petition and notice and shall be entitled
to at least fifteen days' notice of the said hear-
ing: Provided, That the procedure described in
this section shall not be necessary in the case of
any operation for sterilization or asexualization
provided for in this article if the parent, legal or
natural guardian, or spouse or next of kin of the
inmate, patient or non-institutional individual
shall submit to the superintendent of the institu-
tion of which the subject is a patient or inmate
or to the superintendent of public welfare of the
county in which the subject is residing, regardless
of whether the subject is a legal resident of such
county, a duly witnessed petition requesting that
sterilization or asexualization be performed up-

on said inmate, patient or non-institutional indi-

vidual, provided the other provisions of this article
are complied with. Any operation authorized in
accordance with this proviso may be performed
immediately upon receipt of the authorization from
the eugenics board. (1933, c. 224, s. 9; 1933, c.
463, ss. 3, 6.)

Editor's Note.—Public Laws 1935, chapter 463, section 6
added the proviso at the end of this section. Section 3 of
the same act added the last sentence to the first para-
graph.

§ 35-45. Consideration of matter by board.—
The said board at the time and place named in
said notice, with such reasonable continuances
from time to time and from place to place as
the said board may determine, shall proceed to
hear and consider the said petition and evidence
offered in support of and against the same:
Provided, that the said board shall give oppor-
tunity to said inmate, patient or individual resi-
dent to attend the said hearings in person if de-
sired by him or if requested by his guardian or
next of kin, or the solicitor.

The said board may receive and consider as
evidence at the said hearings the commitment
papers and other records of the said inmate or
patient with or in any of the aforesaid institu-
tions as certified by the superintendent or execu-
tive official, together with such other evidence
as may be offered by any party to the proceed-
ings.

Any member of the said board shall have power
for the purposes of this article to administer
oaths to any witnesses at such hearing.

Depositions may be taken, as in other civil
cases, by any party after due notice and read in
evidence, if otherwise pertinent.

Any party to the said proceedings shall have
the right to be represented by counsel at such
hearings.

A stenographic transcript of the proceedings at
such hearings duly certified by the petitioner and
the inmate, patient or individual resident, or his
guardian or next of kin, or the solicitor, shall be
made and preserved as part of the records of the
case. (1933, c. 224, s. 10.)

§ 35-46. Board may deny or approve peti-
tion.—The said board may deny the prayer of
the said petition or if, in the judgment of the
board, the case falls within the intent and mean-

ing of one or more of the circumstances men-
tioned in § 35-39, and an operation of asexualiza-
tion or sterilization seems to said board to be

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for the best interest of the mental, moral or physical improvement of the said patient, inmate or individual resident or for the public good, it shall be the duty of the board to approve said recommendation in whole or in part or to make such order as under all the circumstances of the case may seem appropriate, within fifteen days after the conclusion of said hearings, and to send to the prosecutor a written order, signed by at least three members of the board, directing him to proceed with the operation as provided in this article. Said order shall contain the name of the specific operation which is to be performed and the date when said operation is to be performed.

If the board disapproves the petition, the case may not be brought up again except on the request of the inmate, patient, or individual resident, or his guardian, or one or more of his next of kin, husband, wife, father, mother, brother, or sister, until one year has elapsed.

Nothing in this article shall be construed to empower or authorize the board to interfere in any manner with the right of the patient, inmate, or individual resident, or his guardian or next of kin to select a competent physician of his own choice for consultation or operation at his own expense. (1933, c. 224, s. 11.)

§ 35-47. Orders may be sent parties by registered mail; consenting to operation.—Any order granting the prayer of the petition, in whole or in part, may be delivered to the petitioner by registered mail, return receipt demanded, to all parties in the case, including the legal guardian, the solicitor and the next of kin of the inmate, patient, or individual resident. It shall be the duty of the said guardian, the solicitor and the next of kin to protect by such measures as may seem to them in their sole discretion sufficient and appropriate the rights and best interests of the said inmate, patient, or individual resident.

If the inmate, patient or individual resident, or the next of kin, legal guardian, solicitor of the county, and guardian appointed as herein provided, shall not before, shall consent in writing to the operation as ordered by the board, such operation shall take place at such time as the said prosecutor petitioning shall designate. (1933, c. 224, s. 12.)

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

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

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

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

Cross Reference.—See note to § 35-36.

Editor’s Note.—The second paragraph of this section was changed by the 1935 amendment. The amendment also inserted in the second sentence of the fourth paragraph the words “unless appealed from.”

§ 35-49. Appeal costs.—The cost of appeal, if any, to the superior or higher courts, shall be taxed as in civil cases. If the case is finally determined in favor of the plaintiff, the costs shall be paid by the county. (1933, c. 224, s. 14; 1935, c. 463, s. 5.)

Editor’s Note.—The amendment of 1935 omitted the paragraph of this section which provided that the record before the board was conclusive as to facts.

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

The pendency of an appeal in the supreme court shall operate as a stay of proceedings un-
§ 35-51. Civil or criminal liability of parties limited. Neither the said petitioner nor any other person legally participating in the execution of the provisions of this article shall be liable, either civilly or criminally, on account of such participation, except in case of negligence in the performance of said operation. (1933, c. 224, s. 16.)

§ 35-52. Necessary medical treatment unaffected by article.—Nothing contained in this article shall be construed so as to prevent the medical or surgical treatment for sound therapeutic reasons of any person in this state, by a physician or surgeon licensed in this state, which treatment may incidentally involve the nullification or destruction of the reproductive functions. (1933, c. 224, s. 17.)

§ 35-53. Permanent records of proceedings before board.—Records in all cases arising under this article shall be filed permanently with the secretary of the said eugenics board. Such records shall not be open to public inspection except for such purposes as the court may from time to time approve. (1933, c. 224, s. 18.)

§ 35-54. Construction of terms.—Where the inmates, patients, or non-institutional individuals are referred to in this article as of the masculine or feminine gender, the same shall be construed to include the feminine or masculine gender as well. Wherever the term individual resident appears in this article, it shall be construed to mean non-institutional individual. (1933, c. 224, s. 19.)

§ 35-55. Discharge of patient from institution.—Before any inmate or patient designated in §§ 35-36 and 35-39, shall be released, paroled or discharged, it shall be the duty of the governing body or responsible head of any institution above mentioned to comply with the procedure set out in this article, whenever a written request for the institutionalization or sterilization of said inmate or patient is filed with the governing body or responsible head of the institution in which such inmate or patient has been legally confined. This written request may be made by any public official or by the legal guardian or next of kin of any inmate or patient not later than thirty days prior to the date of said parole or discharge. Upon the receipt of the signed approval of the eugenics board as described in this article, it shall be the duty of said governing board or responsible head to issue an order for the performance of the operation upon said inmate or patient, and the operation must be performed before the release, parole or discharge of any such inmate or patient. (1933, c. 224, s. 20.)

§ 35-56. Existing rights of surgeons unaffected. — Nothing in Public Laws 1935, chapter 463 shall, in any way, interfere with any surgeon in the removal of diseased pathological tissue from any patient. (1935, c. 463, s. 7.)

§ 35-57. Temporary admission to state hospitals for sterilization.—Any feeble-minded, epileptic, or mentally diseased person, for whom the eugenics board of North Carolina has authorized sterilization, may be admitted to the appropriate state hospital for the performance of such operation. The order of the eugenics board authorizing a surgeon on the regular or consulting staff of the hospital to perform the operation will be sufficient authority to the superintendent of such hospital to receive, restrain, and control the patient until such time as it is deemed wise to release such patient. All such admissions shall be at the discretion of the superintendent of the state hospital, and in making any agreement with any county or state institution to perform such operations, the state hospital may collect a fee which shall not be greater than the cost of such operation and the cost of care and maintenance for the duration of the operation and the time required for the patient to recuperate.

The order of the eugenics board and the agreement of the person or persons referred to in this article, whenever a written request for the admission of such patient has been made in accordance with the provisions of this article, to admit such patient shall be full and sufficient authority for the prosecutor or the sheriff of the county to deliver such patient to the proper state hospital. (1937, c. 221.)

Cited in Gower v. Clayton, 215 N. C. 82, 1 S. E. 2d (2d) 133.

Art. 8. Temporary Care and Restraint of Inebriates, Drug Addicts and Persons Insane.

§ 35-58. Hospitals and sanatoriums may restrain and treat alcohol and drug addicts.—The superintendent, manager, or owner of any public or private hospital, sanatorium, or institution, upon the written request of two duly licensed physicians, not connected with any hospital, public or private, and the husband, wife, guardian, or in the case of an unmarried person having no guardian, by some one of the next of kin, may receive, care for and restrain in such hospital, sanatorium, or institution, as a patient, for a period not exceeding twenty days, any alcoholic or drug addict, or any person needing immediate care and treatment because such person has become addicted to the intemperate use of narcotics, hypnotic drugs or alcoholic drinks, to such an extent that he has lost the power of self control. Such request for the admission of such patient shall be in writing and filed at such hospital, sanatorium, or institution, at the time of the reception of such patient, or within twenty-four hours thereafter, and such written request shall be held and considered as a commitment of such patient to the said hospital, sanatorium, or institution, for a period of not exceeding twenty days. The superintendent, manager, or owner of such hospital, sanatorium, or institution shall not detain or restrain any person received as above provided for more than twenty days and shall not be liable in damages to such person or his personal representative or guardian on account of such restraint: Provided, the same is exercised and administered in a humane manner, without violence or personal injury. (1933, c. 213, s. 1.)

§ 35-59. Use of restraining devices limited. — No restraint in the form of muffs or mitts with lock buckles, or waist straps, wristlets, anklelets, or camisoles, head-straps, protection sheets or simple sheets when used for restraint or other device interfering with freedom shall be imposed upon any patient in such hospital, sanatorium, or institution, unless applied in the presence of the superintendent, or of the physician, or of an as-
§ 36-1. Investment and Deposit of Trust Funds.

Art. 1. Investment and Deposit of Trust Funds.

Sec.
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§ 35-60. Civil liability for corrupt admissions.
—Nothing contained in this article shall be held or construed to relieve from liability in any suit or action, instituted in the courts of this state, any husband, wife, guardian, physician, or assistant physician, to such person or patient on account of collusion of such husband, wife, guardian, physician or assistant physician to unlawfully, wrongfully and corruptly commit any such person or patient to such hospital, sanatorium, or institution, under the provisions of this article. (1933, c. 213, s. 3.)

Chapter 36. Trusts and Trustees.

Art. 1. Investment and Deposit of Trust Funds.

Sec.
36-21. Not void for indefiniteness; title in trustee; and approve or disapprove the restraint imposed. (1933, c. 213, s. 2.)

States are responsible, farm loan bonds issued by Federal land banks, or in bonds of the state of North Carolina issued since the year one thousand eight hundred and seventy-two; or in drainage bonds duly issued under the provisions of article 8 of chapter entitled Drainage; and in settlements by guardians, executors, administrators, trustees, and others acting in a fiduciary capac-
ity, such bonds or other securities of the United States, and such bonds of the state of North Carolina, and such drainage bonds, shall be deemed cash to the amount actually paid for same, including the premium, if any, paid for such bonds or other securities, and may be invested as such by the transfer thereof to the persons entitled. (Rev., s. 1792; Code, s. 1594; 1870-1, c. 197; 1885, c. 389; 1917, c. 6, s. 9; 1917, c. 67, s. 1; 1917, c. 152, s. 7; 1917, c. 191, s. 1; 1917, c. 269, s. 5; C. S. 4018.)

Cross References.—As to authority to invest in federal farm bonds, see § 53-60. As to further provisions as to investment by guardians and interest thereon, see § 24-4. As to authority of guardians and other fiduciaries to buy real estate foreclosed under mortgages executed by them, see § 33-25. As to investment in bonds guaranteed by the United States, see § 53-64. As to loans on mortgages, etc., issued under federal housing act, see § 53-45.


§ 36-2. Investment of trust funds in county, city, town, or school district bonds.—Guardians, executors, administrators, trustees, and others acting in a fiduciary capacity, are authorized to invest funds in their hands as such fiduciaries in bonds issued by any county, city, town or school district, of the state of North Carolina subsequent to January first, one thousand nine hundred and fifteen, provided that the net debt of such county, city, town or school district does not exceed ten (10%) per cent of the assessed valuation of the property therein subject to taxation for the payment of such bonds, in the same manner, to the same extent and with the same legal consequence as fiduciaries are now authorized to invest such funds in bonds of the state of North Carolina under the provisions of § 36-1. (Ex. Sess. 1921, c. 63; 1931, c. 257; C. S. 4018(a).)

Editor's Note.—The Act of 1931 made this section applicable to city, town and school district bonds.


§ 36-3. Investment in building and loan and federal savings and loan associations.—Guardians, executors, administrators, clerks of the superior court and others acting in a fiduciary capacity may invest funds in their hands as such fiduciaries in stock of any building and loan association organized and licensed under the laws of this state: Provided, that no such funds may be so invested unless and until authorized by the insurance commissioner. Provided further, that such funds may be invested in stock of any federal savings and loan association organized under the laws of the United States, upon approval of an officer of the Home Loan Bank at Winston-Salem, or such other governmental agency as may hereafter have supervision of such associations. (1933, c. 549, s. 1; 1937, c. 14.)

Editor's Note.—The 1937 amendment added the second proviso.

§ 36-4. Investment in registered securities.—Any guardian having in hand surplus funds belonging to a minor ward may, if he so elects, invest the same in registered securities within the classes designated by §§ 36-1 and 36-2, the registration of said securities as to principal only to be in the name of said minor ward.

Upon delivery of such registered securities to the clerk of the superior court of the county in which the estate of said minor ward is being administered, said clerk of the superior court shall give said guardian a receipt for the same and said clerk of the superior court shall thereafter hold said securities for said ward, subject only to final disposition thereof to be approved by the resident judge or presiding judge of the superior court: Provided, however, all income accruing therefrom shall be paid to said guardian in the same manner and for the same purposes as the any other income of said estate derived from other sources.

Whenever any guardian shall have delivered to the clerk of the superior court registered securities as hereinbefore provided, he shall be entitled to credit in his account as guardian for the amount actually expended for such securities, and his bond as such guardian shall thereupon be reduced in an amount equal in proportion to the total amount of the bond as the funds expended for the securities are to the total amount of the estate covered by such bond. (1933, c. 449; 1943, c. 96.)

Local Modification.—Craven: 1935, c. 449.

Editor's Note.—Prior to the 1943 amendment the latter part of the third paragraph read as follows: "in an amount equal to twice the amount of the funds actually invested in said securities." As to effect of section, see 13 N. C. Law Rev. 386.

§ 36-4.1. Investment in life, endowment or annuity contracts of legal reserve life insurance companies.—(1) Executors, administrators c. t. a., trustees and guardians legally holding funds or assets belonging to, or for the benefit of, minors or others may, upon petition filed with the clerk of the superior court of the county in which said fiduciary has qualified, be authorized by an order of such clerk of superior court and approved by either the resident judge or a judge of the superior court at term time, to invest such funds or assets, or part thereof, in single premium life, endowment or annuity contracts; any such fiduciaries may be authorized by order of the clerk of the superior court, upon approval by the judge as above provided, to invest the earnings, or part thereof, of such trust funds or assets, without encroaching upon the principal, in any annual premium life, endowment or annuity contracts of legal reserve life insurance companies duly licensed and qualified to transact business within the state: Provided, that where any such annual premium contract has been purchased as herein authorized any such fiduciary may, upon authorization of the clerk of the superior court and approval of the judge as above specified, encroach upon and use the principal of such trust funds or assets in order to pay subsequent premiums and thereby prevent a lapsation or forfeiture of any such insurance contract purchased pursuant to the provisions of this section.

(2) Such contracts may be issued on the life, or lives, of a ward, or wards, and beneficiary, or beneficiaries of a trust fund, or upon the life of any person in whose life the said ward or beneficiary has an insurable interest, and shall be so drawn by the insuring company, that the proceeds or avails thereof shall be the sole property of the person, or persons whose funds are invested therein. Such contracts may not be purchased from any such company for which such executor, administrator c. t. a., guardian or trustee is acting as agent, or receives any commission, or part of any commission, directly or indirectly
paid by such company to its agent soliciting and/or selling such contract.

(3) Notwithstanding anything contained in this section, no insurance contracts as specified in subsection (1) may be purchased by any executor, administrator, c. t. a., trustee, or guardian if the trust agreement or other instrument, if any, under which such fiduciary has qualified and is acting provides otherwise. (1943, c. 473, ss. 1-3.)

§ 36-5. Trust funds deposited at trustee’s risk.—
No provision in any charter or certificate of organization of any corporation permitting deposits therein by any guardian, executor or other trustee or fiduciary, or by any county, bonded or other officer, shall operate or be construed to relieve or discharge them, or either of them, from official responsibility, or to relieve them, or either of them, or their sureties, from liability on their official bonds. (Rev., s. 1793; 1889, c. 470; C. S. 4019.)

Cross Reference.—As to deposit of trust funds, see §§ 32-8 to 32-11.

Art. 2. Removal of Trust Funds from State.

§ 36-6. Proceeding to remove trust funds of nonresidents.—When any personal estate in this state is vested in a trustee resident therein, and those having the beneficial interest in the said estate are nonresidents of this state, the clerk of the superior court of the county in which the said trustee resides may, on a petition filed for that purpose, order him or his personal representative to pay, transfer, and deliver the said estate, or any part of it, to a nonresident trustee appointed by some court of record in the state in which the said beneficiary or beneficiaries reside. No such order of any clerk shall be valid and in force until approved by the resident judge of said judicial district, or the judge holding court in such district. (1911, c. 161, s. 1; C. S. 4020.)

Cross Reference.—As to guardian’s right to remove ward’s personalty from the state, see § 33-48.


§ 36-7. Removal ordered on notice; bond of nonresident trustee.—No such order shall be made, in the case of a petition, until notice of the application shall have been given to all persons interested in such trust estate, as now required by law in other special proceedings, nor until the court shall be satisfied by authentic documentary evidence that the nonresident trustee, appointed as aforesaid, has given bond, with sufficient surety, for the faithful execution of the trust, nor until it is satisfied that the payment and removal of such estate out of the state will not prejudice the right of any person interested or to become interested therein. (1911, c. 161, s. 2; C. S. 4021.)

Cross References.—As to bond in surety company, see § 109-35 et seq. As to mortgage in lieu of bond, see § 109-24 et seq. As to cash deposit in lieu of bond, see § 109-32.

§ 36-8. Order of removal discharges resident trustee.—When any guardian or committee, trustee or other person in this state, shall pay over, transfer, or deliver any estate in his hands or vested in him, under any order or decree made in pursuance of this article, he shall be discharged from all responsibility therefor. (1911, c. 161, s. 3; C. S. 4023.)
§ 36-12. Resignation allowed; costs; judge's approval.—In making an order allowing the fiduciary to resign the clerk shall make such order concerning the costs of the proceedings and commissions to the fiduciary as may be just. If there is no appeal from the decision and order of the clerk within the time prescribed by law, the proceedings shall be submitted to the judge of the superior court and approved by him before the same become effective. (1911, c. 39, s. 3; C. S. 4026.)

§ 36-13. Appeal; stay effected by appeal.—Any party in interest may appeal from the decision of the clerk to the judge at chambers, and in such event the procedure shall be the same as in other special proceedings as now provided by law. If the clerk allows the resignation, and an appeal is taken from his decision, such appeal shall have the effect to stay the judgment and order of the clerk until the cause is heard and determined by the judge upon the appeal taken. (1911, c. 39, s. 4; C. S. 4027.)

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

§ 36-15. Final accounting before resignation.—No executor, administrator, guardian, trustee, or other fiduciary shall be allowed or permitted to resign his trust until he shall first file with the court his final account of the trust estate, and until the court shall be satisfied that the said account is true and correct. (1911, c. 39, s. 6; C. S. 4029.)

Cross References.—As to vouchers being presumptive evidence, see § 28-119. As to fee for auditing final accounts, see § 2-35.

§ 36-16. Resignation effective on settlement with successor.—In case the resignation of the fiduciary is accepted by the court, the same shall not go into effect, or release or discharge the fiduciary from liability, until he shall have accounted to his successor in full for all moneys, securities, property or other assets or things of value in his possession or under his control or which should be in his possession or under his control belonging to the trust estate. (1911, c. 39, s. 6; C. S. 4030.)

§ 36-17. Court to appoint successor; bond required.—If the court shall allow any executor, administrator, guardian, trustee, or other fiduciary to resign his trust upon compliance with the provisions of this article, it shall be the duty of the court to proceed to appoint some fit and suitable person as the successor of such executor, administrator, guardian, trustee or other fiduciary; and the court shall require the person so appointed to give bond with sufficient surety, approved by the court, in a sum double the value of the property to come into his hands, conditioned upon the faithful performance of his duties as such fiduciary and for the payment to the persons entitled to receive the same of all moneys, assets, or other things of value which may come into his hands. All bonds executed under the provisions of this article shall be filed with the clerk, and shall be recorded in his office in a book kept for that purpose. (1911, c. 39, s. 7; C. S. 4031.)

Cross References.—As to bond in surety company, see § 109-16 et seq. As to mortgage in lieu of bond, see § 109-24 et seq. As to cash deposit in lieu of bond, see § 109-32.

§ 36-18. Rights and duties devolve on successor.—Upon the acceptance by the court of the resignation of any executor, administrator, guardian, trustee, or other fiduciary, and upon the appointment by court of his successor in the manner provided by this article, the substituted trustee shall succeed to all the rights, powers, and privileges, and shall be subject to all the duties, liabilities, and responsibilities that were imposed upon the original trustee. (1911, c. 39, s. 8; C. S. 4032.)

Art. 4. Charitable Trusts.

§ 36-19. Trustees to file accounts.—When real or personal property has been granted by deed, will, or otherwise, for such charitable purposes as are allowed by law, it shall be the duty of those to whom are confided the management of the property and the execution of the trust, to deliver in writing a full and particular account thereof to the clerk of the superior court of the county where the charity is to take effect, on the first Monday in February in each year, to be filed among the records of the court, and spread upon the record of accounts. (Rev., s. 3922; Code, s. 2342; R. C., c. 18, s. 1; 1832, c. 14, s. 4; 45 Eliz., c. 4; C. S. 4033.)


§ 36-20. Action for account; court to enforce trust.—If § 36-19 be not complied with, or there is reason to believe that the property has been mismanaged through negligence or fraud, it shall be the duty of the clerk of the superior court to give notice thereof to the attorney-general or solicitor who represents the state in the superior court for that county; and it shall be his duty to bring an action in the name of the state against the grantees, executors, or trustees of the charitable fund, calling on them to render a full and minute account of their proceedings in relation to the administration of the fund and the execution of the trust. The attorney-general or solicitor may also, at the suggestion of two reputable citizens, commence an action as aforesaid; and, in either case, the court may make such order and decree as shall seem best calculated to enforce the performance of the trust. (Rev., s. 3923; Code, ss. 2343, 2344;
Trust Estate Is Not Forfeited.—The trustees of a charitable trust who violate the provisions of the trust are subject to the procedure prescribed by this section, and where the trust is created by will the trust estate is not forfeited in whole or in part, but upon the order of the court that the moneys derived have been diverted to other uses than the testator intended. Humphrey v. Board of Trustees, 203 N. C. 201, 165 S. E. 547.

§ 36-21. Not void for indefiniteness; title in trustee; vacancies. No gift, grant, bequest or devise, whether in trust or otherwise, to religious, educational, charitable or benevolent uses or for the purpose of providing for the care or maintenance of any part of any cemetery, public or private, shall be invalid by reason of any indefiniteness or uncertainty of the objects or beneficiaries of such trust, or because said instrument confers upon the trustee or trustees discretionary powers in the selection and designation of the objects or beneficiaries of such trust in carrying out the purposes thereof, or by reason of the same in contravening any statute or rule against perpetuities. If a trustee or trustees are named in the instrument creating such a gift, grant, bequest or devise, the legal title to the property given, granted, bequeathed or devised for such purpose shall vest in such trustee or trustees and its or their successor or successors duly appointed in accordance with the terms of such instrument. If no trustee or trustees be named in said instrument, or if a vacancy or vacancies shall occur in the trusteeship, and no method is provided in such instrument for filling such vacancy or vacancies, then the Superior Court of the proper county shall appoint a trustee or trustees, pursuant to § 36-9, to execute said trust in accordance with the true intent and meaning of the instrument creating the same. Such trustee or trustees when so appointed shall be vested with all the power and authority, discretionary or otherwise, conferred by such instrument. (1925, c. 264, s. 1.)

Editor's Note.—See 16 N. C. L. Rev. 22.

Charitable trusts are not subject to the rule against perpetuities, this section being merely declaratory of the existing law, and limitations over from one charity to another may be applied without contravening any statute or rule against perpetuities. Williams v. Williams, 215 N. C. 739, 3 S. E. (2d) 114.

Charitable trusts are not subject to the rule against perpetuities. Penick v. Bank of Wadeborough, 218 N. C. 286; 12 S. E. (2d) 253.

Appointment of Trustee upon Occurrence of Vacancy.—Where land is conveyed to trustees and their successors for specified charitable purposes, the court may appoint trustees upon failure of the successors to the original trustees, since equity will not permit a trust to fail for want of a trustee. Wills v. Clark, 214 N. C. 526, 199 S. E. 20.

§ 36-22. Trusts created in other states valid. —Every such religious, educational or charitable trust created by any person domiciled in another state, which shall be valid under the laws of the state of the domicile of such creator or donor, shall be deemed and held in all respects valid and effectual in this State, even though one or more of the trustees be not originally residents of this State, and the trust created thereby shall be deemed and held valid as in said trust shall reside or be located in a foreign state. (1925, c. 264, s. 2.)

§ 36-23. Application of section 36-22. —Section 36-22 shall apply to all trusts heretofore or hereafter created in which one or more of the beneficiaries or objects of such trust shall reside or be located in this State. (1925, c. 264, s. 3.)

Art. 5. Uniform Trusts Act.

§ 36-24. Definitions. — As used in this article unless the context or subject matter otherwise requires:
1. “Person” means an individual, a corporation, a partnership, an association, a joint stock company, a trust, an unincorporated organization or two or more persons having a joint or common interest.
2. “Trustee” includes trustees, a corporate as well as a natural person and a successor or substitute trustee.

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3. “Relative” means a spouse, ancestor, descendant, brother or sister.

4. “Affiliate” means any person directly or indirectly controlling or controlled by another person, as hereinabove defined, or any person under direct or indirect common control with another person. It includes any person with whom a trustee has an express or implied agreement regarding the purchase of trust investments by each from the other, directly or indirectly, except a broker or stock exchange.

5. “Trust” means an express trust only. (1939, c. 197, s. 1.)

Editor’s Note.—For comment on this uniform act, see 17 N. C. Law Rev. 396.

§ 36-25. Bank account to pay special debts.—1. Whenever a bank account shall, by entries made on the books of the depositor or the funds at the time of the deposit, be created exclusively for the purpose of paying dividends, interest or interest coupons, salaries, wages, or pensions or other benefits to employees, and the depositor at the time of opening such account does not expressly otherwise declare, the depositor shall be deemed a trustee of such account for the creditors to be paid therefrom, subject to such power of revocation as the depositor may have reserved by agreement with the bank.

2. If any beneficiary for whom such a trust is created does not present his claim to the bank for payment within one year after it is due, the depositor who created such trust may revoke it as to such creditor. (1939, c. 197, s. 2.)

§ 36-26. Loan of trust funds.—Except as provided in § 36-27, no corporate trustee shall lend trust funds to itself or an affiliate, or to any director, officer, or employee of itself or of an affiliate; nor shall any noncorporate trustee lend trust funds to himself, or to his relative, employer, employee, partner, or other business associate. (1939, c. 197, s. 3.)

§ 36-27. Funds held by bank for investment or distribution.—Funds received or held by a bank as fiduciary awaiting investment or distribution shall be promptly invested, distributed or deposited to the credit of the trust department in the commercial department of the bank or another bank: Provided, that the bank or the commercial department shall first deliver to the trust department, as collateral security, securities eligible for the investment of the sinking funds of the state of North Carolina equal in market value to such deposited funds, or readily marketable commercial bonds having, at the time of the deposit, a rating equal to one hundred and twenty-five per cent (125%) of the funds so deposited; and such collateral security shall be held by the trust department in trust and for the special benefit of the estate or fund for which the deposit was made, or, in case the deposit consists of uninvested or undistributed funds belonging to several estates or trust funds, then in trust for the special benefit of said estates or funds in proportion to their respective interest in such deposits. The said securities shall at all times be kept separate and apart from the other assets of the trust department and proper records shall be kept by the proper officer in connection therewith. If such funds are deposited in a bank insured under the provisions of the Federal Deposit Insurance Corporation, the above collateral security will be required only for that portion of uninvested balances of each trust which are not fully insured under the provisions of that corporation. “Investment” and/or “invested” shall not be construed to include savings accounts or certificates or deposits in any bank. (1939, c. 197, s. 4.)

§ 36-28. Trustee buying from or selling to self.—No trustee shall directly or indirectly buy or sell any property for the trust from or to itself or an affiliate; or from or to a director, officer, or employee of such trustee or of an affiliate; or from or to a relative, employer, partner, or other business associate. (1939, c. 197, s. 5.)

§ 36-29. Trustee selling from one trust to another trust.—No trustee shall as trustee of one trust sell property to itself as trustee of another trust. (1939, c. 197, s. 6.)

§ 36-30. Corporate trustee buying its own stock.—No corporate trustee shall purchase for a trust shares of its own stock, or its bonds or other securities, or the stock, bonds or other securities of an affiliate. (1939, c. 197, s. 7.)

§ 36-31. Voting stock.—A trustee owning corporate stock may vote it by proxy, but shall be liable for any loss resulting to the beneficiaries from a failure to use reasonable care in deciding how to vote the stock and in voting it. (1939, c. 197, s. 8.)

Cross References.—As to trustee’s power to vote stock, see also § 55-111. As to liability as stockholder, see § 60-17.

§ 36-32. Banks holding stock in name of nominee.—A bank holding stock as fiduciary may hold it in the name of a nominee, without mention of the trust in the stock certificate or stock registration book: Provided, that (1) the trust records and all reports or accounts rendered by the fiduciary clearly show the ownership of the stock by the fiduciary and the facts regarding its holdings; (2) the nominee shall not have possession of the stock certificate or access thereto except under the immediate supervision of the fiduciary. The fiduciary shall personally be liable for any loss to the trust resulting from any act of such nominee in connection with such stock so held. (1939, c. 197, s. 9.)

§ 36-33. Powers attached to office.—Unless it is otherwise provided by the trust instrument, or an amendment thereof, or by court order, all powers of a trustee shall be attached to the office and shall not be personal. (1939, c. 197, s. 10.)

§ 36-34. Powers exercisable by majority. —1. Unless it is otherwise provided by the trust instrument, or an amendment thereof, or by court order, any power vested in three or more trustees may be exercised by a majority of such trustees; but no trustee who has not joined in exercising a power shall be liable to the beneficiaries or to others for the consequences of such exercise, nor shall a dissenting trustee be liable for the consequences of an act in which he joins at the direction of the majority trustees, if he expressed his dissent in writing to any of his cotrustees at or before the time of such joinder.

2. Nothing in this section shall excuse a cotrustee from liability for inactivity in the administra-
tion of the trust nor for failure to attempt to prevent a breach of trust. (1939, c. 197, s. 11.)

Cross Reference.—As to right of trustee where only a naked trust is created, see § 41-3.

§ 36-33. Contracts of trustee. — 1. Whenever a trustee shall make a contract which is within his powers as trustee, or a predecessor trustee shall have made such a contract, and a cause of action shall arise thereon, the party in whose favor the cause of action has accrued may sue the trustee in his representative capacity, and any judgment rendered in such action in favor of the plaintiff shall be collectible (by execution) out of the trust property. In such an action the plaintiff need not prove that the trustee could have secured reimbursement from the trust fund if he had paid the plaintiff's claim.

2. No judgment shall be rendered in favor of the plaintiff in such action unless he proves that within thirty days after the beginning of such action, or within such other time as the court may fix, and more than thirty days prior to obtaining the judgment, he notified each of the beneficiaries known to the trustee who then had a present interest, or in the case of a charitable trust the attorney general and any corporation which is a beneficiary or agency in the performance of such charitable trust, of the existence and nature of the action. Such notice shall be given by mailing copies thereof in postpaid envelopes addressed to the parties to be notified at their last known addresses. The trustee shall furnish the plaintiff a list of the parties to be notified, and their addresses, within ten days after written demand therefor, and notification of the persons on such list shall constitute compliance with the duty placed on the plaintiff by this section. Any beneficiary, or in the case of charitable trusts the attorney general and any corporation which is a beneficiary or agency in the performance of such charitable trust, may intervene in such action and contest the right of the plaintiff to recover.

3. The plaintiff may also hold the trustee who makes the contract personally liable on such contract, if the contract does not exclude such personal liability. The addition of the word "trustee" or the words "as trustee" after the signature of a trustee to a contract shall be deemed prima facie evidence of an intent to exclude the trustee from personal liability. (1939, c. 197, s. 12.)

Cross References.—As to endorsement of a negotiable instrument by trustee, see § 25-50. As to costs when trustee is a party to an action, see § 6-31.

§ 36-36. Exoneration or reimbursement for torts.

—1. A trustee who has incurred personal liability for a tort committed in the administration of the trust is entitled to exoneration therefor from the trust property if he has not discharged the claim, or to be reimbursed therefor out of trust funds if he has paid the claim, if (1) the tort was a common incident of the kind of business activity in which the trustee was properly engaged for the trust or, (2) although the tort was not a common incident of such activity if neither the trustee nor any officer or employee of the trustee was guilty of personal fault in incurring the liability.

2. If a trustee commits a tort which increases the value of the trust property, he shall be entitled to exoneration or reimbursement with respect thereto to the extent of such increase in value, even though he would not otherwise be entitled to exoneration or reimbursement.

3. Nothing in this section shall be construed to change the existing law with regard to the liability of trustees of charitable trusts for torts of themselves or their employees. (1939, c. 197, s. 13.)

§ 36-37. Tort liability of trust estate.—1. Where a trustee of his predecessor has incurred personal liability for a tort committed in the course of his administration, the trustee in his representative capacity may sue and collection had from the trust property, if the court shall determine in such action that (1) the tort was a common incident of the kind of business activity in which the trustee or his predecessor was properly engaged for the trust; or (2) that, although the tort was not a common incident of such activity, neither the trustee nor his predecessor, nor any officer or employee of the trustee or his predecessor, was guilty of personal fault in incurring the liability; or (3) that, although the tort did not fall within classes (1) or (2) above, it increased the value of the trust property. If the tort is within classes (1) or (2) above, collection may be had of the full amount of damage proved; and if the tort is within class (3) above, collection may be had only to the extent of the increase in the value of the trust property.

2. In an action against the trustee in his representative capacity under this section the plaintiff need not prove that the trustee could have secured reimbursement from the trust fund if he had paid the plaintiff's claim.

3. No judgment shall be rendered in favor of the plaintiff in such action unless he proves that within thirty days after the beginning of the action, or within such other period as the court may fix and more than thirty days prior to obtaining the judgment, he notified each of the beneficiaries known to the trustees who then had a present interest of the existence and nature of the action. Such notice shall be given by mailing copies thereof in postpaid envelopes addressed to the persons on such list shall constitute compliance with the duty placed on the plaintiff by this section. Any beneficiary may intervene in such action and contest the right of the plaintiff to recover.

4. The trustee may also be held personally liable for any tort committed by him, or by his agents or employees in the course of their employment, subject to the rights of exoneration or reimbursement provided in § 36-36.

5. Nothing in this section shall be construed to change the existing law with regard to the liability of trustees of charitable trusts for torts of themselves or their employees. (1939, c. 197, s. 14.)

§ 36-38. Withdrawals from mingled trust funds.

—Where a person who is a trustee of two or more trusts has mingled the funds of two or more trusts in the same aggregate of cash, or in the same bank or brokerage account or other investment, and a withdrawal is made therefrom by the trustee for his own benefit, or for the benefit of a third person not a beneficiary or
creditor of one or more of the trusts, or for an unknown purpose, such a withdrawal shall be charged first to the amount of cash, credit, or other property of the trustee in the mingled fund, if any, and after the exhaustion of the trustee's cash, credit, or other property, then to the several trusts in proportion to their several interests in the cash, credit, or other property at the time of the withdrawal. (1939, c. 197, s. 15.)

§ 36-39. Unenforceable oral trust created by deed.—1. When an interest in real property is conveyed by deed to a person which is unenforceable on account of the statute of frauds and the intended trustee or his successor in interest still holds title but refuses to carry out the trust on account of the statute of frauds, the intended trustee or his successor in interest, except to the extent that the successor in interest is a bona fide purchaser of a legal interest in the real property in question, shall be under a duty to convey the interest in real property to the settlor or his successor in interest. A court having jurisdiction may prescribe the conditions upon which the interest shall be conveyed to the settlor or his successor in interest.

2. Where the intended trustee has transferred part or all of his interest and it has come into the hands of a bona fide purchaser, the intended trustee shall be liable to the settlor or his successor in interest for the value of the interest thus transferred at the time of its transfer, less such offsets as the court may deem equitable. (1939, c. 197, s. 16.)

§ 36-40. Power of settlor.—The settlor of any trust affected by this article may, by provision in the instrument creating the trust if the trust was created by a writing, or by oral statement to the trustee at the time of the creation of the trust if the trust was created orally, or by an amendment of the trust if the settlor reserved the power to amend the trust, relieve his trustee from any or all of the duties, restrictions, and liabilities which would otherwise be imposed upon him by this article; or alter or deny to his trustee any or all of the privileges and powers conferred upon the trustee by this article; or add duties, restrictions, liabilities, privileges, or powers, to those imposed or granted by this article; but no act of the settlor shall relieve a trustee from the duties, restrictions, and liabilities imposed upon him by §§ 36-26, 36-27 and 36-28. (1939, c. 197, s. 17.)

§ 36-41. Power of beneficiary.—Any beneficiary of a trust affected by this article may, if of full legal capacity and acting upon full information, by written instrument delivered to the trustee relieve the trustee as to such beneficiary from any or all of the duties, restrictions, and liabilities which would otherwise be imposed on the trustee by this article, except as to the duties, restrictions, and liabilities imposed by §§ 36-26, 36-27 and 36-28. Any such beneficiary may release the trustee from liability to such beneficiary for past violations of any of the provisions of this article. (1939, c. 197, s. 18.)

§ 36-42. Power of the court.—A court of competent jurisdiction may, for cause shown and upon notice to the beneficiaries, relieve a trustee from any or all of the duties and restrictions which would otherwise be placed upon him by this article, or wholly or partly excuse a trustee who has acted honestly and reasonably from liability for violations of the provisions of this article. (1939, c. 197, s. 19.)

§ 36-43. Liabilities for violations of article.—If a trustee violates any of the provisions of this article, he may be removed and denied compensation in whole or in part; and any beneficiary, co-trustee, or successor trustee may treat the violation as a breach of trust. (1939, c. 197, s. 20.)

§ 36-44. Uniformity of interpretation.—This article shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it. (1939, c. 197, s. 21.)

§ 36-45. Short title.—This article may be cited as the Uniform Trusts Act. (1939, c. 197, s. 22.)

§ 36-46. Time of taking effect.—This article shall take effect the first day of July, one thousand nine hundred and thirty-nine and shall apply in the construction of and operation under (a) all agreements containing trust provisions entered into subsequent to March 15, 1941; (b) all wills made by testators who shall die subsequent to March 15, 1941; and (c) all other wills and trust agreements and trust relations in so far as such terms do not impair the obligation of contract or deprive persons of property without due process of law under the Constitution of the State of North Carolina or of the United States of America. (1939, c. 197, s. 23; 1941, c. 269.)

Editor's Note.—The 1941 amendment struck out a part of the original section and substituted therefor that part of this section beginning with the words "in the construction."

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


§ 36-47. Establishment of common trust funds.—Any bank or trust company qualified to act as fiduciary in this state may establish one or more common trust funds for the purpose of furnishing investments to itself as fiduciary, or to itself and another or others, as co-fiduciaries; and may, as such fiduciary or co-fiduciary, invest funds which it lawfully holds for investment in interests in such common trust fund or funds, if such investment is not prohibited by the instrument, judgment, decree, or order creating such fiduciary relationship or by an amendment thereof, and if, in the case of co-fiduciaries, the bank or trust company procures the consent of its co-fiduciary or co-fiduciaries to such investment. (1939, c. 200, s. 1.)

Editor's Note.—For comment on this enactment, see 17 N. C. Law Rev. 594.

§ 36-48. Court accountings.—Unless ordered by a court of competent jurisdiction the bank or trust company operating such common trust fund or funds shall not be required to render a court accounting with regard to such fund or funds; but it may, by application to the superior court, secure approval of an accounting on such conditions as the court may establish. This section shall not affect the duties of the trustees of the participating trusts under the common trust fund to render accounts of their several trusts. (1939, c. 200, s. 2.)

§ 36-49. Supervision of state banking commis-
All common trust funds established under the provisions of this article shall be subject to the rules and regulations of the state banking commission. (1939, c. 200, s. 3.)

§ 36-50. Uniformity of interpretation. — This article shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it. (1939, c. 200, s. 4.)

Chapter 37. Uniform Principal and Income Act.

Sec.
37-1. Definition of terms.
37-3. Income and principal; disposition.
37-4. Apportionment of income.
37-5. Corporate dividends and share rights.
37-6. Premium and discount bonds.
37-7. Principal used in business.
37-8. Principal comprising animals.
37-10. Principal subject to deprecation.
37-12. Expenses; trust estates.

(1) All receipts of money or other property paid or delivered as rent of realty or hire of personalty or dividends on corporate shares payable other than in shares of the corporation itself, or interest on money loaned, or interest on or the rental or use value of property wrongfully withheld or tortiously damaged, or otherwise in return for the use of principal, shall be deemed income unless otherwise expressly provided in this chapter.

(2) All receipts of money or other property paid or delivered as the consideration for the sale or other transfer, not a leasing or letting, or property forming a part of the principal, or as a repayment of loans, or in liquidation of the assets of a corporation, or as the proceeds of property taken on eminent domain proceedings where separate awards to tenant and remainderman are not made, or as proceeds of insurance upon property forming a part of the principal except where such insurance has been issued for the benefit of either tenant or remainderman alone, or otherwise as a refund or replacement or change in form of principal, shall be deemed principal unless otherwise expressly provided in this chapter. Any profit or loss resulting upon any change in form of principal shall inure to or fall upon principal.

(3) All income after payment of expenses properly chargeable to it shall be paid and delivered to the tenant or retained by him if already in his possession or held for accumulation where legally so directed by the terms of the transaction by which the principal was established, while the principal shall be held for ultimate distribution as determined by the terms of the transaction by which it was established or by law. (1937, c. 190, s. 3.)

§ 37-4. Apportionment of income. — Whenever a tenant shall have the right to income from periodic payments, which shall include rent, interest on loans and annuities, but shall not include dividends on corporate shares, and such right shall cease and determine by death or in any other manner at a time other than the date when such periodic payments should be paid, he or his per-
sonal representative shall be entitled to that portion of any such income next payable which amounts to the same percentage thereof as the time elapsed from the last due date of such periodic payments to and including the day of the determination of his right of the total period during which such income would normally accrue. The remaining income shall be paid to the person next entitled to income by the terms of the transaction by which the principal was established. But no action shall be brought by the trustee or tenant to recover such apportioned income or any portion thereof until after the day on which it would have become due to the tenant but for the determination of the right of the tenant entitled thereto. The provisions of this section shall apply whether an ultimate remainderman is specifically named or not. Likewise when the right of the first tenant accrues at a time other than the payment dates of such periodic payments, he shall only receive that portion of such income which amounts to the same percentage thereof as the time during which he has been so entitled is of the total period during which such income would normally accrue; the balance shall be a part of the principal. (1937, c. 190, s. 4.)

Cross Reference.—As to apportionment in the case of renting real estate, see § 42-2 et seq.

§ 37-5. Corporate dividends and share rights. — (1) All dividends on shares of a corporation forming a part of the principal which are payable in the shares of the corporation shall be deemed principal. Subject to the provisions of this section, all dividends payable otherwise than in the shares of the corporation itself, including ordinary and extraordinary dividends and dividends payable in shares or other securities or obligations of corporations, other than the declaring corporation, shall be deemed income. Where the trustee shall have the option of receiving a dividend, either in cash or in the shares of the declaring corporation, it shall be considered as a cash dividend and deemed income, irrespective of the choice made by the trustee.

(2) All rights to subscribe to the shares or other securities or obligations of a corporation accruing on account of the ownership of shares or other securities in such corporation, and the proceeds of any sale of such rights, shall be deemed principal. All rights to subscribe to the shares or other securities or obligations of a corporation accruing on account of the ownership of shares or other securities in another corporation, and the proceeds of any sale of such rights, shall be deemed income.

(3) Where the assets of a corporation are liquidated, amounts paid upon corporate shares as cash dividends declared before such liquidation occurred or as arrears of preferred or guaranteed dividends shall be deemed income; all other amounts paid upon corporate shares on disbursements of the corporate assets to the stockholders shall be deemed principal. All disbursements of corporate assets to the stockholders, whenever made, which are designated by the corporation as a return of capital or division of corporate property shall be deemed principal.

(4) Where a corporation succeeds another by merger, consolidation or reorganization or otherwise acquires its assets, and the corporate shares of the succeeding corporation are issued to the shareholders of the original corporation in like proportion to, or in substitution for, their shares of the original corporation, the two corporations shall be considered a single corporation in applying the provisions of this section. But two corporations shall not be considered a single corporation under this section merely because one owns corporate shares of or otherwise controls or directs the other.

(5) In applying this section the date when a dividend accrues to the person who is entitled to it shall be held to be the date specified by the corporation as the one on which the stockholders entitled thereto are determined, or in default thereof the date of declaration of the dividend. (1937, c. 190, s. 5.)

§ 37-6. Premium and discount bonds.—Where any part of the principal consists of bonds or other obligations for the payment of money, they shall be deemed principal at their inventory value or in default thereof at their market value at the time the principal was established, or at their cost where purchased later, regardless of their par or maturity value; and upon their respective maturities or upon their sale any loss or gain realized thereon shall fall upon or inure to the principal. (1937, c. 190, s. 6.)

§ 37-7. Principal used in business.—(1) Whenever a trustee or a tenant is authorized by the terms of the transaction by which the principal was established, or by law, to use any part of the principal in the continuance of a business which the original owner of the property comprising the principal had been carrying on, the net profits of such business attributable to such principal shall be deemed income.

(2) Where such business consists of buying and selling property, the net profits for any period shall be ascertained by deducting from the gross returns during and the inventory value of the property at the end of such period, the expenses during and the inventory value of the property at the beginning of such period.

(3) Where such business does not consist of buying and selling property, the net income shall be computed in accordance with the customary practice of such business, but not in such way as to decrease the principal.

(4) Any increase in the value of the principal used in such business shall be deemed principal, and all losses in any one calendar year, after the expenses are deducted from such business for that year has been exhausted, shall fall upon principal. (1937, c. 190, s. 7.)

§ 37-8. Principal comprising animals. — Where any part of the principal consists of animals employed in business, the provisions of § 37-7 shall apply; and in other cases where the animals are held as a part of the principal, partly or wholly because of the offspring or increase which they are expected to produce, all offspring or increase shall be deemed principal to the extent necessary to maintain the original number of such animals and the remainder shall be deemed income; and in all other cases such offspring or increase shall be deemed income. (1937, c. 190, s. 8.)

§ 37-9. Disposition of natural resources.—Where
any part of the principal consists of property in lands from which may be taken timber, minerals, oils, gas or other natural resources, and the trustee or tenant is authorized by law or by the terms of the transaction by which the principal was established to sell, lease or otherwise develop such natural resources, and no provision is made for the disposition of the net proceeds thereof after the liquidation of expenses and carrying charges on such property, such proceeds, if received as rent on a lease, shall be deemed income, but if received as consideration, whether as royalties or otherwise, for the permanent severance of such natural resources from the lands, shall be deemed principal to be invested to produce income. Nothing in this section shall be construed to abrogate or extend any right which may otherwise have accrued by law to a tenant to develop or work such natural resources for his own benefit. (1937, c. 190, s. 9.)

§ 37-10. Principal subject to depletion.—Where any part of the principal consists of property subject to depletion, such as leaseholds, patents, copyrights and royalty rights, and the trustee or tenant in possession is not under a duty to change the form of the investment of the principal, the full amount of rents, royalties or return from the property shall be income to the tenant; but where the trustee or tenant is under a duty, arising either by law or by the terms of the transaction by which the principal was established, to change the form of the investment, either at once or as soon as it may be done without loss, then the return from such property not in excess of five per centum per annum of its fair inventory value, or in default thereof its market value at the time the principal was established, or at its cost where purchased later, shall be deemed income and the remainder principal. (1937, c. 190, s. 10.)

§ 37-11. Unproductive estate.—(1) Where any part of a principal in the possession of a trustee consists of realty or personalty which for more than a year, and until disposed of as hereinafter stated, has not produced an average net income of at least one per centum per annum of its fair inventory value, or in default thereof its market value at the time the principal was established, or of its cost where purchased later, and the trustee is under a duty to change the form of the investment as soon as it may be done without sacrifice of value and such change is delayed, but is made before the principal is finally distributed, then the tenant, or in case of his death his personal representatives, shall be entitled to share in the net proceeds received from the property as delayed income to the extent hereinafter stated.

(2) Such income shall be the difference between the net proceeds received from the property and the amount which, had it been placed at simple interest at the rate of five per centum per annum for the period during which the change was delayed, would have produced the net proceeds at the time of change, but in no event shall such income be more than the amount by which the net proceeds exceed the fair inventory value of the property or in default thereof its market value at the time the principal was established or its cost where purchased later. The net proceeds shall consist of the gross proceeds received from the property, less any expenses incurred in disposing of it and less all carrying charges which have been paid out of principal during the period while it has been unproductive.

(3) The change shall be taken to have been delayed from the time when the duty to make it first arose, which shall be presumed, in the absence of evidence to the contrary, to be one year after the trustee first received the property or if unproductive, otherwise one year after it became unproductive.

(4) If the tenant has received any income from the property or has had any beneficial use thereof during the period while the change has been delayed, his share of the delayed income shall be reduced by the amount of such income received or the value of the use had.

(5) In the case of successive tenants the delayed income shall be divided among them or their representatives according to the length of the period for which each was entitled to income. (1937, c. 190, s. 11.)

§ 37-12. Expenses; trust estates.—(1) All ordinary expenses incurred in connection with the trust estate or with its administration and management, including regularly recurring taxes assessed against any portion of the principal, water rates, premiums on insurance taken upon the estates of both tenant and remainderman, interest on mortgages on the principal, ordinary repairs, trustees' compensation except commissions computed on principal, compensation of assistants, and court costs and attorneys' and other fees on regular accountings, shall be paid out of income. But such expenses where incurred in disposing of, or as carrying charges on, unproductive estate as defined in § 37-11, shall be paid out of principal, subject to the provisions of sub-section two of § 37-11.

(2) All other expenses, including trustee's commissions computed upon principal, cost of investing or reinvigorating principal, attorneys' fees and other costs incurred in maintaining or defending any action to protect the trust or the property or assure the title thereof, unless due to the fault or cause of the tenant, and cost of, or assessments for, improvements to property forming part of the principal, shall be paid out of principal. Any tax levied by any authority, federal, state or foreign, upon profit or gain defined as principal under the terms of sub-section two of § 37-3 shall be paid out of principal, notwithstanding said tax may be denominated a tax upon income by the taxing authority.

(3) Expenses paid out of income according to sub-section one which represent regularly recurring charges shall be considered to have accrued from day to day, and shall be apportioned on that basis whenever the right of the tenant begins or ends at some date other than the payment date of the expenses. Where the expenses to be paid out of income are of unusual amount, the trustee may distribute them throughout an entire year or part thereof, or throughout a series of years. After such distribution, where the right of the tenant ends during the period, the expenses shall be apportioned between tenant and remainderman on the basis of such distribution.

(4) Where the costs of, or special taxes or assessments for, an improvement representing an addition of value to property held by the trustee as
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part of principal are paid out of principal, as pro-
vided in sub-section two, the trustee shall reserve
out of income and add to the principal each year
a sum equal to the cost of the improvement di-
vided by the number of years of the reasonably
expected duration of the improvement. (1937, c.
190, s. 12.)

§ 37-13. Expenses; non-trust estates.—(1) The
provisions of § 37-12, so far as applicable and ex-
cepting those dealing with costs of, or special
taxes, or assessments for, improvements to prop-
erty, shall govern the apportionment of expenses
between tenants and remaindermen where no trust
has been created, subject, however, to any legal
agreement of the parties or any specific direction
of the taxing or other statutes; but where either
tenant or remainderman has incurred an expense
for the benefit of his own estate, and without the
consent or agreement of the other, he shall pay
such expense in full.

(2) Subject to the exceptions stated in sub-sec-
tion one the cost of, or special taxes or assessments
for, an improvement representing an addition of
value to property forming part of the principal
shall be paid by the tenant, where such improve-
ment cannot reasonably be expected to outlast the
estate of the tenant. In all other cases a portion
thereof only shall be paid by the tenant, while the
remainder shall be paid by the remainderman.
Such portion shall be ascertained by taking that
percentage of the total which is found by dividing
the present value of the tenant's estate by the
present value of an estate of the same form as
that of the tenant, except that it is limited for a
period corresponding to the reasonably expected
duration of the improvement. The computation
of present values of the estates shall be made on
the expectancy basis set forth in the "American Ex-
pertence Tables of Mortality," and no other evi-
dence of duration or expectancy shall be con-
sidered. (1937, c. 190, s. 13.)

§ 37-14. Uniformity of interpretation. — This
chapter shall be so interpreted and construed as to
effectuate its general purpose to make uniform the
law of those states which enact it. (1937, c. 190,
s. 14.)

§ 37-15. Short title.—This chapter may be cited
as the Uniform Principal and Income Act. (1937,
c. 190, s. 15.)

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Chapter 38.

Boundaries.

Sec. 38-3. Procedure.

38-4. Surveys in disputed boundaries.

§ 38-1. Special proceeding to establish. — The owner of land, any of whose boundary lines are in dispute, may establish any of such lines by special proceedings in the superior court of the county in which the land or any part thereof is situated. (Rev., s. 325; 1893, c. 22; C. S. 361.)

Cross Reference. — As to special proceeding generally, see § 1-393 et seq.

Object of the Doctrine of the Section. — This section grew out of and is in some respects similar to the common law “writ of perambulation,” although the procedure hereunder tends greatly to simplify the procedure obtaining under the former law. Until the passage of this section the consent of both adjoining land owners was necessary in order to have the dispute as to the bounds of their respective estates judicially determined. Under the present law either of the adjoining proprietors acting as a matter of right is entitled to have the land processed, without the other’s consent, and, where there has been an annual occupation, have the controverted matters settled by the court under the influence of its discretion. Green v. Williams, 144 N. C. 60, 63, 58 S. E. 549.

Purpose of Processioning. — The primary object of this section and the provisions of the section is to facilitate the speedy determination of disputed boundaries between adjoining land owners who do not contest the other’s title to their respective tracts. Parker v. Taylor, 133 N. C. 189, 45 S. E. 473. Title to the land is not in issue unless so made by the pleadings, Cole v. Seawell, 132 N. C. 349, 67 S. E. 753; but when placed in issue by the defendant’s denial of the plaintiff’s ownership then, by sec. 1-399, the pending special proceedings are converted into a civil action to quiet title and the court will try all the issues in controversy therewith. Woody v. Fountain, 143 N. C. 90, 55 S. E. 425.

Relief under the Section—Injunctions. — To warrant the granting of an injunction in the cases of special proceedings, the relief sought must be subsidiary to the relief asked in the special proceedings, Hunt v. Snead, 64 N. C. 176; and since this section gives no substantive relief—settles no rights, or titles to property, but only locates the disputed lines by an order issued by the court, it will be treated as an answer since it contains all that is required by the section. Scott v. Kellum, 117 N. C. 664, 23 S. E. 306.

Dispute as to Boundary Necessary. — To sustain an action to establish the true dividing line between adjoining owners of land, a dispute as to the location of the line must be shown or the case on appeal will be dismissed in the Supreme Court. Wood v. Hughes, 195 N. C. 185, 141 S. E. 569.

Effect of Binding Agreement. — Where, in proceedings to establish the disputed boundaries between adjoining lands, a binding executed agreement between the parties has been established by uncontradicted evidence, the plaintiff is estopped from proceeding under this section, and there is no error in the court’s holding that the completed agreement of arbitration operated as an estoppel as a matter of law. Lower v. Smith, 201 N. C. 642, 644, 161 S. E. 222.

Procedure. — As the procedure for the application of this section is such as to require the court to determine the true boundary line, and to settle the disputed questions in controversy, it is in the nature of a special proceeding. (Rev., s. 326; 1893, c. 22; 1903, c. 21; C. S. 362.)

§ 38-2. Occupation sufficient ownership. — The occupation of land constitutes sufficient ownership for the purposes of this chapter. (Rev., s. 326; 1893, c. 22; 1903, c. 21; C. S. 362.)

Sufficiency of Ownership. — When Title Not in Dispute. — The owner of land, who in possession thereof, in this section, to mean possession, and uniformly hold that one in (a) possession of the land, and (or) (b) whose title thereto is not disputed so that no issue is raised save only that of the location of the boundary, has sufficient ownership to avail himself of the special proceedings herein provided for. Williams v. Hughes, 124 N. C. 3, 32 S. E. 125; Parker v. Taylor, 133 N. C. 105, 45 S. E. 473.

Where it is admitted that plaintiff’s title was not in dispute, and that defendant’s title was not in dispute except as to the true boundary line, the refusal of the court to enter judgment in favor of the plaintiff, in addition to the issue as to the true boundary line, will not be held error. Clark v. Dill, 208 N. C. 421, 183 S. E. 281.

Same. — When Title Is in Dispute. — Where, however, the defendant puts in issue his title to the land in issue, the case has taken the form of a civil action, then the plaintiff can no longer rest his case by merely proving his occupation of the land as evidencing the boundary, but must go further and prove his title to the land. Woody v. Fountain, 143 N. C. 67, 55 S. E. 425. See also Williams v. Hughes, 124 N. C. 3, 32 S. E. 325.

§ 38-3. Procedure. — 1. Petition; Summons; Hearing. — The owner shall file his petition under oath stating therein facts sufficient to constitute the location of such line as claimed by him and making defendants all adjoining owners whose interest may be affected by the location of said line. The clerk shall thereupon issue summons to the defendants as in other cases of special proceedings. If the defendants fail to answer, judgment shall be given establishing the line according to petition. If the answer deny the location set out in the petition, the clerk shall issue an order to the county surveyor or, if cause shown, to any competent surveyor to survey said line or lines according to the contention of both parties, and make report of the same with a map at a time to be fixed by the clerk, not more than thirty days from date of order; to which time the cause shall be continued. The cause shall then be heard by the clerk upon the location of said line or lines and judgment given determining the location thereof.

Cross Reference. — As to special proceedings generally, see § 1-393 et seq.

Compliance with the Procedural Steps Mandatory. — This section must be strictly followed in all material respects, and any flagrant or negligent departure therefrom will be fatal to the proceedings. Forney v. Williamson, 98 N. C. 329, 4 S. E. 463. But the Court will look to the substance and not to the form of the pleadings, and where an affidavit contains a full and explicit denial of the line set out in the plaintiff’s petition it will be treated as an answer since it contains all that is required by the section. Scott v. Kellum, 117 N. C. 664, 23 S. E. 180.

Effect of Misjoinder of Parties. — A proceeding under the provisions of this section to establish the true dividing line between adjoining owners of land, will be dismissed without the county surveyor or, if cause shown, to any competent surveyor to survey said line or lines according to the petition of both parties, and make report of the same with a map at a time to be fixed by the clerk, not more than thirty days from date of order; to which time the cause shall be continued. The cause shall then be heard by the clerk upon the location of said line or lines and judgment given determining the location thereof.

Cross Reference. — As to special proceedings generally, see § 1-393 et seq.

Burden of Proof. — Upon the institution of the proceedings to ascertain the true dividing line between the lands the burden of proof is upon the plaintiff to establish such line, Woody v. Fountain, 143 N. C. 67, 55 S. E. 425; Hill v. Daiton, 140 N. C. 9, 52 S. E. 273, and this burden does not shift to the defendant merely because, in addition to denying the line to be established by the plaintiff, he alleges another to be the dividing line. Garris v. Harrington, 167 N. C. 86, 83 S. E. 253.

The plaintiff is the actor and has the burden of establishing the true location of the dividing line. McCañes v. Baldwin, 212 N. C. 292, 192 S. E. 207.

Applicability of Doctrine of Res Judicata. — Title to Land Not in Issue. — Where the only fact in issue is the establishment and location of the boundary line, then the judgment of
the clerk is, to this extent, binding on the parties and they may not again litigate on this precise point. Whitaker v. Garren, 167 N. C. 658, 83 S. E. 769. But his judgment may not estop the parties from asserting in a separate action title in the land, Nash v. Shute, 182 N. C. 528, 109 S. E. 353.

Same.—Title in Issue.—Where, however, the parties join issue upon the title and the case is transferred to the regular term of the court a judgment therein estops the parties both as to the title and the location of the line. Whitaker v. Garren, 167 N. C. 658, 83 S. E. 759. See also, Nash v. Shute, 182 N. C. 528, 109 S. E. 353, the court in this case, saying: "...the law confines on the clerk no jurisdiction to settle questions of title. He can only authoritatively determine the location of a disputed line... The parties are therefore not concluded by his judgment in respect to questions of title."

When Title Is Put in Issue—Injunctive Relief.—When defendant in a processioning proceeding puts title in issue, the true dividing line, and therefore injunctive relief will not lie at the instance of one party to enjoin the other from retaining possession of the disputed strip, pending the final determination of the proceeding, even in the superior court on appeal, since the restraint sought is not germane to the subject of the action. Jackson v. Jackson, 216 N. C. 401, 5 S. E. (2d) 234.

Evidence—Generally. — The general rules for ascertaining boundaries apply equally well when recourse is had through special proceedings. Power Co. v. Savage, 170 N. C. 625, 87 S. E. 629. See also, Woodard v. Harrell, 191 N. C. 194, 132 S. E. 12, containing dicta to the effect that parol evidence of location of boundary line may be properly admitted, if the parties were merely locating the true boundary line, but not to show verbal agreement to change the true dividing line. See also The Surveyor’s Report.—The surveyor, when acting under this section, is not in any sense a referee and his report to the court should not contain conclusions of law, but should merely set forth a detailed account of the facts of the case and what lines were disputed or how far they were disputed, and solely the location of the true dividing line, and therefore injunctive relief will not lie at the instance of one party to enjoin the other from retaining possession of the disputed strip, pending the final determination of the proceeding, even in the superior court on appeal, since the restraint sought is not germane to the subject of the action. See Jackson v. Jackson, 216 N. C. 401, 5 S. E. (2d) 234.

When Transfer to Regular Term Required.—The jurisdiction of the clerk in these special proceedings is limited in its scope. It extends only to those cases in which the only fact in issue is the location of the boundary line between the lands. Where the title to the land is put in issue the clerk has no authority to pass on any question involved but must transfer the whole proceedings to the regular term of the court. Brown v. Hutchinson, 155 N. C. 205, 71 S. E. 302; Smith v. Johnson, 127 N. C. 43, 49 S. E. 62; Parker v. Taylor, 135 N. C. 103, 45 S. E. 473.

2. Appeal to Term.—Either party may within ten days after such determination by the clerk serve notice of appeal from the ruling of the clerk determining the said location. When notice of appeal is served it shall be the duty of the clerk to transmit the issues raised before him to the next term of the superior court of the county for trial by a jury, when the question shall be heard de novo.

Parties on Appeal.—Under the provision contained in this section for the appeal by either party to the regular term of the court, other parties having an interest in the locus in quo may, upon motion, be permitted to come in. Batts v. Bridgen, 147 N. C. 133, 60 S. E. 897.

3. Survey After Judgment.—When final judgment is given in the proceeding the court shall issue an order to the surveyor to run and mark the line or lines as determined in the judgment. The surveyor shall make report including a map of the line as determined, which shall be filed with the judgment roll in the cause and entered with the judgment on the special proceedings docket.

4. Procedure as in Special Proceedings.—The procedure under this chapter, the jurisdiction of the court, and the right of appeal shall, in all respects, be the same as in special proceedings except as herein modified. (Rev., s. 326; 1893, c. 22; 1903, c. 51; C. S. 353.)

§ 38-4. Surveys in disputed boundaries.—When in any suit pending in the superior court the boundaries of lands are drawn in question, the court may, if deemed necessary, order a survey of the lands in dispute, agreeable to the boundaries and lines expressed in each party’s titles, and other surveys as shall be deemed useful; which surveys shall be made by two surveyors appointed by the court, one to be named by each of the parties, or by one surveyor, if the parties agree; and the surveyors shall attend according to the order of the court, and make the surveys, and shall make as many accurate plans thereof as shall be ordered by the court; and for such surveys the court shall make a proper allowance, to be taxed as among the costs of the suit. (Rev., s. 1594; Code, s. 939; R. C., c. 31, s. 119; 1779, c. 157; 1766, c. 292; C. S. 364.)

Allowance for Costs of Survey.—The word “courts,” as used in the last provision of this section, refers to the judge, and not to the clerk, and where the trial judge has failed to make an order allowing compensation to the surveyor, the clerk has no power to make the allowance; but on appeal from the clerk’s refusal, such order will be made by the judge of the Superior Court, Cannon v. Briggs, 174 N. C. 740, 54 S. E. 519; LaRoque v. Kennedy, 156 N. C. 360, 72 S. E. 454.

Discretion of Court.—This section vests in the court a sound discretion within the limits defined. Vance v. Pritchard, 218 N. C. 273, 10 S. E. (2d) 225.

Chapter 39: Conveyances.

Sec. 39-8. Acknowledgment at different times and places; before different officers; order immaterial.

39-9. Abstinence of wife’s examination does not preclude her from being a witness to deed as to husband.

39-10. Officers authorized to take privy examination.


39-14. [Repealed.]

Art. 3. Fraudulent Conveyances.


39-16. Conveyance with intent to defraud purchasers void.

39-17. Voluntary conveyance evidence of fraud as to existing creditors.


39-20. bona fide purchaser of mortgaged property not affected by illegal consideration of note secured.

Art. 1. Construction and Sufficiency.

§ 39-1. Fee presumed,” though word “heirs” omitted.—When real estate is conveyed to any person, the same shall be held and construed to be a conveyance in fee, whether the word “heirs” is used or not, unless such conveyance in plain and express words shows, or it is plainly intended by the conveyance or some part thereof, that the grantor meant to convey an estate of less dignity.

(Rev., s. 946; Code, s. 1280; 1879, c. 148; C. S. 991.)

Cross Reference.—As to presumption of conveyance in fee simple when deed and registry of conveyance destroyed, see § 8-21.

Editor’s Note.—This section changes the common-law rule that in order to convey a fee simple the word “heirs” should appear either in the premises or the habendum of the deed. Carolina Real Estate Co. v. Bland, 152 N. C. 225, 67 S. E. 453. Even prior to the enactment of the section the courts of this State commenced to draw away from the strictness of the common-law rule in this respect, and a perusal of a large number of cases bearing upon and controlling the subject show a marked tendency to mitigate the harshness of the law. So an exception as to devises and equitable estate had already been made. (See Whitchard v. Whilterhurst, 181 N. C. 79, 106 S. E. 453; Hollowell v. Manly, 179 N. C. 262, 167 S. E. 396, relating to a conveyance in trust.) And a series of cases established the proposition that the word “heirs,” when used as indicative of the estate to be granted, no matter where the word appeared in the instrument, would be transposed and inserted so as to cause the instrument to operate as a fee simple. Smith v. Proctor, 139 N. C. 314, 51 S. E. 889.

Same.—Fee Simple Presumed Unless Clear Intent Otherwise.—All conveyances of land executed since the passage of the act are to be taken to be in fee simple, unless the intention of the grantor is plainly manifest in some part of the instrument to convey an estate of less dignity. It is the legislative will that the intention of the grantor and not the technical words of the common law shall govern. Triplett v. Williams, 149 N. C. 394, 398, 63 S. E. 79.

And by this section, a deed though not using the word “heirs”, is a conveyance in fee, unless the contrary intention appears. Holloway v. Green, 167 N. C. 91, 83 S. E. 243.

Same.—Method prescribed not exclusive.—Where the presumption found in this section is rebutted by the fact that the deed in this case intended to convey only a life estate which is manifest from the many restraining expressions contained therein. Boomer v. Grantham, 281 N. C. 203, 163 S. E. 662.

Same.—Fee Simple Presumed Unless Clear Intent Otherwise.—All conveyances of land executed since the passage of the act are to be taken to be in fee simple, unless the intention of the grantor is plainly manifest in some part of the instrument to convey an estate of less dignity. It is the legislative will that the intention of the grantor and not the technical words of the common law shall govern. Triplett v. Williams, 149 N. C. 394, 398, 63 S. E. 79.

And by this section, a deed though not using the word “heirs”, is a conveyance in fee, unless the contrary intention appears. Holloway v. Green, 167 N. C. 91, 83 S. E. 243.

The section was applied where the intent of the donor, appearing by proper construction of a deed, was to give a simple estate to his child by his marriage. Sharpe v. Brown, 177 N. C. 294, 98 S. E. 825.

The granting clause of a deed was to one of the grantor’s sons, his heirs and assigns, and following the description “this deed is conveyed to the said grantee to him his life-time and then to his boy children” with habendum to the son “and his heirs and assigns their only use and behoof for ever” with warranty to the said son “and his heirs and assigns.” It was held that the portion of the habendum restraining assignment except to the brothers of the grantor is not an assignment of a life estate as with an assignment of the fee, and to hold that the grant to the “son and his heirs” conveyed the fee simple would require that other portions
Although a deed to lands executed and delivered prior to this deed between the granting clause and habendum. Tripplett v. Williams, 149 N. C. 394, 63 S. E. 79.

Deeds Executed Prior to Effective Force of Section.—Although a deed to lands executed and delivered prior to the effective force of this section would pass an estate in fee simple if the deed entirely omitted the word "heirs" or other appropriate words of inheritance, a deed executed before such date to a school committee, and the conveyance being in fee simple, would pass a fee simple title to the lands conveyed therein. Tucker v. Smith, 199 N. C. 502, 154 S. E. 820.

Deed to Husband and Wife and Heirs of Wife.—A deed conveying lands to a husband and wife only and to the heirs of the latter, does not pass the fee to the former by virtue of this section, for as to him it is plainly intended that the grantor meant to convey an estate of less dignity. Sprinkle v. Sprinkle, 149 N. C. 223, 62 S. E. 918.

Restraint of Alienation.—Where a conveyance is construed under this section to be in fee, any attempt of restraint upon alienation is ineffective. Where the grantor intended simply to pass a fee simple title to the lands conveyed therein, Holloway v. Green, 167 N. C. 91, 83 S. E. 246.

Retention of Mineral Rights.—Under this section where a mineral is left upon the premises, which is hereby excepted, the mineral found upon the premises, which is hereby excepted, is sufficient under this section to admit of parol evidence of identification.

Capable of Being Reduced to Certainty.—A description contained in a deed or contract to convey lands is sufficiently definite to admit of parol evidence of identification when it is capable of being reduced to certainty by reference to something extrinsic to which the instrument refers. Katz v. Daughtrey, 198 N. C. 91, 151 S. E. 879.

§ 39-3. Conveyances to slaves.—When it is made to appear that any gift or conveyance has been made to any person, while a slave, of any lands or tenements, whether the same was conveyed by deed or parol, and the bargainee or donee has put such land or tenements or any part thereof into actual possession of the same, such possession shall have continued for the term of years prior to the ninth day of March,
one thousand eight hundred and seventy: Pro-
vided, further, that any absence from the premises
from the first day of May, one thousand eight
hundred and sixty-one, to the first day of January,
one thousand eight hundred and sixty-six, shall
not be held as an abandonment or discontinuance
of the possession: Provided, also, that this section
shall not affect the interest of a bona fide pur-
chaser for value from the grantor or bargainor
of the lands or tenements in dispute. (Rev., s.
shall not affect the interest of a bona fide pur-
chaser for value from the grantor or bargainor
949; Code, s. 1278; 1869-70, c. 77; C. S. 993.)

Cross References.—As to authority of sheriff to execute
deed to land sold under execution, see § 1-316. As to sher-
iff's deed for trust estate, see § 1-316. As to sheriff's deed
on sale of estate of redemption, see § 1-317. As to duty of
sheriff or other officers to execute deed for property sold
under execution, see § 1-319.

A tax deed executed by an "ex-sheriff" may be authorized
under this section. Manufacturing Co. v. Rosey, 144 N. C.
370, 57 S. E. 2; McNair v. Boyd, 163 N. C. 478, 79 S. E. 966.

When Executed by Successor.—A deed made by a successor
in office does not apply to a case where one having himself
of office has expired; and when he dies or removes
or tax collector dies having a tax list in his hands
other than the present succession. (Rev., ss. 950, 951; Code, s. 1267; R. C.
s. 37, s. 30; 1891, c. 212; C. S. 993.)

Where Not Applicable to Will.—Where a man made a will
in which he set aside money or money due to a certain
the widow died in 1899, the slaves cannot take under the will.

§ 39-4. Conveyances by infant trustees.—When
an infant is seized or possessed of any estate in
trust, whether by way of mortgage or otherwise,
for another person who may be entitled in law to
have a conveyance of such estate, or may be de-
clared to be seized or possessed, in the course of
any proceeding in the superior court, the court
may decree that the infant shall convey and as-
sure such estate, in such manner as it may direct,
to such other person; and every conveyance and assurance
made in pursuance of such decree shall be as effectual in law as if made by a person
of full age. (Rev., s. 1036; Code, s. 1365; R. C.
c. 37, s. 27; 1821, c. 1116, ss. 1, 2; C. S. 994.)

Editor's Note.—The general rule is that the contracts of
infants are voidable at the option of the infant, and when
avoided, the contract is null and void ab initio. Pippen v.

Editor's Note.—The grantor in any
future contingent interest to some person or
after create a voluntary trust estate in real or
by way of mortgage or otherwise, for another person who may be entitled in law to
have a conveyance of such estate, or may be declared to be seized or possessed, in the course of
any proceeding in the superior court, the court may decree that the infant shall convey and assure such estate, in such manner as it may direct, to such other person; and every conveyance and assurance made in pursuance of such decree shall be as effectual in law as if made by a person of full age. (Rev., s. 1036; Code, s. 1365; R. C. c. 37, s. 27; 1821, c. 1116, ss. 1, 2; C. S. 994.)

A tax deed executed by an "ex-sheriff" may be authorized under this section. Manufacturing Co. v. Rosey, 144 N. C. 370, 57 S. E. 2; McNair v. Boyd, 163 N. C. 478, 79 S. E. 966.

§ 39-6. Revocation of deeds of future interest
made to persons not in esse.—The grantor in any voluntary conveyance in which some future interest in real estate is conveyed or limited to a person not in esse may, at any time before he comes into being, revoke by deed such interest so conveyed or limited. This deed of revocation shall be registered as other deeds; and the grantor of like interest for a valuable consideration may, with the joinder of the person from whom the consideration moved, revoke said interest in like manner. The grantor, maker or trustee who has heretofore created or may hereafter create a voluntary trust estate in real or personal property for the use and benefit of himself or of any other person or persons in esse with a future contingent interest to some person or persons not in esse or not determined until the happening of a future event may at any time, prior to the happening of the contingency vesting the future estates, revoke the grant of the same in that person or persons in esse or not determined by a proper instrument to that effect; and the grantor of like interest for a valuable consideration may, with the joinder of the person from whom the consideration moved, revoke said interest in like manner: Provided that
in the event the instrument creating such estate has been recorded, then the deed of revocation of such estate shall be likewise recorded before it becomes effective: Provided, further, that this section shall not apply to any instrument hereafter executed creating such a future contingent interest when said instrument expressly state in effect that the grantor, maker, or trustor may not revoke such interest: Provided, further, that this section shall not apply to any instrument hereafter executed whether or not such instrument contains express provision that it is irrevocable unless the grantor, maker, or trustor shall within six months after the effective date of this proviso either revoke such future interest. It shall be with the trustee an instrument stating or declaring that it is his intention to retain the power to revoke under this section: Provided, further, that in the event the instrument creating such estate has been recorded, then the revocation or declaration shall likewise be recorded before it becomes effective. (Rev., s. 1045; 1893, c. 498; 1899, c. 305; 1941, c. 264; 1943, c. 437; C. S. 996.)

Cross Reference.—As to registration of deeds, see §§ 47-17, 47-18 et seq.

Editor's Note.—The Act of 1929 added the last sentence to this section down to the second proviso. Formerly the section applied only to voluntary conveyances; as amended, it includes the creation of voluntary trusts in real or personal property only for the benefit of the grantor, maker, or trustor, and of persons not in esse, but for the benefit of persons determinable upon the happening of a future event. Furthermore, as amended, it applies to voluntary trusts heretofore created as well as to such as may be created hereafter.


The 1943 amendment inserted before the first proviso the words beginning with “and the grantor.” The amendment became effective March 15, 1941, and did not affect pending litigation. For comment on this enactment, see 19 N. C. Law Rev. 278.

The 1943 amendment added the last three provisos after this section.

For article commenting on this section, see 20 N. C. Law Rev. 207.

Section Not Retroactive.—This section does not apply to deeds executed prior to its enactment. Roe v. Journeigan, 175 N. C. 261, 95 S. E. 495; Roe v. Journeigan, 181 N. C. 189, 156 S. E. 186.

Though vested rights may not be affected by retroactive laws, contingent interests may be affected thereby, and where there is a voluntary trust with the limitation over the remainder in esse, who consented to the revocation of a trust given by this section is not within the constitution. Stanback v. Citizen’s Nat. Bank, 197 N. C. 20, 148 S. E. 313.

Constitutionality was upheld in Stanback v. Citizen’s Nat. Bank, 197 N. C. 292, 148 S. E. 313. Mere expectations of future contingent interests provided for persons not in esse do not constitute vested rights such as would deprive the legislature of the power to enact this section authorizing revocation of a voluntary grant. MacMillan v. Branch Banking, etc., Co., 221 N. C. 352, 20 S. E. (2d) 276.

Voluntary Trusts.—A trust estate in personality created by the donor in consideration of one dollar and natural love and affection is a voluntary trust revocable by the donor under this section. Stanback v. Citizen’s Nat. Bank, 197 N. C. 292, 148 S. E. 313.

Where a voluntary trust is created in bank stock for the life of the donor or until he reach the age of fifty years, and in contemplation of the donor’s death, in the absence of issue to his next of kin, those who take in remainder take upon a contingency, the vesting of which depends upon the uncertain happening of a future event, and the execution by the donor, Stanback v. Citizen’s Nat. Bank, 197 N. C. 292, 148 S. E. 313. Where a woman receives property without restriction from her husband and the deed evidences a deed in marriage and her hereditary interests do not ipso facto become vested, and she may revoke the trust upon giving a sufficient deed to that effect and in compliance with the provisions of this section. MacRae v. Commerce Union Trust Co., 199 N. C. 714, 715, 155 S. E. 614.

Plaintiff executed a voluntary trust in personally with direction that the income therefrom be paid to her for life and upon her marriage, depending upon their reaching a certain age, the trust estate is to be passed to her issue or in the event of her marriage, depending upon their reaching a certain age, the trust estate is to be passed to her issue. No provision for the withdrawal of the trust estate is made by the donor, and the donor’s right to revoke under this section is not within the constitution. Stanback v. Citizens Nat. Bank, 221 N. C. 352, 20 S. E. (2d) 276.

Law Governing Power of Revocation of Trust Settlement—Where the daughter of a British subject takes property absolutely from her husband under his will upon her marriage, and marries in North Carolina, executing in this State a deed of settlement in trust, without consideration, the deed is a conveyance of the property to a trust estate agreed to under this section. MacMillan v. Branch Banking, etc., Co., 221 N. C. 352, 20 S. E. (2d) 276.

The waiver of the right of revocation by the trustor of a voluntary trust is without consideration and does not prejudice the power of revocation by the donor under this section. MacMillan v. Branch Banking, etc., Co., 221 N. C. 352, 20 S. E. (2d) 276.


Art. 2. Conveyances by Husband and Wife.

§ 39-7. Instruments affecting married woman’s title; husband to execute; privy examination. — Every conveyance, power of attorney or other instrument affecting the estate, right or title of any married woman in lands, tenements or hereditaments must be executed by such married woman and her husband, and due proof or acknowledgment thereof must be made as to the husband and due acknowledgment thereof must be made by the wife, and her private examination, touching her voluntary assent to such instrument, shall be taken separate and apart from her husband, and such acknowledgment or proof as to the execution by the husband and such acknowledgment or proof as to the execution by the wife and her private examination shall be taken and certified as provided by law. Any conveyance, power of attorney, contract to convey, mortgage, deed of trust or other instrument executed by any married woman in the manner by this chapter provided, and executed by her husband also, shall be valid in law to pass, bind or charge the estate, right, title and interest of such married woman in and to all such lands, tenements and hereditaments or other estate, real or personal, as shall constitute the subject-matter or be embraced within the terms and conditions of such instrument or purport to be passed, bound, charged or conveyed thereby. (Rev., s. 922; Code, s. 1256; 1999, c. 293, s. 9; C. C. F., s. 429, subsec. 6; 1868-9, c. 277, s. 15; C. S. 997.)

I. General Considerations.

II. Executions in which Husband and Wife.

A. In General.

B. The Husband’s Acknowledgment and Proof Thereof.

C. Acknowledgment and Privy Examination of Feme Covener.

III. Effect of Feme Coventer’s Deed.
Cross References.
As to private examination of wife, see § 47-39. As to husband's acknowledgment and wife's private examination before the same officer, see § 47-40. As to married women generally, see § 47-7. As to officers authorized to take examination, see § 39-10. As to dower, see § 30-4 et seq.

1. GENERAL CONSIDERATIONS.
Editor's Note.—In arriving at the legislative intent and a sound construction of this section, it must be considered in connection with Article X, Section 6, of the Constitution of North Carolina, and Chapter 52 of the General Statutes. The Constitution secures to a feme covert her property, real and personal, acquired before or after marriage, as her sole and separate estate and property. However, if this requirement is not met, the instrument merely as a witness is a sufficient "written assent." Jennings v. Hinton, 123 N. C. 48, 35 S. E. 182; or a letter written by him is sufficient. Prinkley v. Ballance, 126 N. C. 393, 35 S. E. 611; Stallings v. Walker, 176 N. C. 321, 324, 97 S. E. 25.

Execute Same Instrument.—This section clearly contemplates that the same instrument of writing shall be executed by both husband and wife. Slocomb v. Ray, 123 N. C. 371, 31 S. E. 849; Green v. Bennett, 120 N. C. 394, 27 S. E. 142.

Order of Procedure.—It is contemplated and required by the statute that the deed shall be first acknowledged by the husband and wife, and that her privy examination shall be taken afterwards; or if, for any of the causes specified in the statute, this cannot be done, then, first, the husband must make known to the proper officer to take her acknowledgment and privy examination his intention to convey the real estate; and, second, he must acknowledge the execution of the deed, or it must be proved as to him by witnesses before a judge or the county court, and then, upon suggestion to the judge or county court, as directed by the statute, the commission may go out to take the privy examination of the wife. Graves v. Johnson, 172 N. C. 176, 178, 90 S. E. 112.

B. Husband's Acknowledgment and Proof Thereof.

Time of acknowledgment.—While the husband and wife must both be parties to the same deed, there is manifestly no requirement in the language of the statute that the act of acknowledgment by both should be contemporaneous. Lineberger v. Tidwell, 123 N. C. 571, 574, 31 S. E. 829; Green v. Bennett, 120 N. C. 394, 27 S. E. 142.

Same.—Husband executes first. —The deed is none the less effective to pass the title of the wife because the husband has voluntarily acknowledged it before she does. But after executing the deed, the instrument merely as a witness is a sufficient "written assent." Jennings v. Hinton, 123 N. C. 48, 35 S. E. 182; or a letter written by him is sufficient. Prinkley v. Ballance, 126 N. C. 393, 35 S. E. 611; Stallings v. Walker, 176 N. C. 321, 324, 97 S. E. 25.

Must be proved as to husband.—The statute has changed to permit the receipt of the acknowledgment of the husband to be taken afterwards. One of the real causes for changing the law (§ 39-8), but this section still requires the acknowledgment of the husband or proof of his execution of the deed to pass the title of the wife. And the principle announced, that the General Assembly has power to prescribe the form in which the assent of the husband to the execution of a deed by the wife shall be evidenced, is unimpeached. See Lineberger v. Tidwell, 123 N. C. 571, 574, 31 S. E. 829, construes section 1256 of the Code (1883), Revisal, sec. 992, Consolidated Statutes, § 992, which is a Revisal; see section 1256, Consolidated Statutes, § 992, which is a Revisal; and see section 1256, Consolidated Statutes, § 992, which is a Revisal.

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The husband, but not proved as to him, was ineffectual to pass the title of the wife, although her acknowledgment and private examination were taken. The fact that the grantor was compelled to take the public examination of the wife did not destroy the validity of the deed. See Price v. Blankinship, 174 N. C. 759, 94 S. E. 519.

Consent Proved and Recorded after Wife's Death.—No title by a woman to her dower in land is binding upon the grantee from recovering possession during her husband's life, until such conveyance be signed by both the husband and wife; and a deed made and signed in due form by the wife, in which thereafter the husband writes in his name as a grantor, and after her death, acknowledges its execution before the clerk, is invalid to pass title. Hensley v. Blankinship, 174 N. C. 759, 94 S. E. 519.

Consent Proved and Recorded before Wife's Death.—When only interest is dower.—Where the only interest is dower, the power of attorney sufficient in form by the heirs at law of a deceased owner of land, as tenants in common, but one of them, a feme covert, until she is privily examined by the proper authorities, whose leading purpose was to facilitate alienation by married women. Burgess v. Wilson, 13 N. C. 306, 306, and left the statute unchanged as to married women, while the evils and inconveniences resulting from the provisions of this section, both the owner of land, as tenants in common, but one of them, a feme covert, until she is privily examined by the proper authorities. This section offers a safeguard which ought to be retained. Graves v. Johnson, 172 N. C. 176, 179, 90 S. E. 113.

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Veto Power of Husband.—While the husband has no interest in the wife's property, he has a "veto" power over the alienation of her realty by withholding his written consent. Section 47-67 of this Code, which was held in the Barrett case not to apply so as to impair or divest the rights of a feme covert acknowledged the execution of a deed, and the judgment of a competent superior court, the deed was then a conveyance of record and could not be collaterally impeached in an action of ejectment. Wright v. Player, 72 N. C. 94.

Editor's Note.—Prior to the enactment of this section a deed made by husband and wife, conveying the wife's land, was required to be first acknowledged by the husband before the acknowledgment and private examination of the wife. This order of acknowledgment and private examination was taken. It has said that the only defect in the private examination in question was that it was taken a few minutes or hours before the husband's acknowledgment on the same day of the execution of the deed by him. Obviously such stringent and technical requirements could hardly be said to be in line with the spirit of a statute whose leading purpose was to facilitate alienation by married women, or as said in Barfield v. Combs, 15 N. C. 514, "object of this statute is to make it easy to pass any title or interest whatsoever."

§ 39-8. Acknowledgment at different times and places; before different officers; order immaterial.

—In all cases of deeds or other instruments executed by husband and wife and requiring registration, the probate of such instruments as to the husband and acknowledgment and private examination of the wife may be taken before different officers authorized by law to take probate of deeds, and at different times and places, whether before one or more officials, in this state or only one in this state and the other in another state or country. And in taking the probate of such instruments executed by husband and wife, including the private examination of the wife, it is immaterial whether the execution of the instrument was proven as to or acknowledged by the husband before or after the acknowledgment and private examination of the wife. (Rev., s. 953; 1899, c. 225, s. 9; 1895, c. 136; C. S. 998.)
When Husband and Wife not of State.—When the husband and wife reside in a foreign country her acknowledgment, etc., may be taken by an ambassador, etc., of the United States, or by the mayor or other chief officer of the city or town of her residence, or if that officer is not qualified, by a Military Officer. — An acknowledgment and private examination taken by the provost marshal of the city of New Bern while that place was in possession of the State of North Carolina, although the absence of fraud and the like, is good, having a similar effect as foreign judgments.

§ 39-10. Officers authorized to take private examination.—The officers authorized by law to take private examinations of real property are (1) any instrument to which her assent is or may be necessary, and to certify the fact of such private examination, see § 47-18 and annotations.

§ 39-11. Certain conveyances not affected by fraud if private examination regular.—No deed conveying lands nor any instrument required or allowed by law to be registered, executed by husband and wife since the eleventh of March, one thousand eight hundred and eighty-nine, if the private examination was properly taken or not, but no such instrument shall be the act or deed of the wife unless her private examination is taken according to law. (Rev., s. 955; 1899, c. 235, s. 8; 1901, c. 637; C. S. 1909.)

Cross Reference.—As to provision that clerk of the superior court pass on certificate of acknowledgment and other registration, see § 47-14.

When Assent of Wife Not Needed.—An unembarrassed conveyance of land, no matter when the land was acquired, may be conveyed the same, absolutely, or by way of trust or mortgage, free of all homestead rights, without the assent of the husband, subject only to her right of dower, except in the following cases: (1) where the conveyance is fraudulent as to creditors, and the conveyance is still required to pass the title or interest of the wife; (2) where no homestead has been allotted, but there are judgments against the wife, subject only to her right of dower, except in the following cases: (1) where the conveyance is fraudulent as to creditors, and the conveyance is still required to pass the title or interest of the wife; (2) where no homestead has been allotted in other lands. Hughes v. Hodges, 102 N. C. 236, 9 S. E. 437.

Acknowledgment of Husband Required.—The acknowledgment of the husband or proof of his execution of the deed is still required to pass the title or interest of the wife. Graves v. Johnson, 127 N. C. 176, 179, 90 S. E. 113.

§ 39-9. Absence of wife's examination does not affect deed as to husband.—When an instrument purports to be signed by a husband and wife the instrument may be ordered registered, if the acknowledgment of the husband is duly taken, whether the private examination of the wife is properly taken or not, but no such instrument shall be the act or deed of the wife unless her private examination is taken according to law. (Rev., s. 955; 1899, c. 235, s. 8; 1901, c. 637; C. S. 1909.)

Cross Reference.—As to provision that clerk of the superior court pass on certificate of acknowledgment and other registration, see § 47-14.

When Privy Examination Not Taken.—In an action to secure borrowed money, she may not have it set aside upon the ground that the private examination of the wife was thereto certified by the probate office, see § 47-18 and annotations.

Constitutional Requirement as to Homestead.—By the sixth section of the tenth Article of the Constitution, a deed made by the owner of a homestead without the voluntary signature and assent of his wife is void. Wittkower v. Gitney, 124 N. C. 437, 441, 32 S. E. 731.

§ 39-10. Officers authorized to take private examination.—The officials authorized by law to take private examinations and acknowledgments of the execution of any instrument are empowered to take the private examination of any married woman, when her private examination is necessary, touching her free and voluntary assent to the execution of any instrument to which her assent is or may be necessary, and to certify the fact of such private examination. (Rev., s. 955; 1899, c. 235, s. 6; C. S. 1909.)

Cross Reference.—As to officials authorized by law to take acknowledgments, see §§ 2-16, paragraph 13, 47-1, 47-2, 47-3, 10-c.
§ 39-12. Power of attorney of married woman. — All conveyances which may be made by any person under a power of attorney from any feme covert, freely executed by her with her husband, shall be valid to all intents and purposes to pass the estate, right and title which said feme covert may have in such lands, tenements and hereditaments mentioned or included in such power of attorney. (Rev., s. 957; Code, s. 1257; R. C., c. 37, s. 11; 1798, c. 510; C. S. 1002.)

Cross Reference. — As to registration of power of attorney, see § 47-28.

§ 39-13. Wife need not join in purchase-money mortgage. — The purchaser of real estate who does not pay the whole of the purchase money at the time when he takes a deed for title may make a mortgage or deed of trust for securing the payment of such purchase money, or such part thereof as may remain unpaid, which shall be good and effectual against his wife as well as himself, without requiring her to join in the execution of such mortgage or deed of trust. (Rev., s. 958, Code, s. 1272; 1868-9, c. 204; 1907, c. 12; C. S. 1003.)

Cross Reference. — As to dower generally, see § 30-4 et seq. As to property in which widow is entitled to dower, see § 30-5. As to deed of husband alone, purchase money mortgages as exception, see § 30-6.

Dower Right Subject to Defeat. — The dower right of a feme covert may be defeated by a mortgage of the husband alone, whether for the purpose of purchasing land, or for the purpose of purchasing another mortgage, for the security of the original mortgage, or by the conveyance of land mortgaged, or by the conveyance of any interest in such land as may be exempt as a homestead. (Rev., s. 958, Code, s. 1272; 1868-9, c. 204; 1907, c. 12; C. S. 1003.)

§ 39-14: Repealed by Session Laws 1943, c. 543.

Editor's Note. — Chapter 65 of the Public Laws of 1921, now codified as section 30-9, was a re-enactment of this section. However, that act contained no specific repeal of this section. The 1943 act accomplished the repeal in specific terms.

Art. 3. Fraudulent Conveyances.

§ 39-15. Conveyance with intent to defraud creditors void. — For avoiding and abolishing feigned, covinous and fraudulent gifts, grants, alienations, conveyances, bonds, suits, judgments and executions, as well of lands and tenements as of goods and chattels, which may be contrived and devised of fraud, to the purpose and intent to delay, hinder and defraud creditors and others of their just and lawful actions and debts, every gift, grant, alienation, bargain and conveyance of lands, tenements and hereditaments, goods and chattels, by writing or otherwise, and every bond, suit, judgment and execution, at any time had or made, to or for any intent or purpose last before declared and expressed, shall be deemed and taken (only as against that person, his heirs, executors, administrators and assigns, whose actions, debts, accounts, damages, penalties and forfeitures by such covinous or fraudulent devices and practices aforesaid, are, shall, or might be in anywise disturbed, hindered, delayed or defrauded) to be utterly void and of no effect; any pretense, color, feigned consideration, expression of use, or any other matter or thing to the contrary notwithstanding; and in all actions by creditors to set aside gifts, grants, alienations and conveyances of lands and tenements and judgments purporting to be liens on the same on the ground that such gifts, grants, alienations, conveyances and judgments are feigned, covinous and fraudulent hereunder, it shall be no defense to the action to allege and prove that the lands and tenements alleged to be so conveyed or encumbered do not exceed in value the homestead allowed by law as an exemption: Provided, that nothing in this section shall be construed to authorize the sale under execution or other final process, obtained on any debt during the continuance of the homestead, of any interest in such land as may be exempt as a homestead. (Rev., s. 960; Code, s. 1545; 1893, c. 78; R. C., c. 50, s. 1; 50 Edw. III, c. 6; 13 Eliz., c. 5, s. 2; 1715, c. 7, s. 4; C. S. 1005.)

I. General Considerations.

II. What Constitutes Fraud.

A. In General.

B. Intent.

C. Badges of Fraud.

III. Rights and Liabilities of Parties and Purchasers.

IV. Rights and Remedies of Creditors.

Cross References. — As to registration of conveyances, contracts to convey, and leases of land, see § 47-18. As to assignments for benefit of creditors, no preferences allowed in deeds of trust or deeds of assignment thereof, see § 23-1. As to arrest and bail in action for fraud on creditors, see § 1-410, paragraph 5. As to attachment in action for fraud, see § 1-440.

I. GENERAL CONSIDERATIONS.

Editor's Note. — This section is a substantial re-enactment of the statute 13 Eliz., C. 5, sec. 2. Bank v. Adrian, 116 N. C. 357, 547, 21 S. E. 792. Prior to its enactment it was necessary to invoke the aid of a court of equity to have a deed declared void for fraud, and where, under a statutory proviso, deeds were pronounced void as against creditors (in order to secure a formal declaration of their invalidity, the moving party must have asked for relief that would have been formerly administered solely in a court of equity. Farthing v. Carrington, 116 N. C. 315, 328, 22 S. E. 759), it was a period in the judicial history of this state. It was held that courts of law might hear evidence and pass even incidentally upon the question whether a deed was fraudulent under 13 Eliz. Logan v. Simmons, 18 N. C. 13, 1840; Anns. 311; Hummington v. Encrady & Bro. v. Skinner, 31 N. C. 191; Helsms v. Green, 105 N. C. 251, 259, 11 S. E. 470; Wharton on Evidence, sec. 131. 13 Eliz., is declaratory of the common law so far as regards existing creditors. The remedy given to subsequent creditors was entirely upon the enactment of the statute. In this sense the statute is sometimes spoken of as being in affiliation [154]

It applies to voluntary conveyances of personality, as well as realty, as against creditors. Garrison v. Brice, 48 N. C. 498.

Prevents Passage of Any Estate.—The section makes fraudulent conveyances absolutely void, and in that way prevents the passing of any estate whatever, as against creditors of the grantor. Smith v. Banks, 105 N. D. 473, 149 N. E. 668; Brown v. Hume, 129 N. C. 195, 201, 9 S. Ct. 37, 32 L. Ed. 370.

The conveyance Made by Debtor.—The section operating, as it does, to wholly avoid the conveyances coming within its purview, can be applied only to conveyances made by the debtor himself. Gowing v. Rich, 23 N. C. 553.

Mortgagor Considered as Owner.—In expounding the statute against fraudulent conveyances, the mortgagor is considered the owner of the estate, and the mortgagee an encumbrancer. Wall v. White, 14 N. C. 105, 107.


II. WHAT CONSTITUTES FRAUD.

A. In General.

Rule Stated.—In Aman v. Walker, 165 N. C. 224, 227, 81 S. E. 162, it was held that the principles to be deduced from the authorities as to fraudulent conveyances are: (1) If the grantor did not retain property fully sufficient and available to pay his debts then existing, and there is no actual intent to defraud, the conveyance is valid. (2) If the conveyance is voluntary and made with the actual intention upon the part of the grantor did not retain property fully sufficient and available to pay his debts then existing, it is invalid as to creditors; but it cannot be impeached by subsequent creditors, unless they have knowledge or notice of such fraud. See, in this connection, § 39-15. Black v. Sanders, 46 N. C. 67; Warren v. Maley, 85 N. C. 12, 14; Credle v. Carraway, 64 N. C. 422, 424; Worthy v. Brady, 91 N. C. 263, 269; Savage v. Knight, 92 N. C. 491, 495; Clement v. Cozart, 112 N. C. 412, 420, 17 S. E. 486; Hobbs v. Cashwell, 152 N. C. 183, 188, 67 S. E. 495; Powell Bros. v. McConnell Lumber Co., 153 N. C. 52, 58, 68 S. E. 926. (3) If the conveyance is voluntary and made with the actual intent upon the part of the grantor to defraud creditors, it is void, although this fraudulent intent is not participated in by the grantees, and although property sufficient and available to pay existing debts is retained. (4) If the conveyance is voluntary and made with the actual intent to defraud creditors upon the part of the grantor alone, not participated in by the grantee or of which he has notice, it is void. Black v. Sanders, 46 N. C. 67; Warren v. Maley, 85 N. C. 12, 14; Credle v. Carraway, 64 N. C. 422, 424; Worthy v. Brady, 91 N. C. 263, 269; Savage v. Knight, 92 N. C. 491, 495; Clement v. Cozart, 112 N. C. 412, 420, 17 S. E. 486; Hobbs v. Cashwell, 152 N. C. 183, 188, 67 S. E. 495; Powell Bros. v. McConnell Lumber Co., 153 N. C. 52, 58, 68 S. E. 926.

Evidence of Intent.—The rule laid down by Mr. Justice Story in 22 V. 144, 226, 173 U. S. 144, 148, 5 S. Ct. 81, 28 IL. Ed. 670, is that the fraud which will be sustained as against creditors, must be intended, or the person does and intends to do that which from its conveyances the law pronounces fraudulent, he is held to have intended the fraud inseparable from the act. Chetham v. Woodsworth, 80 N. C. 161, 161, cited in note in 23 IL. R. A., 616, 279, 41, 327, 11 Ed. 370.

Fraud a Compound Question of Law and Fact. — In Crow v. Holland, 12 N. C. 481, 482, it was said: "Fraud is a compound question of law and fact. The facts going to establish it are decided by a jury. Whether, when the fraud is established, there is to be the object to be secured be bona fide due, and itself tinge'd with no vicious ingredient.

The Sufficiency of Intent. — It is not necessary that there should have been an intent to hinder, delay, and defraud. An intent either to hinder and delay, or an intent to defraud, is sufficient. Peeler v. Peeler, 109 N. C. 628, 14 S. E. 59.

Same—Actual Delay Need Not Result. — In the language of Lord Ellenborough in Mieux v. Howell, 4 East., 113: "The Act of Fraud and Defraud (as I understand it) was meant to prevent deeds, etc., fraudulent in their concoction, and not merely such as in their effect might delay or hinder the creditors." Quoted in Moore v. Hinnant, 89 N. C. 455, 459.

"It is clear, however, from the language of the statute of 13 Elizabeth, remarks a recent author after a full discussion of the subject, "that its provisions were directed exclusively against conveyances made with an actual intent upon the part of the debtors to hinder, delay or defraud creditors, as distinguished from the mere effect or operation of such conveyances. The expressions in the preamble, 'devised and contrived,' (to the end,) 'purpose and intent,' etc., leave no room for doubt on this point. Hence it has been sometimes very expressively designated, as the statute against fraudulent intents in alienation." Moore v. Hinnant, 89 N. C. 455, 460, quoting Burrill Assign, sec. 332.

Intent as Poisonous Element. — The intention of a conveyance to accomplish the object of the assignee, or the assignee's lawyer to execute it, and if any of these latter be covinous, the intent is necessarily so. Stone v. Marshall, 52 N. C. 300, 390.

Acts fraudulent in view of the law, because of their necessary tendency to delay or obstruct the creditor in pursuance of his legal remedy, do not cease to be such because the fraud as an independent fact was not then to this purpose. The person does and intends to do that which from its conveyances the law pronounces fraudulent, he is held to have intended the fraud inseparable from the act. Chetham v. Woodsworth, 80 N. C. 161, 161, cited in note in 23 IL. R. A., 616, 279, 41, 327, 11 Ed. 370.

Mutuality of Fraudulent Intent.—In Horbach v. Hill, 112 N. C. 144, 51 S. E. 670, 144 U. S. 144, 148, 5 S. Ct. 81, 28 IL. Ed. 670, it was said that the fraud which will be sustained as against creditors, must be intended, or the person does and intends to do that which from its conveyances the law pronounces fraudulent, he is held to have intended the fraud inseparable from the act. Chetham v. Woodsworth, 80 N. C. 161, 161, cited in note in 23 IL. R. A., 616, 279, 41, 327, 11 Ed. 370.

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Same—Reservation of Exemptions. — The reservation of exemptions allowed by law in a deed of assignment is no evidence of a fraudulent intent. Barber v. Buffaloe, 111 N. C. 380, 45 S. E. 386.


Intent Not Clear—Badges of Fraud. — It is true that courts and juries cannot see and know the intent of an assignor except from his words and acts. Where he expresses his intent—his purpose to be—to defraud his creditors, we need not look further. This will avoid the assignment. But if he had not so declared his purpose, then we have to look to his action to ascertain his intent, and if by which the assignment was made—to what are called the "badges of fraud." Byr- stey v. Stallings, 124 N. C. 55, 64, 32 S. E. 384. These "badges of fraud" constitute the subject of the next succeeding analysis line of this note.

C. Badges of Fraud.

Badges of Fraud Defined.—As stated in the last paragraph under the preceding analysis line of this note it frequently becomes necessary, in order to ascertain the debtor's intentions, to look for what are designated as "badges of fraud." These badges of fraud are suspicious circumstances that
overhanging a transaction, and where the parties to it withhold testimony that it is exclusively within their power to produce, and that would remove all uncertainty, if believed, as to its character, the law puts the interpretation upon such conduct as it will. In such cases as this, the presumption is that fraud is implied. Where the personal estate is not invaded, and a conveyance executed within four months of the registration of the deed of trust, to raise money by the firm to pay its debts, it was held that when the parties have united in a transaction to defraud creditors to show that he bought for a valuable consideration and without notice, from a fraudulent grantor, a purchaser from a trustee, under a conveyance containing upon its face a evidence of a fraudulent purpose to defeat creditors, takes with notice of such evidence, Eigenbrun v. Smith, 98 N. C. 207, 4 S. E. 122. Rights of Wife.—If the widow or the wife of the deceased, or for possession of the land conveyed to defraud creditors. The court held that when the parties have united in a transaction to defraud another or others, or the public, or the due administration of justice, or which is against the public policy or contra bonos mores, the courts will not enforce it against each other. Bank v. Adrian, 116 N. C. 537, 540, 21 S. E. 792. Although a purchaser may pay a full price for the property, yet if he purchased with the intent to aid his vendor to defeat the latter's creditors his purchase will be void. Eigenbrun v. Smith, 98 N. C. 207, 4 S. E. 122. When a husband to his wife is attacked for fraud, the onus is upon the wife to show that a consideration, in the shape of money paid, the discharge of a debt due from him to her, or something of value, actually passed. Peeler v. Peeler, 109 N. C. 628, 14 S. E. 263. The burden is on the purchaser of property conveyed to defraud creditors to show that he bought for a valuable consideration and without notice. Cox v. Wall, 132 N. C. 730, 44 S. E. 653.

IV. RIGHTS AND REMEDIES OF CREDITORS.

Editor's Note.—It would seem that this article dealing with fraudulent conveyances would have to be deleted from your next edition. It is but a statement of the law as it now stands and as it has been held by the courts. It reminds us of the need of a new Code for the protection of creditors.

Minor children are not creditors of their father's for their past support furnished them by another, and for which their personal estate was not invaded, and a conveyance executed for their benefit, is not fraudulent, even though the instrument be set aside by them under this section. Bryant v. Bryant, 212 N. C. 6, 192 S. E. 864.

Preference of Creditors.—It is stated in emphatic terms by Gaston, J., speaking for the court in Hafner v. Irwin, 23 N. C. 10, 11, 3 S. E. 748: “Every creditor of an insolvent or embarrassed man, to the exclusive satisfaction of the claims of some of his creditors, has necessarily a tendency to defeat or hinder his other creditors in the collection of their demands. But if the sole purpose of such an act be the discharge of an honest debt, it does not fall under the operation of the statute against fraudulent conveyances.”

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It is entirely well settled, both in England and America, that, where by law a person, insolvent, in the keeping circumstances, has a right to prefer certain creditors to whom he is under special obligations, where done in good faith and without fraud, though by such preference the fund for the payment of the debt be diminished, it is not void. 

But an agreement by which a conveyance, made for the purpose of preferring creditors, to be kept secret until the time when the debtor has an opportunity to get beyond the reach of process issued by his other creditors, renders the conveyance fraudulent as against other creditors, as intended to defeat or defraud them. 

Conveyance to Defeat Claims for Torts.—A secret conveyance of a mill made to defeat, hinder or delay a party injured by the erection or continuance of his works upon the grantor's property, is void as to all persons whose claims are, shall or may be defrauded thereby. As to pre-existing debts such a deed would be ipso facto fraudulent and void. Morgan v. McCullard, 18 N. C. 221.

Where a deed was executed to evade the payment of any judgment that might be recovered against the grantor in an action for slander pending at the time of its execution, it is fraudulent, under the section, as to his creditors. 

Secret Trusts.—In Clement v. Cozart, 109 N. C. 173, 179, 13 S. E. 812, it was said that if a deed be made, showing upon its face a full valuable consideration, but upon the particular provision, a secret trust that the vendee shall not pay anything therefor, but shall hold the same in contemplation of insolvency for the benefit of the vendor, so as to protect and shield the property against any debts that he may owe at the time on any liabilities that he may subsequently incur, such a deed would be void as to all persons whose claims are, shall or may be defrauded thereby. As to pre-existing debts such a deed would be ipso facto fraudulent and void. 

Absolute Transfers Intended as Security.—A deed absolute but executed upon a parol agreement for redemption, is, in law, fraudulent and void against the creditors of the vendor. 

Surety on Bond.—The liability of a principal to indemnify a surety on a bond is an existing liability at the time of the bond being taken or held by or for the person claiming the benefit of the bond. 

When Insolvent Debtor Improves Wife's Estate. — An insolvent debtor cannot withdraw money from his own estate and give it to his wife to be invested by her in the purchase or improvement of her property, and to ex-tent, when it is done, creditors may subject the property so purchased or improved to the payment of their claims. 

Prior and Subsequent Creditors. — At common law, conveyance of part only of the grantor's property, is, in respect to subsequent creditors seeking satisfaction out of the property conveyed, merely evidence of fraud, the consideration of which belongs to the assignor, and allowed the assignor to remain in possession free of rent; this was evidence of a secret trust and benefit to the assignor, and the turning point in the case. 

When Wife Participates in Husband's Bank Deposits. — When the wife participates in her husband's depositing his money in her name at a bank for the purpose of defrauding his creditors, the attempted appropriation is void under this section which was enacted to prevent fraudulent gifts, and in an appropriate action the deposit will be considered and dealt with as if it stood in the name of the husband. 

When Trustee in Bankruptcy May Have Conveyance Set Aside.—A trustee in bankruptcy is entitled to have a fraudulent conveyance set aside and to recover the property conveyed, goods and chattels, if the same be made with the actual intent in fact to defraud such person who has purchased or shall purchase in fee simple or for lives, for rents, for years, and in fee simple remainder or remainders, goods and chattels, or to defraud such as shall purchase any rent or profit out of the same, shall be deemed utterly void against such person and others claiming under him who shall purchase for the full value thereof the same lands or hereditaments, goods and chattels, or rents or profits out of the same, without notice before and at the time of his purchase of the conveyance, charge, lease or encumbrance, by him alleged to have been made with intent to defraud; and possession taken or held by or for the person claiming under such alleged fraudulent conveyance, charge, lease or encumbrance shall be always deemed and taken as notice in law of such conveyance.
provenance to break through the distinction between land and equity."

In Plummer v. Worley, 35 N. C. 423, Ruffin, C. J., uses this language "It is true that the statute of 27 Eliz. is in its importance of its provisions to "things personal"; but it is in affirmative of the common law." It is apparent that reference is here made to the dictum of Lord Mansfield, and the inference is indisputably suggested that the principle is to be extended to "things personal," but the idea is not followed out in the decision. So it came to be a settled and unbroken holding in this State that the section applied only to land. However, the need for an extension of its provisions to "things personal" has latterly been felt. So, while the rule was too well established for the courts to break away, the statute brought relief by extending the section to "goods and chattels," the change appearing in section 1546 of the Code of 1883.

Section Constricted with Registration Act.—This section and the Registration Act (Sections 47-17 to 47-20) were both intended to prevent fraud, and must be construed together with that view. Austin v. Staten, 126 N. C. 783, 36 S. E. 338.

First Bona Fide Purchaser Protected.—27 Elizabeth being intended for the benefit of purchasers, the first bona fide purchaser, whether from the fraudulent vendor or vendee, is within its operation. Hole v. Henderson, 14 N. C. 12. "Purchaser" Defined.—The term "purchaser" is not used in the same sense as is the idea of "settlor," who conveys to an estate by his own act. It is to be received in its popular meaning as denoting one who buys for money, and, as we think, buys fairly and of course at a fair price. Fullenwider v. Roberts, 20 N. C. 430, 465, citing Upton v. Bailey, 51 N. H. 455. The Legislature thought proper in 1840 to declare that no person shall be deemed a purchaser unless he purchased the land for the full value thereof, without notice, at the time of his purchase, of the conveyance by him alleged to be fraudulent. Hiatt v. Wade, 30 N. C. 340, 342.

Second Purchaser Must Be Bona Fide. — The second purchaser must be a bona fide purchaser before the Act of 1885, still be a bona fide purchaser, and for full value. We do not mean to say that he should have paid every dollar the land was worth, but he should have paid a reasonable fair price, such as would be paid by a purchaser of a legal advantage. Crump v. Black, 41 N. C. 321, 324.

Curing Invalidity. — It is a settled principle that a deed voluntary or even fraudulent in its creation, and voidable by a purchaser, may become good by matter ex post facto. See Sumner v. Hicks, 2 Black 532, 535, 17 L. Ed. 355. But such an assignee takes title subject to any equity, or other right, that attaches to the property in the hands of the debtor. Carpenter v. Duke, 144 N. C. 291, 293, 56 S. E. 698.

§ 39-17. Voluntary conveyance evidence of fraud as to existing creditors.—No voluntary gift or settlement of property by one indebted shall be deemed or taken to be void in law, as to creditors of the donor or settler prior to such gift or settlement, by reason merely of such indebtedness, in property, at the time of making such gift or settlement, fully sufficient and available for the satisfaction of the then creditors, be retained by such donor or settler; but the indebtedness or condition of the donor or settler at such time shall be held and taken, as well with respect to creditors prior to such creditors subsequent to such gift or settlement, to be evidence only from which an intent to defray, hinder or deprive creditors may be inferred; and in any trial shall, as such, be submitted by the court to the jury, with such observations as may be right and proper. (Rev., s. 962; Code, s. 1547; R. C., c. 50, s. 3; 1840, c. 28, ss. 3, 4; C. S. 1007.)

Gifts of Visible Estate and Retention of Choses in Action. — Gifts of visible estates cannot be defeated, where the donor or settlor had resources in stocks or other securities of value at the time of his purchase, in the possession of the fraudulent donee. Wade v. Hiatt, 32 N. C. 302, 303.

When Donor Is Unable to Pay Debts. — It is a well settled rule of law in this state, that no voluntary deed can be set aside, revoked, rescinded, or annulled, to a legacy, before he has paid all of the debts of his testator; but the debt due to a creditor who is able to pay his debts at the time of the execution of the deed. Hobbs v. Cashwell, 152 N. C. 183, 188, 67 S. E. 495; McCranie v. Finchum, 89 N. C. 373.

When Conveyance Avoided Only as between Parties to Action. — When the court, in an action under this section has declared a voluntary conveyance void as to the plaintiff, and decreed that it be "set aside, revoked, rescinded, and annulled," it is avoided only as between the parties to the action. Stigges v. Portis Min. Co., 206 Fed. 534, 538; Allred v. Smith, 135 N. C. 443, 47 S. E. 597, 65 L. R. A. 929.

Legatee Must Suffer Loss. — The assent of an executor to a legacy, before he has paid all of the debts of his testator, void as to the creditors, for it is a fraud, an act in violation of the maxim, "A man must be just before he is generous." So long as the executor is solvent, no debt can be left unpaid, for he is liable to the creditors de bonis propriis, by reason of the devastation. If the executor be insolvent, the loss must fall upon the legatee. Pullen v. Hutchins, 67 N. C. 428, 432.

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Conveyance to Son.—Where a deed to the grantor's son is impeached as a voluntary gift upon the ground that he did not retain property "fully sufficient and available for the satisfaction of his then creditors," as required by the section, evidence of the contrary was required if it be true that the presumption is invalid if not made with a fraudulent intent and enough property is retained for all his creditors. Worthy v. Brady, 91 N. C. 263.

But where such a deed provides that the grantee shall support the grantor in his old age and in any other way with the condition imposed, it is not voluntary within the meaning of the section, but rests upon a valuable consideration. Worthy v. Brady, 91 N. C. 264.

A voluntary conveyance is not avoided by the fact that the grantor was indebted at the time, if he afterwards paid the debt. Smith v. Reavis, 29 N. C. 341.

Conveyance from Husband and Wife.—A voluntary conveyance of land by husband and wife is not avoidable by the courts on the ground that the conveyance is prohibited by the statute, as husband and wife may own and hold title to real estate and certain shares of stock of the father, of the value of seven thousand dollars, and the husband has not retained sufficient property out of which to pay his then existing creditors, and the son has acted in good faith without notice or knowledge, the transfer of the stock to the son is not invalid as against the father's creditors beyond the amount he has expended for the support of the child. Jeter v. Jeter, 137 N. C. 183, 188, 67 S. E. 495; McCannel v. Finchum, 89 N. C. 373.

Conveyances to Wife.—A conveyance of lands to husband and wife by the grantee was valid although the instrument did not contain a provision for the security of the creditors, and the son will not be considered as fraudulent with respect to his father's creditors. Booth v. Holmes, 177 N. C. 524, 527, 99 S. E. 365.

Same.—When a voluntary deed of land or other property made to a son by a father unable to pay his debts is void per se as to creditors; indeed, such a deed to any person is void, and such a deed appearing, the court has no power to give the grantee title to the land. Smith v. O'Neil, 177 N. C. 133, 134, 123 S. E. 288.

When Value Determined—A commissioner's deed of sale from a bankrupt of some of his personal property was not void, and when this is established and the conveyance is not fraudulent, a judgment obtained thereon, and operating as a gift to her within the meaning of this section, is valid. Shaver vy. Alterton, 151 U. S. 607, 625, 14 S. Ct. 442, 38 L. Ed. 286.

A voluntary conveyance is necessarily and in law fraudulent as to creditors, under this section, evidence of the tax valuation of the other lands of the debtor at the time of the voluntary conveyance is competent on the issue of intent to hinder, delay and defraud creditors as tending to show the debtor made a voluntary conveyance of property with a fraudulent intent and enough property is retained to satisfy his debts. Smith v. O'Neil, 177 N. C. 133, 134, 123 S. E. 288.

Prior and Subsequent Creditors.—The controlling principle is stated in Aman v. Walker, 165 N. C. 224, 227, 61 S. E. 162, as follows: "If the conveyance is voluntary, and the grantor did not retain property fully sufficient and available to pay his then existing creditors, the conveyance is not avoidable by reason of the tax valuation, but it cannot be impeached by subsequent creditors without proof of the existence of a debt at the time of its execution, which is unpaid, and when this is established and the conveyance is declared invalid, the proceeds of the property are subjected to the payment of creditors generally." Sutton v. Wills, 177 N. C. 524, 527, 99 S. E. 365.

A voluntary conveyance is necessarily and in law fraudulent as to creditors, whether fraudulent or not, depends upon the bona fides of the transaction, and the question of his intent to defraud has no significance. Garland v. Arrowood, 177 N. C. 371, 39 S. E. 100.

When Question of Fraud for Jury.—The section only requires the question of fraud to be submitted to a jury, in cases where property fully sufficient and available to pay the then existing creditors of the debtor is not afterwards paid to his then existing creditors. O'Daniel vy. Crawford, 15 N. C. 197, in which the subject of fraudulent conveyances is elaborately discussed in accordance with the decisions of the Supreme Court of the United States. O'Daniel vy. Crawford, 15 N. C. 197, 20 N. C. 128, 176 S. E. 288.

§ 39-18. Marriage settlements void as to existing creditors.—Every contract and settlement of property made by any man and woman in consideration of a marriage between them, for the benefit of such man or woman, or of their issue, whether the same be made before or after marriage, shall be void as against creditors of the parties making the same respectively, existing at the time of such marriage, if the same is antenuptial, or at the time of making such contract or settlement if the same is postnuptial. (Rev. s. 965; § 39-18. Marriage settlements void as to existing creditors.—Every contract and settlement of property made by any man and woman in consideration of a marriage between them, for the benefit of such man or woman, or of their issue, whether the same be made before or after marriage, shall be void as against creditors of the parties making the same respectively, existing at the time of such marriage, if the same is antenuptial, or at the time of making such contract or settlement if the same is postnuptial. (Rev. s. 965;
§ 52-14. As to statutes concerning married women gener-
wife, see § 52-13. As to antenuptial contracts of wife, see
§ 39-19

May Surrender Curtesy Initiative. — Since the Act of 1848,
a husband has the right to surrender his estate as tenant
by the curtesy initiative and let it merge in the reversion of
his权益, who is not in debt at the time, but
their rights are not secured, and as to subsequent purchasers
without notice, and creditors, if made with intent to de-
lay or defraud them. Kelly Mar. Women, Chapter 6, sec.
9. See as to rights of creditors in cases of curtesy,
§ 135-15. See also Davis, 60 N. C. 491, 497.

Same—Proceeds to Separate Use of Wife. — And an
agreement made before marriage to which the wife shall receive such a price in per-
sonal property and hold the same to her separate use to en-
able her to lay it out in the purchase of another tract of land, is valid, such price not vesting in the husbandjure
marital, and therefore not subject to claims of his cred-

Application.—Where, in 1863, a husband about to enter
military service made a deed to his wife of certain land for
her support, but retained sufficient property to pay
for her support, but retained sufficient property to pay
ally, see § 52-1 et seq.

Editor's Note. — In Reiger v. Davis, 67 N. C. 185; Las-
siter v. Davis, 64 N. C. 498, and the class of cases of which
they are the leading representatives, the question as to the
burden of proof was not involved. The court decides in
those cases whether a fraudulent conveyance was made, once
unless it appears that the vendee was not a party to the
fraud, or purchased without any notice of the fraudulent in-
Wall, 132 N. C. 730, 741, 44 S. E. 635.

Intended as Proviso.—The purpose of the Legislature in
enacting this section was to constitute an independent pro-
vision, operating as a proviso to the other sections on
the donor and claiming the title from him, and thus prevent
the title to the bona fide purchaser, by carrying it back to
the donor or other good consideration of the estate or
property conveyed, sold, mortgaged or assigned,
property not affected by illegal consideration of note
secured.—No conveyance or mortgage, made to
secure the payment of any debt or the perform-
ance of any contract or agreement shall be
deemed void as against any purchaser for valu-
able or other good consideration of the estate or
property conveyed, sold, mortgaged or assigned,
by reason that the consideration of such debt,
contract or agreement is forbidden by law, if such
purchaser, at the time of his purchase, did not
have notice of the unlawful consideration of such
debt, contract or agreement. (Rev., s. 965; Code,
s. 1548; R. C., c. 50, s. 4; 13 Eliz., c. 5, s. 6; 1785, c. 7, s. 6; C. S. 1009.

See note under § 39-19.

§ 39-19. Purchasers for value and without notice
protected.—Nothing contained in the preceding sections shall be construed to impeach or make
void any conveyance, interest, limitation of use or
uses, of or in any lands or tenements, goods or
chattels, bona fide made, upon and for good con-
sideration, to any person not having notice of such
fraud. (Rev., s. 964; Code, s. 1548; R. C.,
c. 50, s. 4; 13 Eliz., c. 5, s. 6; 1785, c. 7, s. 6; C. S. 1009.

S. E. 635.

Effect.—In Young v. Lathrop, 67 N. C. 41, 72,
Am. Rep. 603, the court held that the section was a pro-
vision, operating as a proviso to the other sections on
the donor and claiming the title from him, and thus prevent
the title of the first purchaser from being impeached and
made void." Cox v. Wall, 132 N. C. 730, 741, 44 S. E. 635.

Bona Fide Purchaser before Execution Sale. — Where a
fraudulent grantee of land conveyed it to a bona fide pur-
chasers for value without notice of the fraud, after a creditor of
the fraudulent grantor had obtained a judgment against him
in a suit on a note which is tainted with usu.

Bona Fide Purchaser Gets Good Title.—Under this sec-

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out notice of the illegality of the consideration of the said debt his title is not affected thereby. McNeill v. Riddle, 66 N. C. 290.

§ 39-21. Bona fide purchaser of fraudulently conveyed property treated as creditor.—Purchasers of estates previously conveyed in fraud of creditors or purchasers shall have like remedy and relief as creditors might have had before the sale and purchase. (Rev., s. 966; Code, s. 1550; R. C., c. 50, s. 6; C. S. 1011.)

§ 39-22. Persons aiding debtor to remove to defraud creditors liable for debts.—If any person removest or aids and assists in removing any debtor out of any county in which he has resided for the space of six months, or more, with the intent, by such removing, aiding or assisting, to delay, hinder or defraud the creditors, or any of them, of such debtor, the person so removing, aiding or assisting therein, and his executors or administrators, shall be liable to pay all the debts which the debtor removed may justly owe in the county from which he was so removed; and the same may be recovered by the creditors, their executors or administrators, by a civil action. (Rev., s. 1939; Code, s. 1551; R. C., c. 50, s. 14; 1820, c. 1063; C. S. 1012.)

What Constitutes Aid and Assistance.—Aid or assistance is the doing of some act whereby the party is enabled, or it is made easier for him to do the principal act, or effect some primary purpose. Wiley & Co. v. McRee, 47 N. C. 349, 351.

Where a party persuades a debtor, who is temporarily absent from the county of his residence, not to go back into that county, but to go to distant parts, and promises, if he will do so, to send his property from his residence to him, and does afterwards send such property to him, and aids him with money to abscond from where he then is, and goes part of the way with him, for the purpose of defrauding his creditors, he is liable under the section. Moore v. Rogers, 48 N. C. 91.

Where a party, having the money of his principal in his hands, in a fair and honest purpose, paid it to his son fraudulently to assist him in absconding, the mere fact that, in a settlement of accounts between the principal and the agent, the former allowed the latter's bill for money thus spent in purchase of land in the name of another, was a reason sufficient to subject the principal. Moore v. Rogers, 51 N. C. 297.

Same—Carrying Debtor to Railway Station.—Where a party, with his horse and buggy, carried a debtor to a railroad station, and placed the money belonging to him to leave the State, with the intent to assist him in the purpose of avoiding his creditors, it was held to be a fraudulent removal within the statute. Moffitt v. Burgess, 53 N. C. 342.

Same—Property Not Carried Entirely Out of County.—Where a debtor removes out of a county with intent to defraud his creditors, a person, who knowing of such intent, helps him by carrying him or his property a part of the way in order to assist him in getting him out of the county, becomes bound for his debts, although he did not convey the debtor or his goods entirely out of the county, and the act of helping him in the purpose of avoiding his creditors, was held to be a fraudulent removal within the statute. Godsey v. Bason, 30 N. C. 360.

Same—Aid without Acts.—There is no distinction between frauds consisting mainly in acts, and those which consist mainly in words, the latter being the only measure of the plaintiff's right of action and the defendant's liability being, that the one should have been damaged in consequence of the fraud of the other. McNeill v. Riddle, 44 N. C. 347.

Same—Mere Advice Insufficient.—Simply advising a debtor to run away, though the advice be given to delay, etc., is not equivalent to aiding and assisting, and will not sustain an action under the statutes against the fraudulent removing of debtors. Wiley & Co. v. McRee, 47 N. C. 349, 351.

Knowledge of Particular Debt Unnecessary.—Where a person knows that a creditor has a lien on the property of a debtor, it is no defense to a suit brought by a creditor if it is not necessary to show that this person had knowledge of any particular debt due from the debtor, but is sufficient if the circumstances of the case indicate the justness of the lien was made with a view to defraud creditors. Godsey v. Bason, 30 N. C. 360.

One Arrested under Writ of Capias Ad Respondendum.—The bail of a person arrested under a writ of capias ad respondendum may maintain an action on the case at common law against one for fraudulently aiding and assisting the principal to remove from the county, in consequence whereof he had to pay the debt sued on. March v. Wilson, 6 N. C. 143.

Surety on Constable's Bond Not Creditor.—A surety on a constable's bond, upon which there has been a breach, but no judgment nor payment by him, is not a creditor, so as to entitle him to recover against one for fraudulently removing his principal. Booe v. Wilson, 46 N. C. 182.

Measure of Damages.—In an action under this section the measure of damages is the amount of the debt due by the debtor to the plaintiff. Godsey v. Bason, 30 N. C. 360.

Same.—Jury in Suit by Different Creditors.—An action on the case, brought by A. against B., for fraudulently removing a debtor, is tried, and a verdict found for defendant. The same jury are tendered in a case of C. against B. for the same act of removing, and are challenged by the plaintiff. They are under a legal bias by reason of having decided the case of A. against B., and the challenge ought to be allowed, and this although additional evidence could be adduced in the second trial. Baker v. Harris, 60 N. C. 271.

Intent of Escaped Debtor Immaterial.—The declaration of a debtor fraudulently removed, that "he intended to get the defendant into a scrape," was held to be immaterial. Moffitt v. Burgess, 53 N. C. 342.

§ 39-23. Sales in bulk presumed fraudulent.—The sale in bulk of a large part, or the whole of a stock of merchandise, otherwise than in the ordinary course of trade and in regular and usual prosecution of the seller's business, shall be prima facie evidence of fraud, and void as against the creditors of the seller, unless the seller, at least seven days before the sale, makes an inventory showing the quantity and, so far as possible, the cost price to the seller of such articles included in the sale, and shall seven days before the proposed sale notify the creditors of the proposed sale, and the price, terms and condition thereof. If the owner of said stock of goods shall at any time before the sale execute a good and sufficient bond, to a trustee therein named, in an amount equal to the actual cash value of the stock of goods, and conditioned that the seller will apply the proceeds of the sale, subject to the right of the owner or owners to retain therefrom the personal property exception or exemptions as are allowed by law, so far as they will go in payment of debts actually owing by the owner or owners, then the provisions of this section shall not apply. Such sale of merchandise in bulk shall not be presumed to be a fraud as against any creditor or creditors who shall not present his or their claim or make demand upon the purchaser in good faith or on the trustee named in any bond given as provided herein, within twelve months from the date of maturity of his claim, and any creditor who does not present his claim or make demand either upon the purchaser in good faith or on the trustee named in a bond within twelve months from the date of its maturity shall be barred from recovering on his claim on such bond, or as against the purchaser, in good faith, of such stock of goods in bulk. Nothing in this section shall prevent voluntary assignments or deeds of trust for the benefit of creditors as now allowed by law, or apply to sales by executors, administrators, receivers or assignees under a voluntary assignment for the benefit of creditors, or trustees in bankruptcy, or by any public officers under judicial process. (1907, c. 623; 1913, c. 30, s. 1; Ex. Sess. 1913, c. 66, s. 1; 1933, c. 190; C. S. 1013.)

Cross References.—As to power of corporation to sell, transfer and convey property in course of business, see §§ 55-26, et seq. As to assignments for benefit of creditors, see §§ 23-3, et seq.
Editor's Note.—The words "seven days before the proposed sale," near the end of the first sentence, were substituted by Public Laws 1933, c. 190, for the words "within said time." 

Constitutionality.—This section is not unconstitutional or void as an unwarranted limitation of the right to sell and dispose of property. Fender v. Speight, 159 N. C. 612, 75 S. E. 251.

Same.—Valid Exercise of Police Power.—This section regulating the sale of merchandise in bulk, with certain requirements as to notice to creditors, inventories, etc., making such sales, contrary to the provisions of the statute, prima facie evidence of fraud and void as against creditors of the seller, is a valid exercise of the police powers of government to bar such fraudulent disposition and prevent such fraudulent in the trial of an issue, as to its validity. Raleigh Tire, etc., Co. v. Morris, 181 N. C. 184, 106 S. E. 562; Whitmore-Ligon Co. v. Hyatt, 175 N. C. 117, 95 S. E. 38; Gallup & Co. v. Rozier, 172 N. C. 283, 90 S. E. 209; Pennell v. Robinson, 164 N. C. 257, 80 S. E. 417.

Construed Strictly.—The statute making void as against creditors a sale of a large part of the whole of a stock of merchandise in bulk, unless the requirements of the act are complied with, is in derogation of the common law, and must be strictly construed. Swift & Co. v. Tempelos, 178 N. C. 487, 101 S. E. 8, 106:4SRA. 562.

A sale in bulk of a large part or the whole of a stock of merchandise under the conditions set forth in the statute, without an inventory and proper notice to creditors or without an undertaking to account for the proceeds, is absolutely void as to creditors and may be made available for their debts and claims. Gallup & Co. v. Rozier, 172 N. C. 283, 90 S. E. 209; Pennell v. Robinson, 164 N. C. 257, 80 S. E. 417; Whitmore-Ligon Co. v. Hyatt, 175 N. C. 117, 95 S. E. 38.

Merchandise Defined.—Within the intent and meaning of the section the word "merchandise" is limited to things ordinarily bought and sold in the way of merchandise, subject of commerce and traffic, and does not include a stock of provisions or supplies kept in a restaurant to be prepared and served to customers for meals, or to the furniture and fixtures used therein in connection with conducting the business of a restaurant. Swift & Co. v. Tempelos, 178 N. C. 487, 101 S. E. 8.

"Sale" within Statute.—Where a bankrupt transfers a large part of his stock of goods to a corporation, which does not assume any of the debts, but merely issues its capital stock in payment, the sale is void as against creditors of the vendor, is in derogation of the common law, and must be strictly construed. First Nat. Bank v. Raleigh Savings & Trust Co., 37 F. (2d) 301.

Subsequent Creditors Not Included.—This section applies only to creditors of the seller at the time of the sale and not to creditors of the corporation, the latter, however, may maintain an action against execution of his judgment creditor. Whitmore-Ligon Co. v. Hyatt, 175 N. C. 117, 95 S. E. 38.

When Question for Jury.—In an action to set aside the sale of a stock of merchandise in bulk as void against creditors, it is for the jury to determine the fact as to whether the seller had complied with the statutory requirements as to notice, to creditors, etc., upon his evidence that he had done so, under proper instructions from the court; and a charge in effect that if he had failed in this respect the transaction was prima facie fraudulent, and not that it was void as reversible error. Gallup & Co. v. Rozier, 172 N. C. 283, 90 S. E. 209.

Liability of Purchaser. — Where a dealer in automobile supplies has sold his stock of merchandise in bulk to those whose business it is to use such material in making repairs for their customers, the latter may not avoid liability to the creditors of the vendor on the ground that they were not dealers in such wares under the doctrine announced in Swift & Co. v. Tempelos, 178 N. C. 487, 101 S. E. 8, for the sale of the original creditor is itself void for noncompliance with this section. Raleigh Tire, etc., Co. v. Morris, 181 N. C. 184, 106 S. E. 562.

Purchaser Not Liable. — Under the provisions of this section, the vendor, at most, would be entitled to have the transfer set aside, but not to hold the purchaser personally liable. Goldman & Co. v. Chank, 200 N. C. 384, 156 S. E. 919, distinguishing but not deciding whether sale was contrary to section.


Art. 4. Voluntary Organizations and Associations.

§ 39-24. Authority to acquire and hold real estate.—Voluntary organizations and associations of individuals organized for charitable, fraternal, religious, or patriotic purposes, when organized for the purposes which are not prohibited by law, are hereby authorized and empowered to acquire real estate and to hold the same in their common or corporate names: Provided, that voluntary organizations and associations of individuals, within the meaning of this article, shall not include associations, partnerships or copartnerships which are organized to engage in any business, trade, or vocation. (1939, c. 133, s. 1.)

Cross References.— As to unlawfulness of associations, etc., maintaining places for receiving, keeping, etc., liquors, see § 18-15. As to secret political and military organizations forbidden, see § 14-10.

§ 39-25. Title vested; conveyance; probate.—Where real estate has been or may be hereafter conveyed to such organizations or associations in their common or corporate names the said title shall vest in said organizations, and may be conveyed by said organization in its common name, when such conveyance is authorized by resolution of the body duly constituted and held, by a deed signed by its chairman or president, and its secretary or treasurer, or such officer as is the custodian of its common seal with its official seal affixed, the said conveyance to be proven and probated in the same manner as provided by law for deeds by corporations, and conveyances thus made by such organizations, and associations shall convey good and fee simple title to said lands. (1939, c. 133, s. 2.)

Cross References.— As to power of corporation to convey, see §§ 55-40. As to probate and regulation for corporate conveyances, see §§ 47-41, 47-16.

§ 39-26. Effect as to conveyances by trustees. — Nothing in this article shall be deemed in any manner to change the law with reference to the holding and conveyance of land by the trustees of churches or other voluntary organizations where such land is conveyed to and held by such trustees (1939, c. 133, s. 3.)

Cross Reference.—As to power of trustees of a religious body to convey property, see § 61-4.

§ 39-27. Prior deeds validated.—All deeds here-tofore executed in conformity with this article are declared to be sufficient to pass title to real estate held by such organizations. (1939, c. 133, s. 4.)

Art. 5. Sale of Building Lots in North Carolina.

§ 39-28. Application for permit to sell.—After March 9, 1927, before a building lot or lots in a new sub-division of real estate is offered for sale or sold in North Carolina wherein it is represented or agreed that streets, sidewalks, water, sewer, lights or other improvements are to be made for the benefit of the purchaser or purchasers, the developer, from the corporation, partnership, or association offering the same for sale shall first apply to the Clerk of the Superior Court of the county wherein the building lot or lots are situated for a permit to so sell said lots. (1927, c. 216, s. 1.)

§ 39-29. Contents of application.—The application for a permit to sell must state the loca-
tion of the lots or lot with an estimate of the cost of the improvement proposed to be made on each lot as a whole; the estimate of cost so made shall be certified as approximately correct by a civil engineer or county surveyor licensed to practice in the State of North Carolina. (1927, c. 210, s. 2.)

§ 39-30. Investigation by clerk; bond. — Upon the filing of said application and the certificate of the cost of the improvement, the clerk of the court shall satisfy himself that the land or lots are located in his county and he shall also satisfy himself of the genuineness of the application and certificate of the engineer or county surveyor, and shall, if so satisfied, require a good and sufficient bond, in a sum equal to the amount certified by the engineer or county surveyor as the approximate cost of the improvement or improvements, with a corporation licensed to do business in the State of North Carolina as surety thereon, conditioned to save the purchaser or purchasers of each lot or lots harmless to the amount of the estimated and certified cost of the proposed improvement on each lot or lots so purchased. (1927, c. 210, s. 3.)

§ 39-31. Application, certificate, bond and order filed as permanent record.—The clerk of the Superior Court shall preserve the application, certificate and bond and his orders thereon as a permanent record for the benefit of any party whose rights are affected thereby and shall, when the provisions of this article have been fully complied with, and when a filing fee of one dollar has been paid, issue a permit to the applicant to sell said lot or lots. (1927, c. 210, s. 4.)

§ 39-32. Penalty for violation. — Any person, firm or corporation selling or offering for sale any building lot or lots in violation of the provisions of this article shall be guilty of a misdemeanor and upon conviction thereof shall be fined or imprisoned in the discretion of the court. (1927, c. 210, s. 5.)


§ 39-33. Method of release or limitation of power.—A release or limitation of a power of appointment with respect to real or personal property exercisable by deed or will or otherwise may be effected, if such power may be released or limited under the laws of this state, by the execution by the holder of such power of an instrument in writing stating that the power is released or limited to the extent set forth therein, and the delivery of such instrument to any person who might be adversely affected if such power were exercised or to the fiduciary or one of the fiduciaries, if any, having possession or control of the property over which the power is exercisable. (1943, c. 665, s. 1.)

§ 39-34. Method prescribed in § 39-33 not exclusive.—The method of release prescribed in § 39-33 is not exclusive, and this article shall not invalidate or be construed to invalidate any instrument or contract of release or limitation of a power not executed and delivered in the manner provided in § 39-33, or as invalidating any other act of release or limitation of a power, whether such instrument, contract or act has been heretofore executed or may be hereafter executed, delivered or done. (1943, c. 665, s. 2.)

§ 39-35. Requisites of release or limitation as against creditors and purchasers for value.—No release or limitation of a power of appointment after the effective date of this article which is made by the owner of the legal title to real property in this state shall be valid as against creditors and purchasers for a valuable consideration until an instrument in writing setting forth the release or limitation is executed and acknowledged in the manner required for a deed and recorded in the county where the real property is. (1943, c. 665, s. 3.)

Editor’s Note.—The act from which this article was codified was ratified March 8, 1943.

§ 39-36. Necessity for actual notice of release or limitation to bind fiduciary.—No fiduciary having possession or control of property over which a power of appointment is exercisable shall be bound or affected by any release or limitation of such power without actual notice thereof. (1943, c. 665, s. 1.)

Chapter 40. Eminent Domain.

Art. 1. Right of Eminent Domain.

Sec. 40-1. Corporation in this chapter defined.

40-2. By whom right may be exercised.

40-3. Right to enter on and purchase lands.

40-4. Power of railroad companies to condemn land for union depots, double-tracking, etc.

40-5. Condemning land for industrial sidings.

40-6. Condemnation by schools for water supply.

40-7. Condemnation for steamboat wharves and warehouses.

40-8. May take material from adjacent lands.


40-10. Dwelling-houses and burial grounds cannot be condemned.

Art. 2. Condemnation Proceedings.


40-12. Petition filed; contains what; copy served.

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§ 40-1. Corporation in this chapter defined.—For the purposes of this chapter, unless the context clearly indicates the contrary, the word "corporation" includes the bodies politic and natural persons, enumerated in the following section, which possess the power of eminent domain. (C. S. 1705.)

§ 40-2. By whom right may be exercised.—The right of eminent domain may, under the provisions of this chapter, be exercised for the purpose of constructing their roads, canals, pipe lines originating in North Carolina for the transportation of petroleum products, lines of wires, or other works, which are authorized by law and which involve a public use or benefit, by the bodies politic, corporation, or persons following:

1. Railroads, street railroads, plankroad, tramroad, turnpike, canal, pipe lines originating in North Carolina for the transportation of petroleum products, telegraph, telephone, electric power or lighting, public water supply, flume, or incorporated bridge companies.

2. Municipalities operating water systems and sewer systems and all water companies operating under charter from the state or license from municipalities, which may maintain public water supplies, for the purpose of acquiring and maintaining such supplies.

3. Person or persons, firms, corporations or copartnerships operating or authorized by law to operate electric light plants, or distributing electric current for lights or power, or for the purpose of constructing wires, poles or other necessary things, and for such purposes or things.

4. Public institutions of the state for the purpose of providing public supplies. or for other necessary purposes of such institutions.

5. School committees of public school districts, county boards of education, boards of trustees or of directors of any corporation holding title to real estate upon which any public school, private school, high school, academy, university or college is situated, in order to obtain a pure and adequate water supply for such school, college or university.

6. The department of conservation and development in the administration of the laws relating to fish and fisheries.

7. Any educational, penal, hospital or other institution incorporated or chartered by the state of North Carolina, for the furtherance of any of its purposes, such institution being wholly or partly dependent upon the state for maintenance, and such institution shall be in need of land for its location, or such institution shall be in need of adjacent land for necessary enlargement or extension, or for land for the building of a road or roads or a side-track for railroads, necessary to the proper operations and completion of any such institution, and shall so declare through its board of directors, trustees or other governing boards by a resolution inserted in the minutes at a regular meeting or special meeting called for that purpose, such institution shall have all the powers, rights and privileges of eminent domain given under this chapter, to condemn and procure such land, and shall follow the procedure established under this chapter.

8. Franchised motor vehicle carriers or union bus station companies organized by authority of the utilities commission, for the purpose of constructing and operating union bus stations: Provided, that this subsection shall not apply to any city or town having a population of less than sixty thousand. (Rev., s. 2575; Code, s. 1698; R. C. c. 61, s. 9; 1832, c. 92, s. 1; 1874-5, c. 83; 1907, cc. 39, 458, 783; 1911, c. 62, ss. 25, 26, 27; 1917, cc. 51, 132; 1923, c. 205; Ex. Sess. 1924, c. 118; 1937, c. 108, s. 1; 1939, c. 228, s. 4; 1941, c. 97, s. 1; 1941, c. 254; C. S. 1706.)

I. Source of Power.
II. Strict Construction.
III. Nature and Purpose.
IV. Extent of Power.
V. To Whom Granted.
VI. Compensation Essential.

Art. 3. Public Works Eminent Domain Law.

§ 40-30. Title of article.
§ 40-32. Definitions.
§ 40-33. Filing of petition; jurisdiction of court; entry upon land by petitioner.
§ 40-34. Form of petition.
§ 40-35. Inclusion of several parcels.
§ 40-37. Determination of issues raised by objections; waiver by failure to file; final judgment; guardian ad litem.
§ 40-38. Appointment of special master.
§ 40-40. Evidence admissible; increase in value; improvements.
§ 40-42. Notice of report.
§ 40-43. Hearing of objections by the court.
§ 40-44. Certified copy of judgment.
§ 40-45. Declaration of taking; property deemed condemned; fixing day for surrender of property; security for compensation and payment of award.
§ 40-46. Right to dismiss petition.
§ 40-47. Divesting title of owner.
§ 40-48. Payment of award into court and disbursement thereof.
§ 40-49. Recovery of award.
§ 40-50. Appeal.
§ 40-51. Costs.
§ 40-52. Powers conferred are supplemental.
As to the power given to railroad companies to condemn land, see § 60-37, Public Laws 1941, ©. 254, 260-265. As to power of street and interurban railways to condemn land for water-power plants, see §§ 136-19, 136-32. As to power of telegraph companies for highways, see §§ 331-1 et seq. As to power of state institutions to condemn land for water supply, see §§ 143-144, 136-52. As to condemning lands for school buildings, see §§ 136-32. As to condemning lands for roads, see §§ 136-19, 136-52. As to condemning lands for mill where land on one side of stream is owned, see § 73-14 et seq. As to condemnation for drainage ditches, see § 151-6 et seq.

I. SOURCE OF POWER.

Editor's Note.—The phrase "eminent domain" was first used by Hugo Grotius, celebrated writer and publicist, in 1625. Grotius says, "The property of subjects is under the eminent domain of the State, so that the state or he who acts in its name and behalf can acquire and dispose of the property, not only in case of extreme necessity, in which even private persons have a right over the property of others, but for ends of public utility, to which those who would suppose a necessary power that private ends should give way." Grotius De Jure Belli et Pacis, Lib. 3, c. 20.

The right of eminent domain or right of taking private property for public use is one of the inherent attributes of every sovereign state. It lies dormant in the state until the right to exercise it is granted by the state to some public or quasi public corporation. Thereafter the right is exercised by the state itself. Politz v. St. Louis, etc., R. Co., 60 Fed. 316, 317. See also Adirondack R. Co. v. New York State, 176 U. S. 335, 346, 20 S. Ct. 460, 44 L. Ed. 623.

As adopted in 1919 this section contained but five subsections. Subsection 6 was added by c. 118, Public Laws of 1924 and subsection 7 by c. 205, Public Laws 1923. Public Laws 1941, § 254, added subsection 8. For comment on subsection 8 see 19 N. C. 451, § 254.

The 1937 amendment inserted the reference to pipe lines in the first sentence of this section, and also in subsection 7. The 1939 amendment changed subsection 3.

I. SOURCE OF POWER.

Definitions.—Eminent domain is the power of a governing body to take private property for public uses upon payment of a just compensation. Western Union Tel. Co. v. Pennsylvania, 158 Penn. St. 540, 27 L. Ed. 923.

I. SOURCE OF POWER.

Founded on Necessity.—This power, or right of eminent domain, is possessed by the government, and may be exercised by the Legislature or under its authority. Unless vested in some private corporation or privy in the exercise of the powers of the government, neither the government nor the state could hold together. It is peculiarly fit to be wielded by the Legislature—it is a power founded on necessity. Raleigh, etc., R. Co. v. Wissler, 160 N. C. 451, 458.

It was a right at common law and is not a right in equity or the creature of a statute. And while the time of its exercise may be prescribed by statute, the right itself is superior to any statute. Kohl v. United States, 91 U. S. 357, 377, 23 L. Ed. 449.

All private property is held subject to the necessities of the state, to the end that the state may take private property or real property whenever its necessities or the exigencies of the occasion demand. United States v. Lynch, 188 U. S. 445, 465, 23 S. Ct. 133, 49 L. Ed. 139.

All property here held by tenancy for the state, and all contracts made subject to the right of eminent domain. Long Island Water Supply Co. v. Brooklyn, 166 U. S. 685, 692, 17 S. Ct. 718, 41 L. Ed. 952.

Legislature Has Exclusive Control.—The method of taking land for a public use is within the exclusive control of the Legislature, limited by organic law, and the courts cannot help the injured landowner, when the state is the defendant, to get anything more than the statutory compensation. Durham v. Rigsbee, 141 N. C. 128, 53 S. E. 531.

A public service corporation has no power to condemn land by its own power, and may only exercise the power under the authority given by a valid statute to do so. Carolina-Tennessee Power Co. v. Hiwassee River Power Co., 173 N. C. 668, 96 S. E. 99.

II. STRICT CONSTRUCTION.

In General.—In construing statutes which are claimed to authorize the exercise of the power of eminent domain, a strict rather than liberal construction is the rule, and statutes assume to call into active operation a power which, however essential to the existence of the Government, is in derogation of the common and inherent rights of the people. Wherever the statute reaches the discretion with which the owner usually had of his property. Carolina, etc., R. Co. v. Penneforward Lumber, etc., Co., 132 N. C. 642, 652, 44 S. E. 358; Board v. Forrest, 193 N. C. 519, 117 S. E. 431.

The exercise of the power is in derogation of common right, and all laws conferring such power must be strictly construed. Emerick v. Richmond, etc., R. Co., 106 N. C. 16, 25, 10 S. E. 1041. And the exercise can be exercised only in the mode pointed out in the statute conferring it. Allen v. Wilmington, etc., R. Co., 102 N. C. 381, 9 S. E. 4. As to condemnation for railroad, see §§ 193-1 et seq. The exercise of the power is given to the county board of education to condemn land for school purposes in derogation of a common-law right, and its terms will be strictly construed as to the extent or limit of the power given. Board v. Forrest, 193 N. C. 519, 117 S. E. 431.

A corporation furnishing electricity for public use may condemn lands of a private owner necessary for its transmission lines under the provisions of this section, but it is unlawful for a power company to enter upon and take the lands of the owner for such purpose without complying with the statutory procedures. Crisp v. Nanthala Power, etc., Co., 201 N. C. 468, 135 S. E. 845.

Power Not Implied.—The power of eminent domain cannot be implied or inferred from vague or doubtful language. Commissioners v. Carpenter, 153 N. C. 66, 68 S. E. 971.

General Act Governs.—The provisions of the general railroad act prevail over provisions of the charter of a railroad company, unless the charter specifically designates and repeals these provisions of the general act. Durham, etc., R. Co. v. Richmond, etc., R. Co., 106 N. C. 16, 27, 10 S. E. 1041.

III. NATURE AND PURPOSE.

Purpose of Grant.—The right of eminent domain is granted because the public interest requires that private property shall be taken for public use under the circumstances and in the manner prescribed by law. Raleigh, etc., R. Co. v. Mecklenberg Mfg. Co., 166 N. C. 168, 173, 82 S. E. 5.

The right of eminent domain can only be exercised where the property taken is to be used for the benefit of the public, and under no circumstances can it be taken for a private use, as the taking of the property of one for the benefit of another is a deprivation of a constitutional right. Strickley v. Highland Boy Gold Min., Co., 203 U. S. 359, 370, 26 S. Ct. 591, 40 L. Ed. 881.

Draining Public Road.—Digging a ditch across private land for the purpose of draining a public road, is condemnation for a public use, as the taking of private property for a public use. State v. New, 120 N. C. 731, 41 S. E. 1084.

Remedy for Abuse.—If, after acquiring the land under condemnation for a public use, a company should devote it to private purposes, there is a remedy by quo warranto and otherwise. Wadsworth Land Co. v. Piedmont Tract Co., 162 N. C. 314, 315, 78 S. E. 297.

IV. EXTENT OF POWER.

Discretion of Grantee.—A perusal of this entire chapter will clearly disclose that the extent and limit of the rights are acquired by variously and rather largely to be referred to the companies or grantees of the power, and only becomes an established law by the exercise of the discretion of the company or corporation, and does not give the power to take the property, unless the charter specifically designates and repeals these provisions of the general act. Durham, etc., R. Co. v. Richmond, etc., R. Co., 106 N. C. 16, 27, 10 S. E. 1041.

It was a right at common law and is not a right in equity or the creature of a statute. And while the time of its exercise may be prescribed by statute, the right itself is superior to any statute. Kohl v. United States, 91 U. S. 357, 377, 23 L. Ed. 449.

All private property is held subject to the necessities of the state, to the end that the state may take private property or real property whenever its necessities or the exigencies of the occasion demand. United States v. Lynch, 188 U. S. 445, 465, 23 S. Ct. 133, 49 L. Ed. 139.

All property here held by tenancy for the state, and all contracts made subject to the right of eminent domain. Long Island Water Supply Co. v. Brooklyn, 166 U. S. 685, 692, 17 S. Ct. 718, 41 L. Ed. 952.

Legislature Has Exclusive Control.—The method of taking land for a public use is within the exclusive control of the Legislature, limited by organic law, and the courts cannot help the injured landowner, when the state is the defendant, to get anything more than the statutory compensation. Durham v. Rigsbee, 141 N. C. 128, 53 S. E. 531.

A public service corporation has no power to condemn land by its own power, and may only exercise the power under the authority given by a valid statute to do so. Carolina-Tennessee Power Co. v. Hiwassee River Power Co., 173 N. C. 668, 96 S. E. 99.

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A Continuing Power.—The power of eminent domain conferred on any public service corporation by this section is not necessarily exhausted by a single exercise of the power, but, within the limits established by the general law or special charter, a subsequent or further exercise of the power may be permissible. Yadkin River Power Co. v. Wissler, 160 N. C. 269, 76 S. E. 267.

Rights Acquired.—Only an easement in lands passes from the owner to a railroad company under condemnation proceedings. See note to section 40-2. The right of private property taken by the railroad company cannot be successfully contested by the owner, unless the proceeding is void for the public use. See Pumpelly v. Green Bay Co., 13 Wall. 166, 2 L. Ed. 357.

Necessity for Compensation.—By the general law of European nations and the common law of England it was a qualification of the right of eminent domain that compensation be paid for the public use. See, e.g., Pumpelly v. Green Bay Co., 13 Wall. 166, 2 L. Ed. 357.

V. TO WHOM GRANTED.

Editor's Note.—The cross references above should be referred to for a list of the various corporations to which the right is granted. See note to section 40-2.

Public Service Corporations.—Where a corporation is authorized by its charter to generate and sell electricity, build dams and hydroelectric plants necessary to the generation of such hydroelectric power, and is therein given power of eminent domain to acquire the necessary rights of way and lands for its dams and the ponding of water, such corporation has the power to exercise the economist right to take private property. Ward v. Wilminton, etc., R. Co., 194 N. C. 893, 140 S. E. 715; City of New York v. Kaiser, 311 N. Y. 703, 28 N. E. 2d 737.

The right of a corporation, having the statutory powers, to condemn lands for a public use is not affected or impaired because it so happens that the use of his land is necessary for the exercise of its franchise or the discharge of its duties. Watts v. Lenor, etc., Turnpike Co., 141 N. C. 129, 51 S. E. 407.

Unconstitutional Unless Compensation Provided.—A statute authorizing a corporation to take private property for a public use is unconstitutional, unless compensation therefor be paid. See, e.g., E. & N. R. Co. v. Winslow, 158 N. C. 173, 74 S. E. 641; Phillips v. Postal Tel. Cable Co., 193 N. C. 513, 41 S. E. 1022.

Whenever the government in the exercise of its governmental rights takes property, the ownership of which it concedes to be in an individual, it impliedly promises to pay therefor. Stamey v. Brunswick, 189 N. C. 166, 126 S. E. 105, 106 S. E. 497.

VI. COMPENSATION ESSENTIAL.

As to determining compensation, see note to section 40-17.

Definition of Compensation.—The word compensation imports that a wrong or injury has been inflicted, which must be expressed in money. Money must be paid to the extent of the injury, whether or more than less than the value of the property. Daumen v. Ross, 167 U. S. 548, 17 S. Ct. 962, 51 L. Ed. 1137.

Necessity for Compensation.—By the general law of the United States, and not to the government of the State, the principle is so grounded in natural equity that it has never been denied to be a part of the law of North Carolina. Bennett v. Carolina Cent. R. Co., 83 N. C. 489, 110 S. E. 297.
§ 40-4. Power of railroad companies to condemn land for union depots, double-tracking, etc.—Any railroad company operating a line of railroad in North Carolina whenever it shall find it necessary to occupy any land for the purpose of getting to a union depot, or for such purpose as may be necessary to carry out the orders of the utilities commission. Whenever it is necessary for any railroad company doing business in this state to cross the streets or streets in a town or city in order to carry out the orders of the utilities commission, to construct an industrial siding, the power is hereby conferred upon such railroad company to occupy such street or streets of any such town or city within the state: Provided, license so to do be first obtained from the board of aldermen, board of commissioners, or other governing authorities of such town or city. (1911, c. 292; 1933, c. 134, s. 8; 1941, c. 97, s. 1; C. S. 1709.)


§ 40-6. Condemnation by schools for water supply.—If the school authorities mentioned in subsection 5 of § 40-2 shall be unable to agree with the owners of any land which, or the use of which, it is necessary to appropriate in obtaining a pure and adequate water supply for the school, they shall file a petition for the condemnation of such lands in conformity with the provisions of this chapter. In addition to the particulars required to be set out in § 40-12, the petition shall state whether the water supply is desired to be obtained from a spring, from a stream, or by digging artesian wells. The proceedings for such condemnation shall conform to the requirements of this chapter. No greater amount of land in area or width shall be condemned under this section than is necessary to obtain a pure and adequate water supply.

Any person holding title to land upon which any school, public or private, is located is empowered to obtain water supplies from the springs, streams or arterial wells the use of which is acquired under this section by building intakes, reservoirs, digging ditches, laying pipes or doing such other things as may be needful to obtain the water supply. (1907, c. 671; C. S. 1710.)

Cross Reference.—As to condemning of land for school buildings, see § 115-85.

§ 40-7. Condemnation for steamboat wharves and warehouses.—Upon the order of the utilities commission that any steamboat company provide wharf and warehouse facilities as may be deemed reasonable and just, at any particular point, such company shall have power to condemn land for such purpose in accordance with the provisions of this chapter. (Ex. Sess. 1913, c. 52; 1933, c. 134, s. 8; 1941, c. 97, s. 1; C. S. 1711.)

Cross Reference.—As to power and duty of Utilities Commission to require steamboat companies to provide wharf and warehouse facilities, see § 62-39.

§ 40-8. May take material from adjacent lands.—For the purpose of constructing and operating its works and necessary appurtenances thereto, or of repairing them after they shall have been made, or of enlarging or otherwise altering them, the corporation entitled to exercise the powers of eminent domain may, at any time, enter on any adjacent lands, and cut, dig, and take therefrom, any wood, stone, gravel, water or earth,
which may be deemed necessary: Provided, that they shall not, without the consent of the owner, destroy or injure any ornamental or fruit trees. (Rev., s. 2576; Code, s. 1702; R. C., c. 61, s. 22; 1874-5, c. 83; 1907, c. 39, s. 2; C. S. 1712.)

In General.—The power of condemnation granted to these companies is not confined to a right of way, delimited by surface boundaries, but may be extended to cutting of trees or removing obstructions outside of these boundaries, as may be required for the reasonable preservation and protection of their lines and other property. Yadkin River Power Co. v. Wissler, 160 N. C. 269, 275, 76 S. E. 267.

Compensation.—The owner of the land is entitled to compensation for the cutting of cross-ties on land not included in the right-of-way, and the negligent filling of ditches instead of building bridges over them in constructing the roads necessary to remove the timber, and for breaking down fences. Waters v. Greenleaf-Johnson Lumber Co., 115 N. C. 648, 20 S. E. 718.

§ 40-9. How material paid for.—If for the value of the damages done to the owner by reason of the acts mentioned in § 40-8 the parties may be unable to agree, the same shall be valued in the manner hereinafter provided. (Rev., s. 2577; Code, s. 1703; R. C., c. 61, s. 23; 1874-5, c. 83; C. S. 1713.)

§ 40-10. Dwelling-houses and burial grounds cannot be condemned.—No such corporation shall be allowed to have condemned to its use, without the consent of the owner, his dwelling-house, yard, kitchen, garden or burial ground, unless condemnation of such property is expressly authorized in its charter or by some provision of this code. (Rev., s. 2578; C. S. 1714.)

Cross Reference.—As to acquisition of residence property, graveyards, etc., by electric, telegraph and power companies, see § 56-6.

Exercise of Discretion Not Permitted.—The principle arising under the general power to condemn, leaving the matter largely within the discretion of the governing authorities seeking condemnation, does not apply to the statutory exceptions. Selma v. Nobles, 183 N. C. 332, 111 S. E. 543.

No Application to Tenant Houses.—This section does not apply to tenant houses, but only to the dwellings of the owners. The right derives from their ownership and is primarily for their own private reasons and mental reasons; and which could not exist where such owner is a corporation renting the dwellings to its tenants. Raleigh v. R. C. v. Mecklenburg Mfg. Co., 166 N. C. 168, 169, 75 S. E. 245.

Subsequent Use by Owner Not Protected.—When a provision in a charter of a railroad company or a deed granting it a right of way prohibited it from entering upon the yard, garden, burial ground, etc., of the owner, the right of the right of way was so used at the date of its acquisition, the right of the company would not be interfered with by the fact that it has since been appropriated to such use. Railroad v. Olive, 142 N. C. 257, 55 S. E. 263; Dargan v. Carolina Cent. R. Co., 131 N. C. 623, 625, 43 S. E. 979.

Nuisance by Taking Under Section.—The creation and maintenance of which not only interferes with the right of lands of private owners is a taking within the principle of eminent domain and condemnation proceedings thereunder, and within the exception contained in this section, with rights; therefore this is not a taking, and the statute is not violated. Selma v. Nobles, 183 N. C. 332, 111 S. E. 543.

Municipal Corporations.—Where a city, under its charter, is given the same power to condemn lands of private owners, to the extent of the public needs, and in the exercise of that power is bound by the restrictions placed on them by this section. Selma v. Nobles, 183 N. C. 332, 111 S. E. 543.

House Not Property of Railroad.—A house standing on the right of way does not become the property of the company. Shields v. Norfolk, etc., R. Co., 129 N. C. 1, 6, 39 S. E. 390; Raleigh v. R. C. v. Mecklenburg Mfg. Co., 166 N. C. 168, 82 S. E. 5.

The North Carolina National Park Commission created by Public Acts 1927, c. 48, is an agency of the State created by statute, vested with the power of eminent domain, and is not subject to the limitations provided in this section and § 40-11. Yarbrough v. Park Commission, 196 N. C. 284, 145 S. E. 563.

Art. 2. Condemnation Proceedings.


—If any corporation, enumerated in § 40-2, possessing by law the right of eminent domain in this state, is unable to agree for the purchase of any real estate required for purposes of its incorporation or for the purposes specified in this chapter, it shall have the right to acquire title to the same in the manner prescribed by the general proceedings herein prescribed. (Rev., s. 2579; Code, s. 1703; 1909; 1885, c. 168; 1893, c. 63; 1901, cc. 41, s. 2; 1899, c. 64; 1903, cc. 565, 159, s. 16; 1871-2, c. 138, s. 13; C. S. 1715.)

Cross Reference.—As to special proceedings generally, see § 1-393 et seq.

Proceeding Governed by Same Rules Laid Down for Civil Actions.—As a proceeding to condemn land under statutory power is a special proceeding and is so denominated by this section, the requirements of § 1-393 that "except as otherwise provided," special proceedings shall be governed by the rules of civil procedure. Where a railroad and other public service corporation has made the entry, appropriated the right of way, constructed its road and is operating the same, and neither party has been suit to resort to the statute remedy, the owner of the land has the right at his election to sue for permanent damages and on payment of the same the easement will pass to the defendant. Mason v. Durham County, 175 N. C. 638, 641, 96 S. E. 110, citing sec. 99-9 et seq. of this code.

Applications to All Railroads.—The method of proceeding for the condemnation of land by railroad corporations prescribed by this section is applicable to all railroads, whether formed under the general law or special act of incorporation. Allen v. Wilmington, etc., Railroad, 122 N. C. 381, 9 S. E. 4; McIntyre v. Western, etc., Co., 67 N. C. 278.

Prior Attempt to Agree Mandatory.—The statutory method of condemning a right of way can be exercised only when the owner has had no previous agreement for the terms of acquisition. Allen v. Wilmington, etc., Railroad, 102 N. C. 381, 9 S. E. 4.

Attempt to Acquire Title.—The clause, "the corporation had not been able to acquire title therefor," has no reference to the pecuniary resources of the corporation; it may apply to the owner's refusal to sell except at a price which in the judgment of the corporation is excessive, to cases in which the owner by reason of some disability cannot convey his title, and likewise in other instances. Western Power Co. v. Moses, 191 N. C. 744, 746, 133 S. E. 5.

It is not required of a quasi public service corporation authorized to condemn land under the provisions of section 40-2, that it first endeavor to agree with the owners, when it is made to appear that infants have an interest therein, and otherwise that a title to the lands could not be acquired in this way. Western Power Co. v. Moses, 191 N. C. 744, 133 S. E. 5.

No Right of Entry Until Payment.—In case the parties cannot agree, then the company may proceed to condemn the land, and the company does not acquire the right to enter for the purpose of constructing the road until the amount of the appraisement has been paid into court. State v. Wells, 147 N. C. 371, 157 S. E. 591.

No Application to Trespasser.—The provisions of this section only apply to the mode of acquiring title to real estate required for the construction of roads. But trespassers committed outside of the right of way in building the road, and for such trespasses the corporations are liable in a civil action. Bridgers v. Dill, 97 N. C. 222, 1 S. E. 767.

Condemnation of Land by Board of Education.—Sections 40-11 to 40-19 apply only to those corporations enumerated in section 40-2, and have no application to a county board of education condemning land for school buildings, such proceedings are controlled by section 115-85, Board v. Forrest, 193 N. C. 519, 530, 137 S. E. 431.

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§ 40-12. Petition filed; contains what; copy served.—For the purpose of acquiring such title to the corporation, or the owner of the land sought to be condemned, may present a petition to the clerk of the superior court of the county in which the real estate described in the petition is situated, praying for the appointment of commissioners of appraisal. Such petition shall be signed and verified according to the rules and practice of such court; and if filed by the corporation it must contain a description of the real estate which the corporation seeks to acquire; and it must, in effect, state that the corporation is duly incorporated, and that it is its intention in good faith to conduct and carry on the public business authorized by its charter, stating in detail the nature of such public business, and the specific use of such land; that the land described in the petition is necessary for the proposed business, and that the corporation has not been able to acquire title thereto, and the reason of such inability. The petition, whether filed by the corporation or the owner of the land, must also state the names and places of residence of the parties, so far as the same can by reasonable diligence be ascertained, who own or have, or claim to own or have, estates or interests in the said real estate; and if any such persons are infants, their ages, as near as may be, must be stated; and if any such persons are idiots or persons of unsound mind or are unknown, that fact must be stated, together with such other allegations and statements of liens or encumbrances on said real estate as the corporation or the owner may see fit to make. A summons as in other cases of special proceedings, together with a copy of the petition, must be served on all persons whose interests are to be affected by the proceedings, at least ten days prior to the hearing of the same by the court. (Rev., s. 2580; Code, s. 1944; 1893, c. 306; 1871-2, c. 138, s. 14; 1907, c. 783, s. 3; C. S. 1716.)

Cross References.—As to summons in contested special proceedings, see §§ 1-394, 1-395. As to service of map and profile in condemnation proceeding by a railroad, see § 60-71.

Editor's Note.—In Durham, etc., R. Co. v. Richmond, etc., R. Co., 106 N. C. 16, 23, 10 S. E. 1041 the court states that the reasons for the requirements which are found in this section of the statute are not within the experience of modern times. The court stated that the idea that the roads could locate their route according to their discretion, and they could not be controlled by the courts unless they abused their discretion. The remedy was usually by injunction which caused a great deal of litigation and delay both to the road and to the landowner. It was therefore deemed necessary, so that the landowner might know what land was intended to be appropriated and could have his grievances adjusted, to require the filing of maps, profiles, etc.

Strict Compliance.—This section stating the requisites of a petition in condemnation proceedings must be strictly complied with or the proceedings will be dismissed. Johnson City, etc., R. Co., 106 N. C. 16, 23, 10 S. E. 1041.

Summons Should Issue.—The proceeding authorized by this section is a special proceeding and a summons should issue as in all other cases. R. v. Lumber Co., 132 N. C. 644, 42 S. E. 743, 44 S. E. 563.

General Language Permitted.—It is not essential that the particular language of the statute should be used. If the facts alleged plainly show that the petitioner has been unable to acquire title to the right of way by agreement, and the reason of the failure to do so, the averments of a petition not strictly in accordance with the statute. Durham v. Rigbee, 141 N. C. 128, 53 S. E. 331.

Petition Must Allege.—It is necessary for the petition in condemnation proceedings to allege, and the burden is upon the petitioner to show, a previous effort to acquire title to the right of way by agreement, and the reason of the failure to do so. In the absence of a proper petition the proceeding should be dismissed. Johnson City, etc., R. Co., 148 N. C. 59, 61 S. E. 683; Power Co., v. Moses, 191 N. C. 784, 131 S. E. 120.

And the petition, whether filed by an owner or by the company, should state the names of all persons interested, and all of them should be in court before the Commissioners are appointed. Hill v. Glendon, etc., Mfg. Co., 113 N. C. 259, 18 S. E. 171.

Same.—Where Landowner Files.—It is not necessary that the petition filed by a landowner in proceedings for the assessment of damages for land taken by a railroad company for a right of way, shall state that the petitioners and the company have failed to come to an agreement as to the sum to be paid, such averment being necessary only when the railroad company is the plaintiff. Johnson City, etc., R. Co. v. Richmond, etc., R. Co., 148 N. C. 59, 61 S. E. 683; Power Co. v. Moses, 191 N. C. 784, 131 S. E. 120.

Description of Property Sought To Be Acquired Is Necessarty.—A description of the part of a railroad company that is sought to be appropriated must be as clear and specific as the particular language of the statute should be used. If the facts alleged plainly show that the petitioner has been unable to acquire title to the right of way, privilege, or easement to run is necessary. Gastonia v. Glenn, 218 N. C. 510, 11 S. E. (2d) 459.

Fraudulent Deed May Be Set Aside.—Where a deed for a part of what has been granted from the state to a railroad company has been made by the part of a railroad company, the superior court has jurisdiction to set aside the conveyance, but cannot go further in the same action, and ascertain and enforce payment of damages suffered by the grantor by reason of the appropriation of his land as a right of way by the company, although such appropriation was made by the company under the deed in question. Allen v. Wilmington, etc., Railroad, 102 N. C. 381, 9 S. E. 4.

Co-tenant Can File Petition.—The fact that a co-tenant of land has granted a right of way to a railroad company will not prevent the other co-tenant from proceeding for the assessment of damages sustained by him, nor will such facts prevent the co-tenant who has made such grant from becoming a party to the proceedings and having his rights adjusted thereunder. Allen v. Wilmington, etc., Railroad, supra; State v. Wells, 142 N. C. 590, 55 S. E. 210.

FRAUDULENT DEED MAY BE SET ASIDE.—Where a deed for a part of what has been granted from the state to a railroad company has been made by the part of a railroad company, the superior court has jurisdiction to set aside the conveyance, but cannot go further in the same action, and ascertain and enforce payment of damages suffered by the grantor by reason of the appropriation of his land as a right of way by the company, although such appropriation was made by the company under the deed in question. Allen v. Wilmington, etc., Railroad, 102 N. C. 381, 9 S. E. 4.

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In condemnation proceedings, the statement required by this section, that the plaintiff has not been able to acquire title to the land, and the reason of such inability, is the requisites of a petition in condemnation proceedings to allege, and the burden is upon the petitioner to show, a previous effort to acquire title to the right of way by agreement, and the reason of the failure to do so. In the absence of a proper petition the proceeding should be dismissed. Johnson City, etc., R. Co., 148 N. C. 59, 61 S. E. 683.

Section Does Not Apply to Telegraph Companies.—As much as section 56-7 sets forth all the necessary statements for the notice of a railroad company to its shareholders and the procedure it provides for its service, only so much of the railroad law as directs proceedings after the petition is before the court is made applicable to telegraph companies, and section 40-12

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cannot be made to apply to telegraph companies. Phillips v. Postal Tel. Cable Co., 130 N. C. 513, 525, 41 S. E. 1022.

Limit of Plaintiff's Recovery Where Evidence Is Insufficient to Show Taking Was for Private Purpose.—Where there is no evidence to show that the railroad or other public works crossing over a road was for a private purpose sufficient to raise an issue of fact, the plaintiff is remitted to his rights under this section and § 156-19 for the recovery of just compensation. Rous v. State Highway, etc., Comm., 209 N. C. 648, 184 S. E. 513.

Waiver of Preliminary Hearing.—Where it is stipulated by the parties in the preliminary proceeding showing that a hearing before commissioners appointed by the clerk under the provisions of this section should be waived, and judgment is rendered determining the amount of damages, and on appeal by the plaintiffs in the Supreme Court affirmed, the defendant is not entitled to an amparo proceeding and the court also finds the error in the exclusion of another element of compensation to which the plaintiff is entitled, on the subsequent trial to determine the amount recoverable on such other element of compensation, the parties are bound by the stipulation waiving a preliminary hearing by commissioners, and plaintiff's exceptions to the trial of the issue will not be sustained. State v. Wilmington-Wrightsville Beach Causeway Co., 205 N. C. 508, 171 S. E. 859.

What Constitutes Waiver.—Where a city is sued for damages by a water company for the subsequent crossing of its water supply pipe on the plaintiff's lands, and it is made to appear that the pipe line is upon the state's highway over the plaintiff's land, the plaintiff, as the servient owner, may maintain his action, and the denial of the waiver of the right that the plaintiff should have proceeded before the clerk under this section, and the plaintiff may maintain his action of trespass in the superior court. Rouse v. Kinston, 193 N. C. 481, 137 S. E. 495.


§ 40-13. How process served.—The summons and a copy of the petition shall be served in the same manner as in special proceedings. (Rev., s. 2581; Code, s. 1944; 1871-2, c. 138, s. 14; C. S. 1717.)

Cross Reference.—As to service of summons in special proceedings generally, see §§ 1-394, 1-395.

Editor's Note.—In the case of Click v. Western, etc., R. Co., 98 N. C. 390, 4 S. E. 183, referring to a proceeding instituted against a railroad company by the owner of land the court said: "This is neither a special proceeding nor a civil action as defined by the code. It is a summary proceeding."

This construction is overruled in Carolina, etc., R. Co. v. Permeaden Lumber, etc., Co., 132 N. C. 644, 653, 44 S. E. 353, and the court in dismissing the demurrer, stated that this case was properly called a special proceeding and therefore a summons issued should in all cases as in others.

§ 40-14. Service where parties unknown.—If the person on whom such service of summons and petition is to be made is unknown, or his residence is unknown and cannot by reasonable diligence be ascertained, then such service may be made under the direction of the court, by publishing a notice, stating the time and place within which such person must appear and plead, the object thereof, with a description of the land to be affected by the proceedings, in a newspaper printed in the county where the land is situated, once in each week, for four weeks previous to the time fixed by the court, and if there be no paper printed in such county, then in a newspaper printed in the city of Raleigh. (Rev., s. 2582; Code, s. 1944, subsec. 5; C. S. 1718.)

§ 40-15. Orders served as in special proceedings in absence of other provisions.—In all cases not herein otherwise provided for, service of orders, notices, and other papers in the special proceedings hereinbefore mentioned or may be made as in other special proceedings. (Rev., s. 2583; Code, s. 1944, subsec. 7; C. S. 1719.)

Cross Reference.—As to special proceedings generally, see § 1-393 et seq.

§ 40-16. Answer to petition; hearing; commissioners appointed.—On presenting such petition to the superior court, with proof of service of a copy thereof, and of the summons, all or any of the persons whose estates or interests are to be affected by the proceedings may answer such petition and show cause against granting the prayer of the same, and may disprove any of the facts alleged in it. The court shall hear the proofs and allegations of the parties, and if no sufficient cause is shown against granting the prayer of the petition, it shall make an order for the appointment of three disinterested and competent freeholders who reside in the county where the premises are to be appraised, for the purposes of the company, and shall fix the time and place for the first meeting of the commissioners. (Rev., s. 2584; Code, s. 1945; 1871-2, c. 138, s. 15; C. S. 1720.)

Finding of Facts Conclusive.—In condemnation proceedings where the right of eminent domain is claimed by the company, and the findings upon which the judgment is rendered determining the amount of damages, and on appeal by the company from the findings, the court will not sustain a collateral attack, and they shall be as conclusive as the judgment of the court. Phillips v. Postal Tel. Cable Co., 130 N. C. 513, 525, 41 S. E. 1022.

Limit of Plaintiff's Recovery Where Evidence Is Insufficient to Show Taking Was for Private Purpose.—Where there is no evidence to show that the railroad or other public works crossing over a road was for a private purpose sufficient to raise an issue of fact, the plaintiff is remitted to his rights under this section and § 156-19 for the recovery of just compensation. Rous v. State Highway, etc., Comm., 209 N. C. 648, 184 S. E. 513.

Same.—Charter Cannot Be Attacked.—The charter of a corporation cannot be collaterally attacked, and a direct proceeding for condemnation must be brought to annul it. But if the corporation were on its face inoperative and void, a court would so declare it in any proceedings to condemn lands by virtue of the eminent domain claim thereunder. Johnson v. City, etc., R. Co., 184 N. C. 69, 61 S. E. 883.

Same.—Advisability of Project.—The advisability of widening a street is a matter committed by law to the sound discretion of the aldermen, with the exercise of which neither the defendants nor the courts can interfere. It is a political and administrative measure of which the defendants are not even entitled to notice or to be heard. Durham v. Riggsbee, 141 N. C. 128, 53 S. E. 531.

Same.—Denial That Land Necessary.—A railroad company is entitled to so much of the way of right as may be necessary for the purpose of the company, and the denial by a company in any proceeding in which it seeks such portion that the portion in controversy is necessary for the purposes of the company does not raise an issue of fact to be determined by a jury, as the company is the judge of the necessity and extent of such use. Railroad v. Olive, 142 N. C. 59, 51 S. E. 193; Holly Shelter R. Co. v. Newton, 133 N. C. 136, 45 S. E. 494.

What Matters Issuable.—A perusal of the entire statute discloses that the extent and limit of the rights to be acquired are primarily and very largely referred to the companies or grantees of the power, and only becomes an issue capable of determination in the case of the company when the company in any proceeding brought to condemn lands by virtue of the right of eminent domain claimed thereunder, by its charter or otherwise, purports to raise any question of law or fact issuable or otherwise to be considered on appeal to the superior court from his award of damages, as provided by law. Selma v. Nobles, 183 N. C. 122, 111 S. E. 541.

Rights Protected by Injunction.—And the rights of the parties may be protected in the meantime from interference by an injunction issued by the judge on application made in the same cause when it appears to the judge in such proceeding that the portion in controversy is necessary for the purposes of the company, and in any proceeding in which the company seeks such portion that the portion in controversy is necessary, or that the company is seeking to acquire such portion for any purpose other than the purposes for which it is granted the power to acquire such portion, the judge shall have power to make such order for the temporary preservation of the rights of the parties as the nature of the case demands, including the power to make such order as to the possession and use of the property as will best effectuate the purposes of the company, and to continue such order until the rights of the parties have been determined by a court of competent jurisdiction.

Where issuable matters are raised before the clerk under this section he should pass upon these matters presented in the record, have the land assessed through commissioners, with the exercise of which neither the parties nor the courts can interfere. It is a political and administrative measure of which the defendants are not even entitled to notice or to be heard. Durham v. Riggsbee, 141 N. C. 128, 53 S. E. 531.

No Appeal from Order Appointing Commissioners.—An order appointing commissioners to assess damages is inter-
locutory, and no appeal will be taken or subscribed to appear they that will fairly and impartially appraise the lands mentioned in the petition. Any one of them may issue subpoena, administer oaths to witnesses, and grant the adjournment of the proceedings before them from time to time in their discretion. Whenever they meet, except by the appointment of the court or pursuant to adjournment, they shall cause ten days notice of such meeting to be given to the parties who are to be affected by their proceedings, or their agent or attorney. They shall view the premises described in the petition, hear the proofs and allegations of the parties, and reduce the testimony, if any is taken by them, to writing; and after the testimony is closed in each case, and without any unnecessary delay, and before proceeding to the examination of any other claim, a majority of them all being present and acting, shall ascertain and determine the compensation which ought justly to be made by the corporation to the party or parties owning or interested in the real estate appraised by them. They shall report the same to the court within ten days after the same (Rev. s. 2585; Code, C. S. 1971.)

Editor's Note.—In the published Acts of 1871-72, ch. 138 a large part of section 18 was erroneously printed under section 16. This error was repeated in the Revised, ch. 99, Sec. 218, of the American Union Tel. Co. v. Wilmington, etc., Railroad, Code, C. S. 420, 421. In the Code of 1893 these included sections 16-18 of ch. 138 supra. In the Consolidated Statutes sections 1721 and 1723 both contained a part of section 18 was erroneously printed under section 1946. This latter provision was repealed in 1891, Laws 1891, ch. 160. The courts have subsequently construed this repeal to mean a restoration of the old rule as stated in Freddie's Case, supra. Southport, etc., R. Co. v. Platt Landy, 135 N. C. 266, 45 S. E. 538; But the evidence of the legislature as to the meaning of this section when the proceeding is begun. Western Carolina Power Co. v. Hayes, 193 N. C. 104, 107, 136 S. E. 353. Evidence Admissible.—In a proceeding to condemn land for a right of way, evidence to show the value of the land taken shall be admissible. Blue Ridge Power Co. v. Parker, 105 N. C. 246, 248, 11 S. E. 328. But a tax list is not admissible for that purpose. Id.

Just Compensation.—It seems to be the general rule in this country that land is taken for the use of a corporation, and where the use of the land is such as to make it a "just compensation," under our general statute, is such compensation after special benefits peculiar to the landowner is entitled to just compensation. Phila. v. Asheville Electric Light Co., 138 N. C. 533, 51 S. E. 740; But the evidence of the legislature as to the meaning of this section when the proceeding is begun. Western Carolina Power Co. v. Hayes, 193 N. C. 104, 107, 136 S. E. 353. Evidence Admissible.—In a proceeding to condemn land for a right of way, evidence to show the value of the land taken shall be admissible. Blue Ridge Power Co. v. Parker, 105 N. C. 246, 248, 11 S. E. 328. But a tax list is not admissible for that purpose. Id.

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Owner at Time of Taking Is One to Be Paid.—Compensation for property taken in the exercise of the power of eminent domain is due to the owner at the time of the taking, and not to the owner at an earlier or later date. Empie v. United States, 131 F. (2d) 481.

The right to condemnation of access does not arise merely upon the erection of easements which they are attached. Id.

For the right to flood lands upon which the defendant has constructed its road and imposed a burden, he has nothing to be "taken," and therefore nothing for which he is entitled to compensation. Abernathy v. South, etc., R. Co., 150 N. C. 97, 104, 63 S. E. 180.

Eminent Domain.—In the exercise of the power of eminent domain, the right of a defendant to receive no special benefit is conclusive. Southport, etc., Co. v. Platt Land, 133 N. C. 266, 45 S. E. 589.

Cited in Ayden v. Lancaster, 197 N. C. 556, 560, 150 S. E. 40.

§ 40-18. Form of commissioners' report.—When the commissioners shall have assessed the damages, they shall forthwith make and subscribe a written report of their proceedings, in substance as follows:

To the Clerk of the Superior Court of

County:

We, ........, commissioners appointed by the court to assess the damages that have been and will be sustained by ........, the owner of certain land lying in the county of ........, which the .......... corporation proposes to condemn for its use, do hereby certify that we met on ........ (or the day to which we were regularly adjourned), and, having first been duly sworn, we visited the premises of the owner, and after taking into full consideration the quality and quantity of the land aforesaid, the additional fencing likely to be occasioned by the work of the corporation, and all other inconveniences likely to result to the owner, we have estimated and do assess the damages aforesaid at the sum of $ ................

We have estimated the special benefits which the said owner will receive from the construction of said works to be the sum of $ ................

Given under our hands, the ........ day of ........, A. D. 19 ....... (Rev., s. 2586; Code, s. 1700; R. C., c. 61, s. 17; 1874-5, c. 83; C. S. 1722.)

Editor's Note.—It was formerly provided that the report of the commissioners be made to the court. In Hanes v. North Carolina R. Co., 109 N. C. 490, 13 S. E. 896 the court held that this provision was not mandatory but directory only and the omission of the seal was not a fatal defect.

Report Need Not State Particulars.—The report of the commissioners will not be set aside because it fails to show in what the benefits assessed consist, where no objection was made when the report was submitted. Wilmington, etc., R. Co. v. Smith, 99 N. C. 131, 3 S. E. 927.

Description of Land Not Essential.—A report of the commissioners is not invalid because it does not contain a description of the property to be condemned. In Hanes v. North Carolina R. Co., 109 N. C. 490, 13 S. E. 896.

But as the easement is conveyed to the petitioner by the report, it is not necessary that it should describe wherein, or in what manner, or to what degree, it seems that the said easement should be described therein as fully and correctly as it would be in a grant. Railroad v. Land Co., 137 N. C. 330, 336, 49 S. E. 350.

Cited in Ayden v. Lancaster, 197 N. C. 556, 560, 150 S. E. 40.
No Appeal to Judge at Chambers.—No appeal lies to the judge at chambers under this section. R. v. v. Stewart, 132 N. C. 486, 492, 13, S. E. 896.

Effect of Appeal.—The appeal, provided by this section, from the superior court in condemnation proceedings, under sec. 40-12, takes the entire record up for review upon questions of fact to be tried by jury in term before the judge, nor is the writ of certiorari, if the judgment has been made and confirmed. Johnson City, etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc,
specific provision for appeal in conformity with the constitutional due-process clause, under the general statute (this section), applying to municipal corporations, this right of appeal is preserved, and the charter provisions or the order of the charter or the code, acting as the reason unconstitutional by the courts. Long v. Rockingham, 187 N. C. 199, 121 S. E. 461.

In condemnation proceedings instituted by a town for the taking of lands for a public municipal purpose, the owner is entitled to a trial by jury in the Superior Court to determine his damages when he has duly preserved the right by his exceptions and proper procedure, and when the taking of lands for a public municipal purpose, the taking of lands for use as a sidewalk by the defendant municipality, the jury finds plaintiff is entitled to an adequate amount of money, or any part of it, to be paid as compensation for the real estate taken, the court may direct the money to be paid into the said court by the corporation, and may determine who is entitled to the same and direct to whom the money shall be paid, and any discretion order a reference to ascertain the facts on which such determination and order are to be made. (Rev., s. 2590; Code, s. 1956; 1871-2, c. 138, s. 28; C. S. 1729.)

§ 40-22. Title of infants, persons non compos, and trustees without power of sale, acquired.—In case any title or interest in real estate be vested by any corporation for its purposes shall be vested in any trustee not authorized to sell, release and convey the same, or in any infant, idiot, or person of unsound mind, the superior court shall have power, by a special proceeding, on petition, to authorize and empower such trustee or the general guardian or committee of such infant, idiot, or person of unsound mind, to sell and convey the same to such corporation, on such terms as may be just; and in case any such infant, idiot, or person of unsound mind has no general guardian or committee, the said court may appoint a special guardian or committee for the purpose of making such sale, release or conveyance, and may require such security from such general or special guardian or committee as said court may deem proper. But before any conveyance or release authorized by this section shall be executed, the terms on which the same is to be executed shall be reported to the court on oath; and if the court is satisfied that such terms are just to the party interested in such real estate, the court shall confirm the report and direct the proper conveyance or release to be executed, which shall have the same effect as if executed by an owner of said land having legal power to sell and convey the same. (Rev., s. 2590; Code, s. 1956; 1871-2, c. 138, s. 28; C. S. 1729.)

Cross References.—As to requirement that judge approve special proceeding where a petitioner is an infant, see § 1-402. As to sales of ward's estate by guardian, see §§ 33-31, 33-33. As to sale of land required for public use on ornament's petition, see § 46-27.

§ 40-23. Rights of claimants of fund determined.—If there are adverse and conflicting claimants to the money, or any part of it, to be paid as compensation for the real estate taken, the court may direct the money to be paid into the said court by the corporation, and may determine who is entitled to the same and direct to whom the money shall be paid, and any discretion order a reference to ascertain the facts on which such determination and order are to be made. (Rev., s. 2591; Code, s. 1947; 1871-2, c. 138, s. 19; C. S. 1727.)

Editor's Note.—The purpose of this section is to prevent a corporation, having the right of eminent domain, from being indefinitely postponed in acquiring title and going on with its work or from being subjected to a succession of suits for compensation. Under the provisions of the section the company acquires the right of way and the court distributes the compensation. See Abernathy v. South, etc., R. Co., 150 N. C. 97, 104, 63 S. E. 180.


§ 40-24. Attorney for unknown parties appointed; pleadings amended; new commissioners appointed.—The court shall appoint some competent attorney to appear for and protect the rights of any party in interest who is unknown or whose residence is unknown, and who has not appeared in the proceedings by an attorney or agent, and shall make an allowance to said attorney for his services, which shall be taxed as costs of the proceeding. The court shall also have power at any time to amend any defect or informality in any of the special proceedings authorized by this chapter as may be necessary, or to cause new parties to be added, and to direct such further notices to be given to any party in interest as it deems proper; and also to appoint other commissioners in place of any who shall die, refuse or neglect to serve or be incapable of serving. (Rev., s. 2592; Code, s. 1948; 1871-2, c. 138, s. 20; C. S. 1728.)

Counsel fees for attorneys appointed under this section are provided for in section 40-19. See Durham v. Davis, 171 N. C. 305, 89 S. E. 431; North Carolina R. Co. v. Goodwin, 110 N. C. 175, 110 S. E. 657.

§ 40-25. Court may make rules of procedure in. —In all cases of appraisal under this chapter where the mode or manner of conducting all or any of the proceedings to the appraisal and the proceedings consequent thereon are not expressed or provided for by the statute, the courts before whom such proceedings may be pending shall have the power to make all the necessary orders and give the proper directions to carry into effect the object and intent of this chapter, and the practice in such cases shall conform as near as may be to the ordinary practice in such courts. (Rev., s. 2593; Code, s. 1949; 1871-2, c. 138, s. 21; C. S. 1729.)

In General.—The provisions of the statute regarding the mode of procedure and rules of practice are indefinite and obscure, and the Legislature, recognizing the difficulty of doing more than outlining the practice so as to enable the rights of the parties, has conferred upon the court the power to make rules of procedure when they are not ex-
presumably provided by the statute. Abernathy v. South, etc., R. Co., 150 N. C. 97, 103, 63 S. E. 180.


§ 40-26. Change of ownership pending proceeding.—When any proceedings of appraisal shall have been commenced, no change of ownership by voluntary conveyance or transfer of the real estate or other subject-matter of the appraisal, or any interest therein, shall in any manner affect such proceedings, the same may be carried on and perfected as if no such conveyance or transfer had been made or attempted to be made. (Rev. s. 2594; Code, s. 1950; 1871-2, c. 138, s. 22; C. S. 1730.)

Subsequent Purchaser May Recover.—An owner of land who acquires title subsequent to the location by a railroad company is not barred of his remedy for compensation where the location was not finished and he begins his action. Hendrick v. Carolina Cent. R. Co., 101 N. C. 617, 7 S. E. 236; Beattie v. Carolina Cent. R. Co., 108 N. C. 429, 11 S. E. 935.


Until a purchase or condemnation, the corporation's occupation is without title, and the conveyance of the land will pass to the vendee the right to compensation for damages. Liverman v. Roanoke, etc., R. Co., 109 N. C. 52, 13 S. E. 734.

Action for Unlawful Entry Personal.—The damages incident to the act of an unlawful entry upon land by a railway corporation are personal to the owner of the land and do not pass by his subsequent conveyance of the premises. Liverman v. Roanoke, etc., R. Co., 109 N. C. 52, 13 S. E. 734.

The purchaser at the mortgage sale, while not entitled to the damages incident to the act of entry, might recover compensation for the land appropriated to the use of the company. Liverman v. Roanoke, etc., R. Co., 109 N. C. 52, 13 S. E. 734.

The right to convey the land is not affected by the mere filing of condemnation proceedings, nor by appraisers' without confirmation and payment, as all rights would pass to the grantee. Nantahala Power, etc., Co. v. Whiting Mfg. Co., 209 N. C. 560, 562, 184 S. E. 48, citing Liverman v. Roanoke, etc., R. Co., 109 N. C. 52, 13 S. E. 734; Beal v. Durham, etc., R. Co., 136 N. C. 298, 48 S. E. 674.

§ 40-27. Defective title; how cured.—If at any time after an attempt to acquire title by appraisal of damages or otherwise it shall be found that the title thereby attempted to be acquired is defective, the corporation may proceed anew to acquire or perfect such title in the same manner as if no appraisal had been made, and at any stage of such new proceedings the court may authorize the corporation, if in possession, to continue in possession, and if not in possession, to take possession and use such real estate during the pendency and until the final conclusion of such new proceedings, and may stay all actions or proceedings against the corporation on account thereof, on such corporation paying into court a sufficient sum or giving security as the court may direct to pay the compensation therefor, which shall be determined, and in every such case the party interested in such real estate may conduct the proceedings to a conclusion if the corporation delays or omits to prosecute the same. (Rev. s. 2594; Code, s. 1950; 1871-2, c. 138, s. 23; C. S. 1731.)

§ 40-28. Title to state lands acquired.—The secretary of state shall have power to grant to any railroad company any land belonging to the people of this state which may be required for the purposes of its road, on such terms as may be agreed on by them, or such company may acquire title thereto by appraisal, as in the case of all other lands of individuals; and if any land belonging to a county or town is required by such company for the purposes of the road, the county or town officers having the charge of such land may grant such land to such company for such compensation as may be agreed upon. (Rev. s. 2506; Code, s. 1955; 1871-2, c. 138, s. 27; C. S. 1732.)

§ 40-29. Quantity which may be condemned for certain purposes:

1. Right of way of railroad.—The width of the land condemned for any railroad shall not be less than eighty feet nor more than one hundred, except where the road may run through a town, when it may be of less width; or where there may be deep cuts or high embankments, when it may be of greater width.

2. Plankroads, etc.—No greater width of land than sixty feet shall be condemned for the use of any plankroad, tramroad, canal, street railroad or turnpike; or greater width than sixteen feet for the use of a flume.

3. Depot or station.—No greater quantity of land than two acres, contiguous to any plankroad, plankroad, tramroad, turnpike, or canal, shall be condemned at one place for a depot or station. (Rev. s. 2597; Code, ss. 1707, 1708, 1709; R. C. c. 61, ss. 27, 28, 29; 1853, c. 92; 1874-5, c. 83; 1907, c. 39; C. S. 1733.)

Cross Reference.—As to power of railroad companies to condemn more than two acres, see § 40-4.


When Section Applies.—If the charter prescribes no maximum or minimum width of the right of way, then paragraph 1 of this section applies, and the company shall have the right to use therein specified subject to the right of the owner to recover compensation by compliance with section 1-31, paragraphs 1 and 2, and Griffith v. R. R., 191 N. C. 84, 88, 131 S. E. 415.


Owner's Right to Use.—To the extent that the land covered by the right of way is not presently required for the purposes of the road, the railroad company may use the same in a manner not inconsistent with the full and proper enjoyment of the easement. Virginia, etc., R. Co. v. McLean, 134 N. C. 448, 74 S. E. 461; Earhardt v. Southern R. Co., 157 N. C. 358, 72 S. E. 1062; Railroad v. Olive, 142 N. C. 257, 273, 55 S. E. 261; Goldsboro Lumber Co. v. Hines Bros. Lumber Co., 126 N. C. 254, 35 S. E. 458; Railroad v. Szigethy, 130 N. C. 257, 131 S. E. 779; Colt v. Owenby-Wofford Co., 166 N. C. 136, 138, 81 S. E. 1067.

Same—Permitting Others to Use.—The grant of a right of way of a specified width does not preclude the grantor from such use of his land himself or permitting the same.
§ 40-30. Title of article.—This article may be referred to as the "Public Works Eminent Domain Law." (1935, c. 470, s. 1.)

Editor's Note.—For act authorizing North Carolina Cape Hatteras Seashore Commission, created by Public Laws 1939, c. 257, to condemn land according to the procedure contained in this article, see Public Laws 1941, c. 100.

§ 40-31. Finding and declaration of necessity. — (a) It is hereby declared that widespread unemployment exists throughout the State, making it impossible for many people in the State to support themselves and their families; that these conditions create a public emergency and constitute a menace to the health, safety, morals and welfare of the people of the State; that it is essential that public works projects, financed in whole or in part by the United States of America or by the State, be commenced as soon as possible in order to reduce and relieve this unemployment and prevent irreparable injury to the people of the State; that to this end, it is necessary to provide a method for the expeditious acquisition of any lands necessary for such public works projects; that such public works projects are hereby declared to be in furtherance of the public welfare and to be public uses and purposes for which public money may be spent and private property acquired; and that the necessity in the public interest for the provision hereinafter enacted is hereby declared as a matter of legislative determination.

(b) Without limitation upon the generality of the foregoing paragraph it is hereby declared that insanitary or unsafe dwelling accommodations exist in various areas of the State and that consequently many persons of low income are forced to reside therein; that these conditions cause an increase in and spread of disease and crime, constitute a menace to the health, safety, morals and welfare of the citizens of the State, impair economic values and are not being, and cannot within a reasonable time be corrected by the investment of private capital available for profit-making enterprises; that the clearance, removal and reconstruction of the areas in which insanitary or unsafe conditions exist and the provision of safe and sanitary dwelling accommodations for persons of low income are public uses and purposes for which private property may be acquired. (1935, c. 470, s. 2.)

§ 40-32. Definitions.—The following terms when ever used or referred to in this article shall have the following respective meanings unless a different meaning clearly appears from the context:

(a) "Public works project" shall mean any work or undertaking which is financed in whole or in part by a federal agency, as herein defined, or by a state public body, as herein defined.

(b) "Federal agency" shall mean the United States of America, the federal emergency administration of public works, or any other agency or instrumentality, corporate or otherwise, of the United States of America.

(c) "State public body" shall mean this State or any county, city, town, municipal corporation, authority, or any other subdivision, agency, or instrumentality, corporate or otherwise, thereof.

(d) "Authorized corporation" shall mean any corporation or association engaged or about to engage in any public works project, as herein defined, for a public use. Provided, that the construction of said public works project and its conduct thereafter by the corporation or association shall be subject to regulation or supervision by a federal agency, as heretofore defined, or a state public body, as herein defined, whether by virtue of an agreement, provision of law, or otherwise.

(e) "Real property" or "property" or "land" shall include all lands, including improvements and fixtures thereon, lands under water, all easements and hereditaments, corporeal and incorporeal, and every estate, interest and right, legal or equitable, in lands or water, and all rights, interests, privileges, easements, encumbrances, and franchises relating to the same, including terms for years and liens by way of judgment, mortgage or otherwise.

(f) "Court" shall mean the court in which jurisdiction over proceedings hereunder is vested by the provisions of § 40-33.

(g) "Petitioner" shall mean the one by whom proceedings for the acquisition of real property, as herein defined, are instituted hereunder pursuant to the provisions of § 40-33. (1935, c. 470, s. 3.)

§ 40-33. Filing of petition; jurisdiction of court; entry upon land by petitioner. — Any federal agency, state public body or authorized corporation may institute proceedings hereunder for the acquisition of any real property necessary for any public works project. Such proceedings may be instituted in the superior court in any county in which any part of the real property or of the proposed public works project is situate. The court, whether during a term or during a vacation, shall cause said proceedings to be heard and determined without delay. All condemnation proceedings shall be preferred cases, and shall be entitled to precedence over all other civil cases.

The petitioner may enter upon the land proposed to be acquired for the purpose of making a survey and of posting any notice thereon which
§ 40-34. Form of petition.—A proceeding may be instituted hereunder by the filing of a petition which shall be sufficient if it sets forth:

(a) The name of the petitioner.

(b) A description of the property, sufficient for the identification thereof, to which there may be attached a plat or map thereof.

(c) A statement that the acquisition of such property by the petitioner is necessary for a public works project and a brief general description of said public works project.

(d) A statement that the proceedings are being instituted under this article.

(e) A suitable prayer for relief. (1935, c. 470, s. 5.)

§ 40-35. Inclusion of several parcels.—Any number of parcels of land, whether owned by the same or different persons and whether contiguous or not, may be included and condemned in one proceeding: Provided, such parcels are to be used for a single public works project. (1935, c. 470, s. 6.)

§ 40-36. Notice of proceedings.—Notice of such proceedings shall be given by one publication in a newspaper having a general circulation in each county in which any part of the property sought to be condemned is located. Such publication shall be at least twenty days and not more than thirty days prior to the date set for the hearing of the validity of the proceedings. Such notice shall be in substantially the following form (the blanks being appropriately filled):

TO WHOM IT MAY CONCERN:

Notice is hereby given that ................. (here insert name of petitioner) has filed a petition in the above court under the Public Works Eminent Domain Law, to acquire by condemnation for ......................... (here give brief general description of the public works project for which the land is sought to be acquired) the following described land:

(Here describe the land sufficiently for the identification thereof. Such description may be by use of a plat or map.)

Notice is further given that on ............ (here insert date of hearing, which must be at least twenty days and not more than thirty days after the date of publication) there will be a hearing in this court, at the opening thereof, for (1) determining the validity of said proceedings and the right of the petitioner, if it so elects, to take title to and possession of such property prior to final judgment, as authorized by § 40-45, of the Public Works Eminent Domain Law, and any persons having any interest in or lien upon the above described property shall be deemed to have waived their rights thereafter to object to the court's decision with respect to such issues, unless prior to said date they shall have filed in writing with the clerk of said court their objections thereto; (2) the appointment of a special master to determine the compensation to be awarded for such property and the persons entitled thereto; (3) the fixing of the date and place at which said special master shall hear and determine the compensation to be paid for such property and the person entitled thereto.

Notice is further given that all claims or demands for compensation because of the taking and condemnation of such property must be filed with the above court before ....................... (here insert date fifteen days after the date above specified for the court hearing), or the same shall be deemed waived.

Dated, the .............. day of ............., A. D., ..........................................................

Clerk of said Court.

Notice of such proceedings shall also be given (a) by posting a copy of the above notice in conspicuous places on the real property sought to be condemned, (b) by filing a copy thereof in the office of the clerk of the court in which such proceedings are pending, and (c) by filing a copy thereof in the proper office or offices for the filing of its lits pendens in each county in which any part of the real property is situated.

Such publication, posting and filing shall constitute a legal and sufficient notice to all persons having any interest in or lien upon the property described in said notice. The filing of such notice in the aforesaid county office shall also be a constructive notice of the proceeding to any person who subsequently acquires any interest in or lien upon said property, and the petitioner shall take all property condemned under this article free of the claims of any such person. (1935, c. 470, s. 7.)

§ 40-37. Determination of issues raised by objections; waiver by failure to file; final judgment; guardian ad litem.—All persons who have not filed written objections with the court prior to the time of the hearing specified in the notice prescribed by § 40-36 shall be deemed to have waived the right to file objections as to the sufficiency and validity of the petition, the proceedings and the relief sought thereby, and as to the right of the petitioner to take title and possession prior to final judgment, as authorized by § 40-45.

The court, at the time specified in said notice, after hearing and determining all issues of fact and law raised by the objections which have been filed, if any there be, shall enter a final judgment with respect to such issues, and thereafter there shall remain for determination only the amount of the compensation to be paid and the persons entitled thereto.

If any infant or other person under a legal disability shall not have appeared in the proceedings by his duly authorized legal representative, the court shall appoint a guardian ad litem to represent such person's interest in the proceedings before the special master. (1935, c. 470, s. 8.)

§ 40-38. Appointment of special master.—The court, at the time of said hearing, shall appoint a special master to fix the amount of damages and compensation for the taking and condemnation of the property described in the petition and the persons entitled thereto, and to report thereon to the court. The special master shall be a disinterested person not related to any one having an interest in or lien upon the property sought to be condemned. The compensation of said special

Immediately after his appointment and taking of oath, the special master shall cause notice to be sent by registered mail to all persons who have appeared in the proceedings or to their attorneys of record and to all others having any interest in or lien upon the property sought to be condemned, as shown by the record of the proper county office or offices for the recording of documents pertaining to such real estate, and to all guardians ad litem appointed pursuant to the provisions of § 40-37, such notice to be addressed to such persons at their respective last known addresses. Such notice shall be substantially in the following form (with the blanks appropriately filled):

IN THE .......... COURT FOR THE .......... OF .......... TO WHOM IT MAY CONCERN:

Notice is hereby given that .......... (here insert name of petitioner) has filed a petition in the above court under the Public Works Eminent Domain Law to acquire by condemnation for .......... (here give brief general description of the public works project for which the land is sought to be acquired), the following described land:

(Here describe the land sufficiently for the identification thereof. Such description may be by use of a plat or map.)

All persons having an interest in or lien upon the above described property, for which compensation will be demanded, are hereby notified that all claims or demands for compensation by reason of the taking and condemnation of such property shall be filed in writing with said court before .......... (here insert date at least fifteen days after the date set for the court hearing in the notice specified in § 40-36, hereof), and shall be deemed waived unless so filed, and that on ............ a hearing will be held by the special master at .......... (insert time and place fixed by the court for such hearing in blanks) with respect to (1) the amount of compensation to be paid for the property sought to be condemned, and (2) the persons entitled to such compensation.

Dated .......... day of .........., A. D., .......... Special master appointed by said Court.

The special master shall also cause a copy of said notice to be posted in conspicuous places on the property sought to be condemned.

After such notice by mailing and posting, the special master, on the date for hearing specified in the aforesaid notice, shall proceed immediately to hear and determine the question of just compensation for the taking and condemnation of the property and the persons entitled to such compensation. To this end, the special master may issue subpoenas, administer oaths to witnesses, and receive evidence and cause same to be recorded. (1935, c. 470, s. 10.)

§ 40-40. Evidence admissible; increase in value; improvements.—For the purpose of determining the value of the land sought to be condemned and fixing just compensation therefor, the following evidence (in addition to other evidence which is relevant, material and competent) shall be relevant, material and competent and shall be admitted and considered by the special master:

(a) Evidence that a building or improvement is unsafe or insanitary or a public nuisance, or is in a state of disrepair, and of the cost to correct any such condition, notwithstanding that no action has been taken by local authorities to remedy any such condition.

(b) Evidence that any state public body, charged with the duty of abating or requiring the correction of nuisances or like conditions or demolishing unsafe or insanitary structures, issued an order directing the abatement or correction of any conditions existing with respect to said building or improvement or the demolition of said building or improvement, and of the cost which compliance with any such order would entail.

(c) Evidence of the last assessed valuation of the property for purposes of taxation and of any affidavits or tax returns made by the owner in connection with such assessment which state the value of such property and of any income tax returns of the owner showing sums deducted on account of obsolescence or depreciation of such property.

(d) Evidence that such buildings and improvements are being used for illegal purposes or are being so overcrowded as to be dangerous or injurious to the health, safety, morals or welfare of the occupants thereof and the extent to which the rentals therefrom are enhanced by reason of such use.

(e) Evidence of the price and other terms upon any sale or the rent reserved and other terms of any lease or tenancy relating to such property or to any similar property in the vicinity when the sale or leasing occurred or the tenancy existed within a reasonable time of the hearing.

The award of compensation shall not be increased by reason of any increase in the value of the property resulting from the public works project to be placed thereon.

No allowance shall be made for improvements begun on property after the publication of the notice specified in § 40-36, except upon good cause being shown. (1935, c. 470, s. 11.)

§ 40-41. Report of special master.—The report of the special master must be filed with the clerk of the court in which said proceeding is pending within thirty days after the date of the taking of the oath, unless further time is granted by the court. The court shall grant additional time for the filing of the report only on a showing that the report cannot, with all due diligence, be prepared within the time fixed. (1935, c. 470, s. 12.)

§ 40-42. Notice of report.—Upon the filing of such report by the special master, the court, without delay, shall fix a date for the hearing of any objections filed thereto. Notice that said report has been filed, that all objections thereto [178]
must be filed with the court within ten days after the date of the mailing of such notice and that the court has fixed a certain date (which shall be stated therein) for the hearing of such objections. The objections shall be given by sending a copy of such notice by registered mail to all persons who have appeared in the proceeding or their attorneys of record at their last known addresses. Upon the expiration of ten days after the mailing of such notice, all objections to the report shall be deemed waived by all persons who have not filed written objections with the court. (1935, c. 470, s. 13.)

§ 40-43. Hearing of objections by the court.
—If no objections are filed to the special master's report, the court (but only on motion of the petitioner unless title to the property has vested in the petitioner) shall enter a final judgment fixing the compensation to be paid for the property and the persons entitled to such compensation. If any objections are filed to the special master's report, the court on the date specified in the aforesaid order shall hear and determine such questions of law and fact as are raised by such exceptions and may approve, disapprove or modify the special master's findings or may reject the special master's report in toto. In the event the special master's report is rejected in toto, the court shall at once appoint another special master in the same manner that the first special master was appointed, and such special master shall have the same powers and duties as the special master first appointed, except that notice of the time for filing claims and of the hearing of the special master may be given by registered mail to all persons who have appeared in the proceedings or their attorneys of record at their last known addresses, and no other notice shall be necessary. If the court shall approve the special master's report, with or without modification, the court (but only on motion of the petitioner unless title to the property has previously vested in the petitioner) shall enter a final judgment, fixing the compensation to be paid for such property and the persons entitled to such compensation.

If title to said property has not previously been vested in the petitioner, the title and right to possession of said property shall vest in the petitioner immediately upon the entry of such final judgment and upon the deposit in court by the petitioner of the amount of the judgment fixed by the court as the compensation for such property. Upon the entry of such judgment and the vesting of title aforesaid, the court shall designate a day (not exceeding thirty days after such filing, except upon good cause shown) on which the parties in possession of said property shall be required to surrender possession to the petitioner. (1935, c. 470, s. 14.)

§ 40-44. Certified copy of judgment.—Upon the rendition of the final judgment vesting title in the petitioner, the clerk of the court shall make and certify, under the seal of the court, a copy or copies of such judgment, which shall be filed or recorded in the proper county office or offices for the recording of documents pertaining to the real property described therein, and such filing or recording shall constitute notice to all persons of the contents thereof. A copy of the judgment certified by the clerk of the court as aforesaid shall be competent and admissible evidence in any proceedings at law or in equity. (1933, c. 470, s. 15.)

§ 40-45. Declaration of taking; property deemed condemned; fixing day for surrender of property; security for compensation and payment of award.
—At any time at or after the filing of the petition referred to in § 40-34, and before the entry of final judgment, the petitioner may file with the clerk of the court a declaration of taking signed by the duly authorized officer or agent of the petitioner declaring that all or any part of the property described in said petition is to be taken for the use of the petitioner.

 Said declaration of taking shall be sufficient if it sets forth: (1) a description of the property, sufficient for the identification thereof, to which there may be attached a plat or map thereof; (2) a statement of the estate or interest in said property being taken; and (3) a statement of the sum of money estimated by the petitioner to be just compensation for the property taken.

Upon the filing of said declaration of taking and the deposit in court, to the use of the persons entitled thereto, of the amount of the estimated compensation stated in said declaration title to the property specified in said declaration shall vest in the petitioner and said property shall be deemed to be condemned and taken for the use of the petitioner, and the right to just compensation for the same shall vest in the persons entitled thereto. Upon the filing of the declaration of taking, the court shall designate a day (not exceeding thirty days after such filing, except upon good cause shown) on which the parties in possession shall be required to surrender possession to the petitioner. In the event that the petitioner is an authorized corporation, the court, prior to directing surrender of possession to the petitioner, shall require such security to be given, in addition to the amount deposited in court, as will reasonably assure the payment of any amount ultimately determined as the compensation to be paid.

The ultimate amount of compensation shall be fixed in the manner heretofore specified. If the amount so fixed shall exceed the amount so deposited in court by the petitioner, the court shall enter judgment against the petitioner in the amount of such deficiency, together with interest at the rate of six per centum per annum on such deficiency from the date of the vesting of title to the date of the entry of the final judgment (subject, however, to abatement for use, income, rents or profits derived from such property by the owner thereof subsequent to the vesting of title in the petitioner) and the court shall order the petitioner to deposit the amount of such deficiency in court. (1935, c. 470, s. 16.)

§ 40-46. Right to dismiss petition.—At any time prior to the vesting of title to the property in the petitioner, the petitioner may withdraw or dismiss its petition with respect to any or all of the property therein described. (1935, c. 470, s. 17.)

§ 40-47. Divesting title of owner.—Upon vesting of title to any property in the petitioner, all the right, title and interest of all persons having any interest therein or lien thereupon shall be divested immediately, and such persons thereafter
§ 40-48. Payment of award into court and disbursement thereof.—The payment into court by the petitioner of the amount of any award or the deposit into court by the petitioner of the amount of any award or the deposit in court of the amount estimated by the petitioner to be the just compensation for the property taken or condemned shall be deemed to be a payment or deposit of money for the use of the persons entitled thereto. Such payment or deposit shall constitute a payment to the persons entitled thereto to the extent of the moneys so paid or deposited into court.

Any such payment shall be as valid and effectual in all respects as if it were made by the petitioner directly to the person entitled thereto or, in the case of a person under legal disability, to his guardian, whether or not (a) such person or his whereabouts is known or unknown, (b) such person is under a legal disability, or (c) there are adverse or conflicting claims to such awards. The money paid into court shall be secured in such manner as may be directed by the court and shall be paid out by the special master to the persons found to be entitled thereto by the final judgment of the court. (1935, c. 470, s. 19.)

§ 40-49. Recovery of award.—If an award shall be paid to a person not entitled thereto, the sole recourse of the person to whom it should have been paid shall be against the person to whom it shall have been paid. In such event the person entitled to the award may sue for and recover the same, with the lawful interest and costs of suit, as such money had and received to his use by the person to whom the same shall have been paid. (1935, c. 470, s. 20.)

§ 40-50. Appeal.—Any time within thirty days from the filing of any interlocutory or final order or judgment by the court, any person or persons of record in the proceedings, who shall have filed exceptions at any stage of the proceedings within the time and in the manner specified, may appeal therefrom, but only with respect to those questions or issues which were raised by such exceptions.

The taking of an appeal shall not operate to stay the proceedings under this article except when the person or persons appealing shall have obtained a stay of the execution of the judgment or order appealed from, in which event the proceedings shall be stayed only with respect to the person or persons appealing and their respective interests in the proceedings. Upon the taking of an appeal the proceedings shall be deemed severed as to the person or persons appealing and their respective interests in the proceedings.

Any interlocutory or final order or judgment shall be final and conclusive upon all persons affected thereby who have not appealed within the time herein prescribed.

Any petitioner, other than an authorized corporation, may appeal without giving bond; but any other person or persons appealing shall give bond, with good and sufficient surety, to be approved by the court, conditioned to pay all costs taxed against appellant on such appeal. (1935, c. 470, s. 21.)

§ 40-51. Costs.—If the petitioner, prior to the making of the award, shall have tendered to an interested person for his property or deposited in court for such property an amount which such interested person refused to accept or agree to as just compensation, all costs shall be assessed against such person in the event that the aforementioned amount tendered or deposited is equal to or in excess of the award fixed or confirmed by the court with respect to such parcel. (1935, c. 470, s. 22.)

§ 40-52. Powers conferred are supplemental.—The powers conferred by this article shall be in addition and supplemental to and not in substitution for the power conferred by any other law. The power of eminent domain may be exercised hereunder, notwithstanding that any other law may provide for the exercise of said power for like purposes and without regard to the requirements, restrictions or procedural provisions contained in any other law. Procedure hereunder, which is not prescribed herein, shall be that which is otherwise prescribed by the law of the State. (1935, c. 470, s. 23.)

§ 40-53. Necessity for certificate of public convenience and necessity from utilities commission.—Notwithstanding any finding of public convenience and necessity, either in general or specific, by the terms of this article, the right of eminent domain shall not be exercised unless and until a certificate of public convenience and necessity for such project has been issued by the utilities commission of North Carolina, and the proceedings leading up to the issuing of such certificate of public convenience and necessity, for such project has been heard and determined by the utilities commission of North Carolina, and the proceedings leading up to the issuing of such certificate of public convenience and necessity, and the right to appeal therefrom shall be as now provided by any such project is hereby vested with full power and authority to investigate and examine all projects set up or attempted to be set up under the provisions of this article and determine the question of the public convenience and necessity for said project. (1935, c. 470, s. 25.)
CHAPTER 41. ESTATES.

Sec. 41-1. Fee tail converted into fee simple. — Every person seized of an estate in tail shall be deemed to have seized of the same in fee simple. (Rev. c. 1737-8; Cowden, c. 1795; R. C. c. 45, s. 1; 1784, c. 204, s. 5; C. S. 1781.)

I. General Considerations.

II. Rule in Shelley's Case.

III. Application and Illustrative Cases.

Cross Reference.

As to fee presumed, though word "heirs" omitted, see § 39-1.

§ 41-1. Fee tail converted into fee simple. —

Every person seized of an estate in tail shall be deemed to have seized of the same in fee simple.

—RULE IN SHELLEY'S CASE.

I. General Considerations.

Editor's Note.—Estates are now held in the British Isles granted by William, the Conqueror (1085), and by Bruce, after the battle of Bannockburn, (1314), estates tail general or special, estates tail male and estates tail female. This system, one of the last relics of the feudal system, is so pregnant with involved technical problems, and so potent an economic and social order. The heavy tax brought about the possession of the masses. The system gained a foot-hold in America during Colonial days, but, with the advent of Independence, this hierarchy, under our conception of freedom, could not exist. So it was that primogeniture, which existed under the Mosaic as well as the English Law, never took root in the states of the American Union. Estates tail were soon abolished. Of these estates it is only necessary to say that they existed in this State in Colonial days; that by section 43 of the Constitution of 1776 it was provided that, "The future Legislature of this State shall regulate entails in such a manner as to prevent perpetuities;" that in 1784 the Legislature passed the act by which all estates tail then in existence were converted into fee-simple estates, and it was enacted that estates tail not already in existence should be deemed to be in fee simple.

Sec. 41-2. Survivorship in joint tenancy abolished; proviso as to partnership.

Sec. 41-3. Survivorship among trustees.

Sec. 41-4. Limitations on failure of issue.

Sec. 41-5. Unborn infant may take by deed or writing.

Sec. 41-6. "Heirs" construed "children" in certain limitations.

Sec. 41-7. Possession transferred to use in certain conveyances.

1. Fee tail converted into fee simple. —

Every person seized of an estate in tail shall be deemed to have seized of the same in fee simple. (Rev. c. 1737-8; Cowden, c. 1795; R. C. c. 45, s. 1; 1784, c. 204, s. 5; C. S. 1781.)

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I. General Considerations.

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As to fee presumed, though word "heirs" omitted, see § 39-1.

For further consideration including a resume of the rule, see the Editor's Note to § 41-6.

Ill. APPLICATION AND ILLUSTRATIVE CASES.

A devise to B and her heirs, the words "heirs of her body," are limited to the issue of B, and not to her personal representatives. Harrington v. Garris, 134 N. C. 24, 45 S. E. 904. See the Editor's Note to § 41-6.

Where land is devised to a person for life at her death, and a reverter or limitation over in the event the wife should die without surviving children and not to the birth of issue, there being issue born at the date of conveyance, the devise is in the form of a life estate, subject to a reverter or limitation over in the event of the death of the grandson without children, then to the "heirs of her body," and if she dies without children, then to the "heirs of her body." Harrington v. Grimes, 163 N. C. 76, 79 S. E. 301, cited and applied in Merchants Nat. Bank v. Dortch, 190 N. C. 104, 135 S. E. 591.

Where a husband conveys his lands to his wife for life and then to "the surviving heirs of her body," he creates an estate tail which is converted by this section, into a fee simple absolute in the widow, and her husband takes no interest in the land, § 41-6, not being applicable, since it applies only when the preceding estate is conveyed to the "ancestor" of the land, to the "bodily heirs" of the devisees named after the birth of issue, in the absence of a reverter or limitation over in the event the wife should not have children born to her marriage with testator. Shaw v. Ilsley, 219 N. C. 753, 134 S. E. (2d) 614.

A devise of land to a widow and the heirs of her body by her late husband creates an estate tail which is converted by this section into a fee simple absolute in the widow, and her children take no interest in the land, to the "ancestor" of the land, to the "bodily heirs" of the devisees named after the birth of issue, in the absence of a reverter or limitation over in the event the wife should not have children born to her marriage with testator. Shaw v. Ilsley, 219 N. C. 753, 134 S. E. (2d) 614.

A devise of land to A. and "her heirs by the body of R." vests in the wife a fee tail special, converted by this section into a fee simple, and her estate is not affected or limited to the issue of the testators. Leathers v. Gray, 101 N. C. 162, 7 S. E. 657.

A devise of land to A. and "her heirs by the body of R." vests in the wife a fee tail special, converted by this section into a fee simple, and her estate is not affected or limited to the issue of the testators. Leathers v. Gray, 101 N. C. 162, 7 S. E. 657.

For further consideration including a resume of the rule, see the Editor's Note to § 41-6.
An estate in remainder to the testator's son "and to his bodily heirs," vests a life estate in the land in H., with an estate tail in remainder to the son, which, under our statute, is converted into a fee simple. And upon the falling in of the life estate, the son can convey a good fee-simple title. Chamblee v. Broughton, 120 N. C. 450, 170 S. E. 111; Leathers v. Gray, 101 N. C. 162, 7 S. E. 657, cited and distinguished. Howard v. Edwards, 181 N. C. 624, 143 S. E. 210.

Illustrative Cases.—A devise of lands to the wife of the testator for life, and at her death or remarriage to her two children, by name, for their natural lives or for the lives of their issue, and then to H., with an estate tail, converted by this section into a fee simple. Washburn v. Biggerstaff, 195 N. C. 624, 143 S. E. 210.

A deed to a married woman and her heirs by her present husband, which, in the case of his death, should divide and "parties of the second part, their heirs and assigns," is held to convey to the married woman a fee tail special, which is converted into a fee simple by this section. Whitler v. Aremong, 219 N. C. 121, 12 S. E. (2d) 906.

Cited in Williamson v. Cox, 218 N. C. 177, 10 S. E. (2d) 662.

§ 41-2. Survivorship in joint tenancy abolished; proviso as to partnership.—In all estates, real or personal, held in joint tenancy, the party or share of any tenant dying shall not descend or go to the surviving tenant, but shall descend or be vested in the heirs, executors, or administrators, or assigns, respectively, of the deceased tenant, so dying, in the same manner as estates held by tenants in common. Provided, that estates held in joint tenancy for the purpose of carrying on and promoting trade and commerce, or any useful work or manufacture, established and pursued with a view of profit to the parties therein concerned, are vested in the surviving partner, in order to enable him to settle and adjust the partnership business, or pay off the debts which may have been contracted in pursuit of the joint business; but as soon as the same is effected, the survivor shall account with, and pay, and deliver to the heirs, executors, administrators and assigns respectively of such deceased partner all such part, share, and sums of money as he may be entitled to by virtue of the original agreement, if any, or according to the tenancy in the joint tenancy as the same manner as partnership stock is usually settled between joint merchants and the representatives of their deceased partners.

Rev. s. 1579; Code, s. 1326; R. C. c. 43, s. 2; 1781, c. 204, s. 6; C. S. 1737.1

I. General Considerations.

II. Estates of Husband and Wife.

III. Joint Tenancy in Partnership Property.

IV. Actions by, against, and between Joint Tenants.

Cross References.

As to executors, administrators, or collectors holding in joint tenancy, see § 28-184. As to survivorship among trustees given power of sale, see § 45-8.

I. GENERAL CONSIDERATIONS.

Editor's Note.—Joint tenancy is a child of the common law, wholly without a statutory basis. It has long been looked upon by the Courts, especially in the States with marked disfavor. As a result of being singed out by the questioning eye of the judiciary, it has fallen easy prey to the operation of legislation. In most of the American States it has been abolished, either wholly or in part.

The right of survivorship, its chief distinguishing feature, has been the one most disliked by Court and Legislature. The abolition of joint tenancy has been made by the statutes, being spared only when the instrument conveying the estate expressly, or by necessary implication, shows that the intention is to create such an estate.

Joint tenancy is abolished by this section, defeasible upon the testator's son dying without issue, and where there is an ultimate limitation over to persons coming within its terms, the testator's son and his bodily heirs, vests a life estate in the land in H., with an estate tail in remainder to the son, which, under our statute, is converted into a fee simple. And upon the falling in of the life estate, the son can convey a good fee-simple title. Ziegler v. Love, 185 N. C. 40, 115 S. E. 887.

In the absence of a statute abolishing joint tenancy, the right of survivorship differentiates the joint tenancy from the partnership. In the case of the partnership the survivors hold in the nature of trustees, until the deceased's interests were placed in the hands of those entitled thereto by law. This section, abolishing survivorship, accomplishes practically the same result in the case of joint tenancy, as it does in the case of partnership.

In the ancient language of the law joint tenancies were said to hold "per me et per tout," the true interpretation of this section is to be found in the statute 'vests a good fee-simple title.' Chamblee v. Broughton, 120 N. C. 450, 454.
or explanatory words, conveys an estate for life in joint tenancy.

Powell v. Morisey, 84 N. C. 421.

Same—Premises Enlarged by Habendum.—Where in the premises of a deed a life estate is given to one mother and her children, such deed operates to convey an estate for life to the mother and an estate in fee in reversion to her two children. Vass v. Freeman, 84 N. C. 421.

Severance.—By Marriage and Act of 1784.—A widow and her two children were joint tenants of a slave. By the marriage of the widow her joint tenancy was severed, as was that of the children, by the act of 1784. (Article X, Code, ch. 43, § 2, now this section.) And in a suit in trover to recover the value of such property, it was held that the title passes to the purchaser, whether the agreement of the parties was to be arrived at in the division of the premises of a deed a life estate is given to a mother alone, or when the estate by entireties is given to one, the whole belongs to the survivor.  Eason v. Eason, 159 N. C. 439, 75 S. E. 797.

Same—Not Abolished.—By Rev. Sec. 6), conferring upon a married woman the same rights of property as real estate, if the personal property of the partner is purchased in fee by partnership funds and for partnership purposes is subject to partnership debts, to the exclusion of the heir or widow of the deceased. Stroud v. May, 154 N. C. 278, 70 S. E. 467; Hood v. Mercer, 150 N. C. 699, 64 S. E. 897; Jones v. Smith & Co., 149 N. C. 318, 63 S. E. 1092; West v. Railroad, 140 N. C. 620, 53 S. E. 477; Bynum v. Wicker, 141 N. C. 95, 53 S. E. 478; Bruce v. Williams, 131 N. C. 667, 42 S. E. 998.

Equal Rights to Possession.—Joint tenants of a chattel have equal rights to its possession. Cole v. Terry, 19 N. C. 252; Lucas v. Wasson, 14 N. C. 398.

Same—Same—Title of Purchaser.—If one joint owner of a crop sells to the other his share of it to pay a debt, and it is divided in the presence of both, for the purpose of ascertaining the amount to be credited on the debt, there is no trespass in the purchasing partner removing the property, though forbidden by the other. Warbritton v. Savage, 49 N. C. 250.

Same—Same—Title of Purchaser.—If one joint owner of a crop sells to the other his share of it, to pay a debt he owed him, and it is divided in the presence of both, for the purpose of ascertaining the amount to be credited on the debt, there is no trespass in the purchasing partner removing the property, though forbidden by the other. Vass v. Freeman, 84 N. C. 221, 227.

When Remaindermen Take as Tenants in Common.—A deed of gift, executed by W. B. to his son J. B., during his natural life only, and then to return to the male children of the said J. B., lawfully begotten of his body, for the want of such to return to the male children of my other sons W and J, and to their issue, and not by moiety. In the event of the survivor's death, the remainder is given to his heirs. Witherington v. Williams, 1 N. C. 422.

Legacies May Hold as Joint Tenant.—The legatees may hold as joint tenants in common, though forbidden by the other. West v. Railroad, 140 N. C. 630, 53 S. E. 477; Bynum v. Wicker, 141 N. C. 95, 96, 53 S. E. 478.

Incidents of Survivorship.—By Marriage and Act of 1784.—A widow and her two children were joint tenants of a slave. By the marriage of the widow her joint tenancy was severed, as was that of the children, by the act of 1784. (Article X, Code, ch. 43, § 2, now this section.) And in a suit in trover to recover the value of such property, it was held that the title passes to the purchaser, whether the agreement of the parties was to be arrived at in the division of the premises of a deed a life estate is given to a mother alone, or when the estate by entireties is given to one, the whole belongs to the survivor.  Eason v. Eason, 159 N. C. 439, 75 S. E. 797.

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nerships fund descend to the heir at law, it is immaterial whether the heir of the deceased partner claims his interest by deed from him or by inheritance. Sherrod v. Mayo, 156 N. C. 144, 72 S. E. 216.

Same—Heir Claiming by Deed.—The heir at law to whom a deceased partner had conveyed by deed his share of lands purchased with partnership funds is entitled to the lands against the surviving partners, in an action by the latter for possession for the purpose of carrying out the partnership affairs, when it appears that the partnership personality is sufficient for the purpose of paying the partnership debts and satisfying any claim the surviving partner may have, and there is no provision in the articles of the partnership agreement of a contrary purpose. Sherrod v. Mayo, 156 N. C. 144, 72 S. E. 216.

IV. ACTIONS BY, AGAINST, AND BETWEEN JOINT TENANTS.

Actions by and against Joint Tenants.—It seems to be well settled that joint tenants must sue jointly, differing in that respect from tenants in common. Mr. Freeman says: "Whenever the title of the cotenants, as in the case of joint tenants and coparceners, is joint, the action may be also joint, and whenever, as in tenancy in common, such tenant is deemed to possess a separate and distinct estate, the remedy of each must be separately and distinctly pursued. Joint tenants being seized by permutating the tenancy, the duties of one are duties of the other. But one and the same title, jointly interpled and be interpleaded. If twenty joint tenants be, and they be disjoined, each shall have his separate cause of action because they have but one joint title." Cotenancy, 329. To the same effect is Sedgwick and Wait Trials, etc., sec. 302. Cameron v. Hicks, 141 N. C. 21, 34, 53 S. E. 728.

Actions between Joint Tenants—Trover.—The exclusive possession of the plaintiff, an action by one joint tenant will not entitle the other to maintain trover against him for it. Cole v. Terry, 19 N. C. 252. A person claiming under a joint tenancy, which tenants in common are permitted to make a joint demise and recover in respect to their interests. Alred v. Smith, 135 N. C. 443, 47 S. E. 597. The difference is in this: Joint tenants must join in one demise because of the essence of unity; tenants in common may join, or, if they prefer, may sue separately, because there is no unity of title. It would seem to follow that joint tenants must recover in respect to their title, and if they fail in that, they cannot recover at all." Cameron v. Hicks, 141 N. C. 21, 35, 53 S. E. 728.

Provisions of Section Prevail over Rule of Stare Decisis.—The section does not interfere with the application of the principles laid down in Shelley's Case in determining the nature and extent of the precedent estate. This is declared in Sanderlin v. Deford, 47 N. C. 75, in construing a will executed in 1838. King v. Utley, 85 N. C. 59, 61. See under analogous lines, 78 C. S. 525, 528, 95 S. E. 881.

Provisions of Section Prevail over Rule of Stare Decisis.—A vested interest in lands cannot be established under the doctrine of stare decisis in direct conflict with the expression of a statutes' contingent limit of the estate, where the decisions relied upon are upon a construction of a written instrument made or executed before the statutory enactment and excepted by it from its provisions, and the subsequent decisions of affirmance of the old rule of construction are either conflicting among themselves or upon a construction of the statute, when a contrary intent is "expressly and plainly declared in the face of the deed or will." Patterson v. McCormick, 177 N. C. 448, 452, 99 S. E. 401.

Cross References.—As to survivorship among trustees with power of sale, see § 45-8. As to limitation on actions by cotenants of personal property, see § 1-29.

The trustees of a trust estate hold as joint tenants, and not as tenants in common. Hicks v. Hicks, 141 N. C. 21, 53 S. E. 728; Webb v. Borden, 145 N. C. 188, 58 S. E. 1083.

§ 41-4. Limitations on failure of issue.—Every contingent limitation in any deed or will, made to depend upon the dying of any person without heir or heirs of the body, or without issue or issues of the body, or without children, or offspring, or descendant, or other relative, shall be held and interpreted a limitation to take effect when such person does not having such heir, or issue, or offspring, or descendant, or other relative (as the case may be) survive the date of his death, or born to him within ten lunar months thereafter, unless the intention of such limitation be otherwise, and expressly and plainly declared in the face of the deed or will creating it: Provided, that the rule of construction contained in this section shall not extend to any deed or will made and executed before the fifteenth of January, one thousand eight hundred and twenty-eight. (Rev., s. 1851; Code, s. 1327; R. C., c. 43, s. 3; 1827, c. 7; C. S. 1737.)

Purpose.—This section was enacted for the primary purpose of making it easy for the grantor, by fixing a definite time when the estate of the first taker shall become absolute, and also to establish a rule of interpretation by which the estate of the first taker shall be affected by the death of the cotenant, the common-law rule being that a contrary intent appears on the face of the instrument. Kirkman v. Smith, 174 N. C. 603, 94 S. E. 423; Harrell v. Hagan, 140 N. C. 111, 60 S. E. 99; Sain v. Baker, 128 N. C. 256, 58 S. E. 838; Bell v. Kessler, 175 N. C. 525, 528, 95 S. E. 881.

Provision is Obligatory.—The rule laid down by the statute is obligatory on the courts and must be observed in all cases except, as provided by the statute, when a contrary intent is "expressly and plainly declared in the face of the deed or will." Patterson v. McCormick, 177 N. C. 448, 452, 99 S. E. 401.

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For purposes of this section, "issue" includes the surviving spouse and the issue of the surviving spouse, and any person marrying after the death of a predeceasing issue. § 41-5.
Rule in Hilliard v. Kearney.—Under the rule at common law a contingency dependent upon death without issue was void for remoteness because it referred to an indefinite failure of嗣子 at any time, such as the termination of the life estate, or some other designated period, and held that the phrase “dying without issue”, was to be referred to a death of the devisee, but the holder of the particular estate itself, and the determinable quality of such an estate, or interest, will continue to affect it till the event occurs by which same is to be determined.1” Patterson v. McCormick, 177 N. C. 448, 456, 99 S. E. 401.

Rule When Ambiguity in Will.—Where there is ambiguity in the will, the Court has held that where the devise is leived for life with contingent limitation over, shall be at the death of the testatrix or that of the first taker, under the principle that the law favors the early vesting of estates, the former will be taken; and where it clearly appears from the terms of the will and surrounding circumstances that was the intent of the testatrix, it will not be affected by the section, by which a contingent limitation depending upon the dying of a person without heir, etc., is to vest at the death of such person. Westfield v. Reynolds, 191 N. C. 402, 133 S. E. 168.

Doctrine of Shifting Uses and Executory Devices.—The section is a rule of construction upholding the second and earlier vesting of estates in lieu of any contingency on the death of heirs, etc., and does not change the application of the doctrine of shifting uses and executory devises in determining the nature and extent of the precedent estate. Sessions v. Sessions, 144 N. C. 121, 56 S. E. 687.

“Children” Does Not Extend to Grandchildren.—A devise to “wife and children” of the testator will not include therein his grandchildren, unless the contrary intention is shown by necessary implication from the terms or expressions used in the will. Thompson v. Batts, 168 N. C. 530, 84 S. E. 858.

A Base and Unqualified Fee.—O devised his lands to certain of his children, S., D., and J. By item 3 of the will a certain tract was devised to D. and “the lawful heirs of his body.” Perrett v. Bird, 153 N. C. 220, 67 S. E. 507.

Illustrative Cases.—An estate to M. and her bodily heirs is converted into a fee simple under our statute, § 41-1, without further limitation, but followed by the words “if no heirs, said lands shall go back to my estate,” the devise will go over to the heirs of the grantor at the death of M., upon the nonhappening of the event as a shifting use under the statute of uses, 27 Hen. VIII., ch. 10; § 41-7, whereunder a fee may be created by a fee, and under the Will, the event is by the statutes for the contingency, by the will of the testator, to the second taker upon the happening of the contingency, under the doctrine of shifting uses and by way of executive devise, and is not a qualification of the prior estate of the testator, but a contingency as declared by the section. Sessions v. Sessions, 144 N. C. 121, 56 S. E. 687.

1 Couch's Annotations—At common law, it is a well-settled rule that a devisee is entitled to take a fee simple estate, defeasible upon his death without issue, unless the contrary intent appears from the will itself; and upon his death and nonhappening of the event as a shifting use, the devise will go over to the heirs of the testator, provided no issue is left, and upon his death and nonhappening of the contingency named, the inheritance passes di
A devise of land to L. with limitation that if she “shall die leaving issue surviving her, then to such issue and their issue forever,” but if she “die without issue surviving her, the same in the premises, with warranty to her and the lawful heirs of her body, creates an estate tail constituting the same in both forms of limitation,” the intent of the grantor by proper construction was to limit over the estate to M.

The same was held in lots of cases involving estates tailing where the limitation would be different under the act. Rice v. Rigsbee, 215 N. C. 757, 3 S. E. (2d) 331; Perry v. Satterwhite, 21 N. C. 69, opinion by Gaston, J.; Brown v. Lipsite, 166 N. C. 529, 80 S. E. 249. "Where property is conveyed to a certain person and his heirs, the heirs of such person, a child then born, take and hold the interest, Johnson Bros. v. Lee, 187 N. C. 522, 187 S. E. 592. 448, 453, 99 S. E. 401.

Editor’s Note.—In many of the cases dealing with estates tailing, the rule in Shelley’s Case is referred to and the question is raised as to whether or not the rule is abrogated by this section, and answered in the negative in the splendid opinion of Justice Blackstone in Shelley’s Case, 1 Ex. Cham. 439, 448, 122 Eng. Rep. 839, 84 S. E. 101. For the purpose of showing the relation of the rule to this section, it will be fitting to give a brief resume of the rule.

The rule takes its name from an early case decided in the reign of Queen Elizabeth (Shelley’s Case, 1 Rep. 94), though even at that time the principle it enunciated was considered an ancient dogma of the common law. Indeed Justice Blackstone traced it to a case decided in the reign of Edward II. However, be that as it may, what is probably the earliest intelligible decision on the subject is that of Chancellor Pollock’s Case, 112 Eng. Rep. 848, 455, 95 S. E. 601.

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ation of land, and to show it into the track of commerce
has other than feudal objects, to wit, the unfettering of es-
sion says: "Though of feudal origin, it is not a relic of bar-
It is owing, perhaps, to this circumstance that the rule,
a gothic column, found among the remains of feudality, has
liberal and commercial spirit of the age, which alike abhor
various statutes enacted upon the subject. Starnes v. Hill,
remove every clog on the free and easy alienability of all
is apparent from the
Henry I to the present. It seems clear that in a highly com-
complex state of society, with greatly diversified industries
indicated "that by 'the heirs' was meant the children of the
person named.'? 3 Washburn Real Prop., 282. The act in
include North Carolina, although he was familiar with our
He also gives a list of the states which have abolished the
seem to be the opinion of many of the ablest law writers
void at common law, is good under the section, and is con-
of an estate for life in lands to another, with remainder to
the heirs of the grantor, could not divest the grantor of the
and includes after-born children. Graves v. Barrett, 126 N.

Limitation Explained.—The word limitation has two-fold
sentence, expressing the limits or bounds to the quantity
of an estate; and the other, the derivative sense; namely,
that of an entire sentence, creating and actually or con-
structively marking out the quantity of an estate." 2
In our statute, the word is manifestly used in its derivative
or secondary sense, which is made very clear to us by the
learned, and able editor of Gonzales Justice Shepherd
in 122 N. C., 27, 1011; Campbell v. Everhart, 139 N. C. 503, 510, 52 S. E. 201.
This section would not apply when the limitation is to a
living person and his heirs. Whitley v. Arenson, 219 N. C.

Same—Applies Only When No Precedent Estate.—The
The Code of 1883, sec. 1539, now section, providing that a
if it were not true that the section applies only when there is

A devise to the "heirs" of a person will be construed to be
his "children" in the absence of a contrary intention
expressed in the instrument Moseley v. Knott, 212 N. C. 651, 194 S. E. 100.

An estate granted to D. for life and then to the heirs of S.
repeated, operative and to the conveyance of the remainder under Revised
which construes the word "heirs" to mean children, in such

Heirs.—By virtue of the section a deed conveying land directly to the
"heirs" of a living person, passes whatever title the grantor
had to the children of such person. Campbell v. Everhart, 139 N. C. 352, 140 S. E. 641.

Limitation to Heirs of Living Person.—A limitation to the
heirs of a living person, if no contrary intention appears in the
deed or will, will be construed to be to the children of
such person. Massengill v. Abell, 192 N. C. 240, 134 S. E. 641.

An estate granted to D. for life and then to the heirs of S.
when by misspelling, operative and to the conveyance of the remainder under Revised
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Heirs.—"The words 'bodily heirs' have the same
meaning as 'heirs of the body,' and are words of limitation

Old Born during Life of Life Tenant.—A devise of lands
to the widow of the testator for life, then to the heirs of
his son J., and it appears that the son was living at the
time and had living children at the death of the testator
heirs to the testator's estate; it was held that the devise, being to the heirs of
a living person, conveyed such interest to the children of the
person designated, and being, in terms, to a class, it will
be construed to mean "the children of such person" since contrary intention did not appear from the will.

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meaning as 'heirs of the body,' and are words of limitation
issue to revert to the heirs of the grantor, the "reverter," to his heirs, under the section meant to his children after the death of his wife and the nonhappening of the stated contingency. Thompson v. Batts, 168 N. C. 333, 84 S. E. 346.

Limitation to Heirs of One with Conditional Limitation over—Where an estate was devised to A "and the heirs of his children," to be equally divided between them, per stirpes. The testator left surviving two sons and two daughters, both of whom were children living at the date of testator's death. The son and daughter are now living. Under Section 4 of the Revised Statute, the testator intended "children" in item 11 of the will, must be construed to mean "children." Lide v. Wells, 190 N. C. 37, 128 S. E. 477, 483.

APPLICATION—Where a testator, by separate devises, gives to one of his three daughters, who are his only heirs at law, a certain tract of his land, with provision in each item, "to her and the lawful heirs of her body in fee simple forever, and if she should die without a lawful heir of her body, then the property to go to the other surviving heir by the expression, "lawful heirs of her body," in the connection used, the testator intended "child" of his daughters. Kornegay v. Cunningham, 174 N. C. 209, 93 S. E. 754. So where a testator devised the use over to his daughters, provided the son dies without heirs, the word "heirs" is construed to mean "children." Sain v. Baker, 128 N. C. 256, 38 S. E. 855.

 Sect. 41-7. Possession transferred to use in certain conveyances.—By deed of bargain and sale, or by deeds of lease and release, or by covenant to stand seized to use, or deed operating by way of covenant to stand seized, the possession, or by any manner or means whatsoever it be, the possession of the bargainor, relessee, or covenanee shall be deemed to be transferred to the bargainee, releasee, or person entitled to the use had under the conveyance, for the estate or interest which such person shall have in the use, as perfectly as if the bargainee, relessee or person entitled to the use had been enfeofed at common law with livery of seizin, and caused to be transferred to the bargainee, releasee, covenantee, and release and covenant to stand seized, the possession, shall have the legal estate, etc., are omitted and the provision is simply "by deed of bargain and sale, lease and release and covenant to stand seized, the possession shall be transferred to the bargainree, releasee, covenanee, Substantially, the section is carried through all the various codes up to the present time, while no material change, has been to make the section all-inclusive by extending its application to every possible case involving the use of any other person, persons, or body politic, by reason of any bargain, sale, feoffment, etc., or otherwise, by any manner or means whatsoever it be, the persons, etc., having

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a use cannot be raised by a general power of appointment
given to the taker of the first estate in the use; and the
use case is much stronger where the power of appointment
is given to a stranger.” Bruce v. Faucett, 49 N. C. 391, 393.

Estates of Freehold to Commence in Futuro.—As estate
of freehold to commence in futuro can be conveyed by a deed
of bargain and sale operating under the section or by execu-
tory devise, as the case may be, subject to the participa-
death to her children in fee, reserving a life estate to the

Life Estate to Woman with Limitation Over to Children.
When the woman is the taker of the first estate for life, the
use and benefit of a woman, for her life, remainder to the use of all
her children, it was held that the legal estate in the re-
mainer, by force of the same statute, passed to the chil-
dren she had at the time of the devi.-, subject to the partic-
ipation of such as she might thereafter have. Wilder v.
Ireland, 53 N. C. 85.

Fee Simple and the Fee Simple, limited by a Fee Simple.—A fee-simple may
be limited after a fee-simple either by a deed or will by
operation of the statute of uses; if by deed, it is a conditional
limitation; if by will, it is an executive devise. Smith v.
Brisson, 90 N. C. 333.

Possession Transferred.—The statute of uses, substituted
for 27 Hen. VIII. (The Code, sec. 1330), now this section,
provides that the possession of the bargainee shall be transfer-
ted to the bargainee as for a complete estate; the bargainee
being enfeoffed at common law with the livery of seizin of the
land intended to be conveyed, etc.” Kirby v. Boyette, 118
N. C. 244, 263, 24 S. E. 18.

Warranties by Tenant to the Use of Another.—It was in
Wilder v. Ireland, 53 N. C. 85: “Where one person is
seized to the use of another, the statute carries the legal
estate to the person having the use. But three classes of
cases are made exceptions to its operation, i. e., (1) where a
use is limited on a use, (2) where a trustee is not seized
but only possessed of a chattel interest, and (3) where the
purposes of the trust make it necessary, in the interest of the
dead and to remain separate, as in the case of land con-
veyed for the separate use and maintenance of a married

“Sole and Separate Use” Construed.—The words “for the
sole and separate use” were construed as including the estate
of a trustee for a married woman, must be con-
strued as manifesting the intent on the part of the grantor
to limit her right of alienation to the mode and manner ex-
pressly provided in the instrument by which the estate is

Covenant to Stand Seized to the Use of Another.—“In Daven-
port v. Wynne, 25 N. C. 136, where there was a conveyance
of real property upon the consideration of love and affection,
reserving a life estate to the donor, it was held by the court
that the conveyance was goo.; that it was a conveyance to
stand seized to the use of the vendee on his death. To the
same effect is Hodges v. Spicer, 79 N. C. 223. And in
Sasser v. Blythe, 2 N. C. 259, overruling Ward v. Ward, 1 N.
C. 215, 27 S. E. 457, it was held that the burden of proof is on the plaintiff to estab-
lish his title, and he cannot recover, for his ancestor's deed
contains a warranty to the grantee, but not to his assignees.
Such assignees can neither maintain an action on such
warranty nor defend under it against the grantor. Smith v.
Ingram, 130 N. C. 100, 40 S. E. 984.

Burden of Proof.—Where land is devised to a married
woman by will, the burden of proof as to whether any person
by deed or will to convey any prop-
erty, which does not yield at the time of the con-
veyance a clear annual income exceeding five
hundred dollars, to any other person in trust to
receive and pay the profits annually or oftener
for the support and maintenance of any child, grandchild or other relation of the grantor, for
the life of such child, grandchild or other rela-
tion, with remainder as the grantor shall pro-
vide; and the property so conveyed shall not be liable for or subject to be seized or taken in
any manner for the debts of such child, grandchild or other relation, whether the same be
contracted

§ 41-8. Collateral warranties abolished; war-
ranties by life tenants deemed covenants. All
collateral warranties are abolished; and all war-
ranties made by any tenant for life of land,
tenements or hereditaments, the same descend-

§ 41-9. Spendthrift trusts. — It is lawful for
any person by deed or will to convey any prop-
erty, and it appears that his ancestor has
held, that the burden of proof is on the plaintiff to estab-
lish his title, and he cannot recover, for his ancestor's deed
contains a warranty to the grantee, but not to his assignees.
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any manner for the debts of such child, grandchild or other relation, whether the same be
contracted
The interest of the cestui que trust in a spendthrift trust is not subject to attachment under any process of law where a judicial sale is not authorized.
§ 41-10

14, 26 S. E. 635. It is not in contemplation of the act that a judgment lien should be included in the terms "estate" and "interest," as they are used in the act." This case was decided at September Term, 1899, The Legislature, at its session in 1903, by chapter 763, amended the Public Laws of 1893, ch. 6, sec. 1, by adding thereto the last sentence of the present section. Crockett v. Bray, 151 N. C. 615, 617, 66 S. E. 666.

This Section Is Highly Remedial.—Plotkin v. Merchants Bank, et al., 188 N. C. 711, 715, 125 S. E. 541. This is a remedial statute which has been liberally construed quieta. Its purpose, as in a liberal construction in order to execute fully the legislative intention and will. Stock v. Stocks, 179 N. C. 285, 289, 102 S. E. 306. And to advance quieting land titles, more comprehensive than the old suit 66 S. E. 666.

session in 1903, by chapter 763, amended the Public Laws of 1893, ch. 6, sec. 1, by adding thereto the last sentence of the present section. Crockett v. Bray, 151 N. C. 615, 617, 66 S. E. 666.

Does Not Deprive Defendant of Right.—The section deprives the defendant of no right, but affords him every opportunity of defending the validity of his title; but in the interest of peace and the settlement of controversies, it allows his adversary to put to the test of early judicial investigation, and does not compel plaintiff to wait on the defendant's pleasure as to the time when the inquiry shall be made, and thus give defendant an unfair advantage over him. Jersey City v. Lembeck, 31 N. J. Eq., 265; Carolina-Tennessee Power Co. v. Hiawassee River Power Co., 175 N. C. 668, 684, 96 S. E. 99.

Restraining Sale under Execution.—Under this section the sheriff's sale of land by execution under a judgment may now be restrained by suit in equity when it will operated to an undue delay or prejudice to the owner of the lands. Milliz v. Bazemore, 194 N. C. 324, 139 S. E. 453.


II. NATURE AND SCOPE.

A. Purpose.

General Observations. — In a recent case the Supreme Court gave the section a broad interpretation in order to carry out the evident purpose of its enactment, and said: "Having reference to the broad and inclusive language of the statute, its purpose to complain of the hardship and injustice sought to be accomplished, we are of opinion that the law, as its terms clearly import, was designed and intended to afford a remedy wherever one owns or has an estate or interest in real property, whether he is in or out of possession, and another wrongfully sets up a claim to an estate or interest therein which purports to affect adversely the estate or interest of the true owner and which is reason-ably calculated to burden and embarrass such owner in the full and proper enjoyment of his proprietary rights, including the right to dispose of the same at its fair market value, and which also involves and is wrongful, and which would be against public interest, and is against the public policy, and at its trial he had an estate in or title to the land, cannot be sustained. It is only required that he have such an interest in the land as that the claim of the defendant is adverse to him." Rumbo v. Gay Mfg. Co., 129 N. C. 9, 10, 39 S. E. 581; Walton v. Perkins, 33 Minn. 357; Holmes v. Chester, 26 N. J. Eq. 81."

B. Interest Necessary to Bring Action.

Editor's Note.—In the case of Rutherford v. Ray, 147 N. C. 253, 61 S. E. 57, it was held that suit may be instituted by any person against any other person claiming an interest adverse to his title.

In Plotkin v. Merchants Bank, et al., 188 N. C. 711, 715, 125 S. E. 541, it was held that "the contention that a plaintiff in an action brought under this section must allege and prove that at the commencement of the action he had the legal title to the land, cannot be sustained. It is only required that he have such an interest in the land as that the claim of the defendant is adverse to him." In Plotkin v. Bank, et al., supra, at page 733, it is said: "The plaintiff is not required to have possession as a condition precedent to his right of action, nor will the apparent invalidity of defendant's title deprive him of the statutory remedy. It is only required that he have such an interest in the land as that the claim of the defendant is adverse to him." In Plotkin v. Bank, et al., supra, at page 733, it is said: "The plaintiff is not required to have possession as a condition precedent to his right of action, nor will the apparent invalidity of defendant's title deprive him of the statutory remedy. It is only required that he have such an interest in the land as that the claim of the defendant is adverse to him."
der Analysis line I, "(General Considerations," of this section.

of lands in possession thereof or entitled thereto brings his
may, if successful, recover his costs. Plotkin v. Merchants
provisions of this section; and where issue has been joined, he

action claiming as such owner to remove as a cloud upon his

plumber to restrain the doing of

expressly embrace a judgment lien. See Editor's Note un-

Shaw, 125 N. C. 491, 492, 34 S. E. 634. This was changed

and "interest" as they are used in the section. Mclean v.

injunction is the proper remedy to restrain the doing of

Costs.—Where the defendant disclaims title to lands in a

Foreclosure of Mortgage Given by Tenant in Common

Prior to Partition.—The purchaser of land from one tenant in

When Land Conveyed Pendente Lite.—Where the owner

When Court Will Hear and Determine without Action.—

The courts will hear and determine a controversy submitted

the conditions were formerly such that a possessory action

chap. 6, may be properly treated as an action of ejectment,

A judgment lien is the only remedy where a possessor claims under his mortgage, and pen-
denue who could, but for the adverse equitable interest of the true owner and which is reasonably calcu-

But the court should enter its decree removing the cloud upon the title. Rumbo v. Gay Mfg. Co., 129 N. C. 9, 39 S. E. 103.

A judgment binds parties and privies only. Hines v. Moyer, 125 N. C. 8, 34 S. E. 103.

When Court Will Hear and Determine without Action.—

The courts will hear and determine a controversy submitted

A contract to convey the lands of the wife, signed by her and

she and her husband, but without having been taken

or recorded is a cloud upon her title to the lands

subject to her suit to remove the same, as such,

valid judgment as cloud. — A judgment, if invalid,

involves, it is not necessary to record it. Campbell v. Moody, 150 N. C. 457, 64 S. E. 213.


The courts will hear and determine a controversy submitted

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In an action to remove a cloud from plaintiffs' title, caused

by the defendant's title, without the service of summons upon

her, instituted an independent proceeding to annul the judgment,

and falsely represented to her that the action had been with-

drawn, and that she had no cause of action. Thompkins v.

the plaintiff to show the fraud by the prepon-

dence of the evidence, and not by clear, strong and cogent

proof as required in the information or correction of a con-


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denue who claims under his mortgage, against the

interest. Appellee sued to quiet title under this section.

The courts will hear and determine a controversy submitted

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the complaint, as not stating a cause of action, was properly overruled, this section being sufficiently broad to entitle plaintiff to bring a suit under this section. Exum v. Carolina R. Co., 222 N. C. 222, 22 S. E. (2d) 424.

Defendant Need Only Be Claimant.—It is true that under the act of the Legislature, 1893, ch. 6, now this section, a plaintiff in equity need not allege an adverse title without showing that the defendant is an occupant or any more than a claimant of the land in controversy. Duncan v. Hall, 117 N. C. 445, 446, 23 S. E. 362.

Sufficiency of Terms—Alleged—When Occupation Is Alleged.——This section removed the necessity for alleging the defendant was in possession. The plaintiff may now set out his claim of title, and if defendant disclaims any adverse claim, the plaintiff shall be entitled to recover the title without showing that the defendant is an occupant or any more than a claimant of the land in controversy. Duncan v. Hall, 117 N. C. 445, 446, 23 S. E. 362.

Allegation of Nonpayment of Taxes.——In a suit to remove a cloud on the title to lands, the suggestion that plaintiff’s ancestors have not, for many years, paid the tax levied, is not sufficient to raise the issue of delivery under this section the court’s constructions. Alford v. Asheville Land Co. v. Lange, 150 N. C. 26, 30, 63 S. E. 164.

When Occupation Is Alleged.——But where he alleges an occupation as the cause of action, not only must the allegations be made, but the suggestion that defendant is in possession. This section removed the necessity for alleging the defendant was in possession. Duncan v. Hall, 117 N. C. 445, 446, 23 S. E. 362.

Allegation of Nonpayment of Taxes.——In a suit to remove a cloud on a plaintiff’s title to land, alleges that the plaintiff is the owner of the locus in quo, and asks for a declaration of title to the land, the suggestion that defendant is in occupation is sufficient to raise the issue against him. Duncan v. Hall, 117 N. C. 445, 446, 23 S. E. 362.

Appraisement.——When occupation is alleged, the suggestion that defendant is in possession, and is necessary to sustain the suit, is sufficient to raise the issue. Johnston v. Kramer Bros. & Co., 203 Fed. 733, 741.

Sufficient to Raise Issue.——Where the complaint in a suit to remove a cloud upon plaintiff’s title to land, alleges that the plaintiff is the owner of the locus in quo, and asks for a declaration of title to the land, the suggestion that defendant is in occupation is sufficient to raise the issue. Johnston v. Kramer Bros. & Co., 203 Fed. 733, 741.

Pleadings Sufficient for Determination of Damages as in Condemnation Cases.—In this section, and in addition to the fact that general relief was prayed, the parties specifically asked that their rights be determined, and defendant, relying upon the right of eminent domain, asserted its right to flood lands in which plaintiff has an interest, and suggested that his interest was not sufficient to raise the issue. Johnston v. Kramer Bros. & Co., 203 Fed. 733, 741.

Possession to Delivery of Deed.——Delivery of a deed is essential to its validity, and where the pleadings and evidence raise the issue of delivery under this section the court’s refusal to allow an issue thereon entitles the plaintiff to a new trial. Ferguson v. Ferguson, 206 N. C. 480, 174 S. E. 304.

Pleadings Sufficient for Determination of Damages as in Condemnation Cases.—In this section, and in addition to the fact that general relief was prayed, the parties specifically asked that their rights be determined, and defendant, relying upon the right of eminent domain, asserted its right to flood lands in which plaintiff has an interest, and suggested that his interest was not sufficient to raise the issue. Johnston v. Kramer Bros. & Co., 203 Fed. 733, 741.

Concurrent Jurisdiction.——Where there is an action pending in the State Courts to try the title to lands under this section, the State Courts have thereby acquired jurisdiction over the real estate, it is true that under the act of the Legislature, 1893, ch. 6, now this section, there is a right to a sale or lease of the property by a Federal Court of Equity, as it merely regulates procedure and does not create any substantive right. And, even if it could be inferred that a person interested in an equitable right to land under the state law, might authorize the trial by a federal court of equity of what is in essence an action of ejectment, for the reason that in such action the defendant is entitled under the federal constitution to a trial by jury. Wood v. Phillips, 50 F. (2d) 714, 716.

§ 41-11. Sale, lease or mortgage in case of remainders.—In all cases where there is a vested interest in real estate, and a contingent remainder over to persons who are not in being, or who in any contingency has not yet happened which will determine who the remaindermen are, there may be a sale, lease or mortgage of the property by a proceeding in the superior court, which proceeding shall be conducted in the manner pointed out in this section. Said proceeding may be commenced by summons by any person having a vested interest in the land, and all persons in esse who are interested in said land shall be made parties defendant and served with summons in the manner and manner now provided by law for the service of summons in other civil actions, as provided by § 1-94, and service of summons upon nonresidents, or persons whose names and residences are unknown, shall be by publication. As now required by law or such service in lieu of publication as now provided by law. In cases where the remainder will or may go to minors, or persons under other disabilities, or to persons not in being, or whose names and residences are not known, or who may in any contingency become interested in said land, but because of such contingency cannot be ascertained, the clerk of the superior court shall, after due inquiry of persons who are in no way interested in or connected with such proceeding, designate and appoint some discreet person as guardian ad litem, to represent such remainderman, upon whom summons shall be served as provided by law for other guardians ad litem, and it shall be the duty of such guardian ad litem to defend such actions, and when counsel is needed to represent him, to make this known to the clerk, who shall by an order give instructions as to the employment of counsel and the payment of fees.

The court shall, if the interest of all parties require or would be materially enhanced by it, order a sale of such property or any part thereof for reinvestment, either in purchasing or in improving real estate, less expense allowed by the court for the proceeding and sale, and such newly acquired or improved real estate shall be held upon the same contingencies and in like manner as was the property ordered to be sold. The court may authorize the loaning of such money subject to its approval until such time when it can be reinvested in real estate. And after the sale of such property in all proceedings hereunder, where there is a life estate, in lieu of said interest or investment of proceeds to which the life tenant would be entitled to, or to the use of, the court, may in its discretion order the value of said "life tenants' share" during the probable life of such life tenant, to be ascertained as now provided by law, and
paid out of the proceeds of such sale absolutely, and the remainder of such proceeds be reinvested as herein provided. Any person or persons owning a life estate in lands which are unproductive and from which the income is insufficient to pay the taxes on and reasonably upkeep of said lands shall be entitled to maintain an action to compel the court to hold or mortgage given until the same has been acquired by the resident judge of the district, or the judge holding the courts of the district at the time said order of sale is made.

The court may authorize the temporary reinvestment, pending final investment in real estate, of funds derived from such sale in any direct obligation of the United States of America or any indirect obligation guaranteed both as to principal and interest or bonds of the state of North Carolina issued since the year one thousand eight hundred and seventy-two; but in the event of such reinvestment, the commissioners, trustees or other officers appointed by the court to hold such funds shall hold the bonds in their possession and shall pay to the life tenant and owner of the vested interest in the lands sold only the interest accruing on the bonds, and the principal of the bonds shall be held subject to final reinvestment and to such expense only as is provided in this section. Temporary reinvestments, as aforesaid, in any direct obligation of the United States of America or any indirect obligation guaranteed both as to principal and interest or state bonds heretofore made with the approval of the court of all or a part of the funds derived from such sales are ratified and declared valid. The court shall, if the interest of the parties require it and would be materially enhanced by it, order such property mortgaged for such term and on such condition as to the court seems proper and to the best interest of the interested parties. The proceeds derived from the mortgage shall be used for the purpose of adding improvements to the property or to remove existing liens on the property as the court may direct, but for no other purpose. The mortgagees shall not be held responsible for determining the validity of the liens, debts and expenses where the court directs such liens, debts and expenses to be paid. In all cases of mortgages under this section the court shall authorize and direct the guardian representing the interest of minors and the guardian ad litem representing the interest of those persons unknown or not in being to join in the mortgage for the purpose of conveying the interest of such person or persons. In all cases of mortgages under this section the owner of the vested interest or his or her legal representative shall within six months from the date of the mortgage file with the court an itemized statement showing how the money derived from the said mortgage has been expended, and shall exhibit to the court receipts for said money. Said report shall be audited in the same manner as provided for the auditing of guardian's accounts. The owner of the vested interest or his or her legal representative shall collect the rents and income from the property mortgaged and apply the proceeds first to taxes and discharge of interest on the mortgage and the annual curtailment as provided thereby, or if said person uses or occupies said premises he or she shall pay the said annual interest and curtailments and said party shall enter into a bond to be approved by the court for the faithful performance of the duties hereby imposed, and such person shall annually file with the court a report and receipts showing that taxes, interest and the curtailment as provided by the mortgage have been paid.

The mortgagee shall not be held responsible for the application of the funds secured or derived from the mortgage. The word mortgage whenever used herein shall be construed to include deeds in trust. (Rev. c. 1590; 1903, c. 99; 1905, c. 548; 1907, cc. 956, 980; 1919, c. 17; Ex. Sess. 1921, c. 88; 1923, c. 69; 1925, c. 281; 1927, c. 124, 180; 1933, c. 123; 1935, c. 299; 1941, c. 328; 1943, cc. 198, 729; C. S. 1744.)

I. General Constructions.

II. Actions in Superior Court for Sale.

A. General Rules and Incidents Governing.

B. Powers of Clerk of Superior Court.

C. Application.

Cross References.

As to constitutional restriction against perpetuities, see North Carolinas Const., Art. I, § 31. As to partition sales of real property generally, see §§ 46-22 to 46-24. As to vagueness of description of land in pleadings, see § 8-39; in conveyance, see § 39-2.

I. General Considerations.

Editor's Note.—The 1925 amendment inserted in the fourth paragraph the provisions as to state bonds and made other changes.

The section was further amended by the Laws 1927, ch. 124, so as to permit a life tenant to bring an action for sale and reinvestment without joinder of remaindermen or reversions.

The rights of persons not sui juris to be protected by a disinterested attorney appointed by the court. The amendment, being remedial in its nature, is made applicable to all cases where any title or interest in such lands was acquired before, as well as after, its enactment, with a proviso exempting pending litigation from its effect.

The only change effected by the 1933 amendment occurs in the second paragraph of the section. In the next to the last sentence of that paragraph, Public Laws of 1933, c. 123 inserted, following the word "proceeds", the word "reinvestment", the words "for the purpose of obtaining funds for improving other non-productive," etc.

The amendment of 1935 inserted the proviso at the end of the second sentence of the fifth paragraph relating to existing liens.

The 1941 amendment inserted the word "lease" in the first sentence of the second paragraph and in the third paragraph. It also added the provision that the mortgagees shall not be held responsible for determining the validity of liens, etc., where the court directs such liens, etc., to be
paid. For comment on the 1941 amendment, see 19 N. C. L. Rev. 548.
The 1943 amendment made changes in the fourth paragraph. And, as amended by Acts 1943, c. 729, it expressly provided that its intent and purpose was "to provide for the sale of contingent remainders in United States bonds and bonds guaranteed as to principal and interest by the United States.

Constitutionality and Validity.—Rev. sec. 1590, now this section, providing for the sale of contingent remainders, is constitutional and valid. Smith v. Miller, 151 N. C. 620, 66 S. E. 556. This section does not interfere with the essential rights of ownership but operating in addition to those already possessed, is constitutional and valid. Pendlen v. Will, 150 N. C. 219, 58 S. E. 556.

Retroactive Effect.—In Springs v. Scott, 132 N. C. 484, 44 S. E. 116, Mr. Justice Connor, speaking for the Court as to the validity of chapter 97, Laws 1933 (Rev. sec. 1590), said: "A valid and necessary exercise of legislative power upon the will considered in that case and the estates that were created thereby, demonstrates by reason and authority that the act is valid, even when attempted to reach back and affect estates already created, the will, so far though only as it is permitted to apply to interests not yet vested. Anderson v. Wilkins, 142 N. C. 134, 159, 55 S. E. 272.

The decision in Springs v. Scott was approved in Waddell v. United Cigar Stores, 195 N. C. 805, 15 S. E. (2d) 273. To prevent any possible doubt of the existence of the contingency has not happened which shall determine the interest of all parties in remainder, whether in esse or not, when the proviso of both statutes have been fully and accurately followed the purchaser at the commissioner's sale may be binding upon beneficiaries not in esse, when their interests are same as those of persons in being who are subject to due process of the jurisdiction of the court. While the courts of this State do not have inherent power to order the sale of real estate limited to a tenant for life, with remainder to children or issue, upon failure thereof, the court has the power to order the private sale of lands for the purpose of dividing the proceeds among tenants in common. Ryder v. Oates, 173 N. C. 569, 93 S. E. 585.

When Applicable.—This section and § 41-12 apply only to a sale of property in which there are or have been contingent interests, in the well v. United Cigar Stores, 195 N. C. 434, 142 S. E. 272. A lease authorized by the decree of a court of chancery may be binding upon beneficiaries not in esse, when their interests are same as those of persons in being who are subject to due process of the jurisdiction of the court. Waddell v. United Cigar Stores, 195 N. C. 434, 142 S. E. 555, containing illustrative provisions, held that the objection to the extent that it may extend beyond the term of the trust.

In Stepp v.法定的，均需经法院决定。在斯普林斯诉斯科特案中，法官帕默说："这个修正案（私法1927年，124），其中的地产是未生产的，如，等等，扩展了权利以包括土地地契，在那里有未到期的再留代价和剩余的法律规定在第41节-41-12，如果裁决，已被引用，因此参考只能引用到剩余的再留代价。

Mortgage for Permanent Improvements.—The locus in quo was devised to testator's daughter for life with limitation over to the daughter's children. The daughter and her husband expended large sums in making permanent improvements up to the time of their death, and the court, upon the application of the holder of the mortgage, held that the sale was made to the best interest of all parties in remainder after the expiration of the life estate in esse and a party to the proceeding to represent the class, and, that upon the sale, and the title made pursuant thereto, the purchaser acquires good title as against all persons in esse or in possesse. Springs v. Scott, 132 N. C. 484, 44 S. E. 116.

The court has the power to order the private sale of lands affected with contingent interests under the provisions of this section, under the court's order, subject to its future approval of the sale, when it is made to appear that the best interests of the testator, the testator's estate, and the estate of all others in remainder, whether in esse or not, are served. Delaney v. Clark, 196 N. C. 282, 145 S. E. 398.

Failure to Serve Summons on Infant—Setting Aside Sale.—Where in proceedings to sell lands affected with contingent interests the provisions of § 41-11, have been observed, and the clerk has appointed a guardian ad litem for the infant, the sale is still valid, even upon return of the proper sales and also unsecured notes made by the life tenant representing a part of the mortgage, used in making said improvements. It was held that since the remaindermen are in no way liable for any sums expended by the life tenant in making permanent improvements, the finding by the court the execution of the mortgage to secure the improvement of the reversion, that the execution of the mortgage to refinance the indebtedness should be reversed. Hall v. Hall, 269 N. C. 66, 152 S. E. 2d 407. (Public Laws 1927, c. 124).
sold by order of the judge of the superior court in term, on appeal in proceedings in partition improperly brought before the clerk, by retaining jurisdiction for the purpose of settling the controversy. Ryder v. Oates, 173 N. C. 569, 45 S. E. 556.

Where an action is wrongfully brought before the clerk of the superior court and is taken to the superior court by appeal, the superior court having original jurisdiction, it will be retained for hearing. Springs v. Scott, 135 N. C. 543, 44 S. E. 116.

When No Appeal Taken Parties Estopped.—Where an executor under a will with power to sell the lands of his intestate, made parties to the action under the power of appointment, to her children and grandchildren, in order to exercise the power of appointment, to her children and grandchildren, it was therein authorized to make. Hayden v. Hayden, 178 N. C. 259, 100 S. E. 315.

Same.—Payment of Betterments.—Where a preliminary judgment in proceedings to sell lands with contingent interests provides for the payment of betterments to the life tenant, and in this respect the judgment is not appealed to or appealed from, it is conclusive upon the parties as now estopped. Pendleton v. Williams, 175 N. C. 246, 95 S. E. 500.

Who May Institute Suit.—Proceedings to have lands sold that are subject to a life estate, with limitation over, appealed from, or where the sale of the lands affected with unascertainable contingent remainders is ordered sold under the provisions of this section, it is now required by the amendatory act of 1919, chapters 17 and 259, and in all cases where property is sold that is subject to a life estate, with limitation over, or a life estate, with provision for an investment, especially in the unfurnished condition in which it was had, sold that are subject to a life estate, with limitation over, such proceeding can be brought only by proper parties in interest. DeLamater v. Dawson, 208 N. C. 501, 190 S. E. 490.

In proceedings under the section certain contingent interests in land held in trust were sold and the Trustee was authorized to restrict the use of the property was asked, and the Commissioner to act in furtherance of its object. Poole v. Thompson, 183 N. C. 588, 112 S. E. 323.

Public or Private Sale Permissible.—The sale of estates affected with contingent interests, made under the provisions of this chapter, if the court is of the opinion that the public interest requires the sale, will be retained for hearing. Springs v. Scott, 135 N. C. 543, 44 S. E. 116.

Judgment in proceedings to sell lands with contingent interests is a vested interest with remainder over to persons not in being, or when the contingency has not yet happened, etc. Pendleton v. Williams, 175 N. C. 246, 95 S. E. 500.

Where an action brought under the provisions of the section authorizing the sale of property held in trust for the exclusive benefit of a minor, if there is a vested interest with remainder over to persons not in being, or when the contingency has not yet happened, etc. Pendleton v. Williams, 175 N. C. 246, 95 S. E. 500.

Pendleton v. Williams, 175 N. C. 246, 95 S. E. 500.

Effect of Omitting Bond.—In all cases where property affected with contingent interests is ordered sold under the provisions of this section, it is now required by the amendatory act of 1919, chapters 17 and 259, and in all cases where property is sold that is subject to a life estate, with limitation over, if the bond made to procure money for building the hotel, but only having funds sufficient to erect the skeleton work of the hotel, other of the lands were decreed by the court to be sold, the record of the proceedings to have lands sold, that are subject to a life estate, with limitation over, such proceeding can be brought only by proper parties in interest. DeLamater v. Dawson, 208 N. C. 501, 190 S. E. 490.

Where the sale of land affected with remote contingent interests made under the provisions of this section, and where the sale of land affected with remote contingent interests in land held in trust, the only fund available to the estate in trust was the proceeds of the sale of the real estate in trust, to the best interests of the parties will be promoted, subject to approval of the court. Poole v. Thompson, 183 N. C. 588, 112 S. E. 323.

Where Commissioner's Authority Was Limited to Sale of Property and Distribution of Proceeds.—Where a commissioner was authorized by the court to make an investment or reinvestment of funds under the provisions of this section, and there were no restrictions in regard to the use of the property of the estate, and in the commissioner's discretion, that the interest involved should be the court to the approval, the proceeds of the sale, when it is shown that, as to the one or the other, or both, public or private sale is permissible, subject to approval of the court. Poole v. Thompson, 183 N. C. 588, 112 S. E. 323.

Public or Private Sale Permissible.—The sale of estates affected with contingent interests, made under the provisions of this chapter, if the court is of the opinion that the public interest requires the sale, will be retained for hearing. Springs v. Scott, 135 N. C. 543, 44 S. E. 116.

Where the sale of land affected with remote contingent interests not ascertainable at the time, the court may order the property disposed of by either of public or private sale, when it is shown that, as to the one or the other, or both, public or private sale is permissible, subject to approval of the court. Poole v. Thompson, 183 N. C. 588, 112 S. E. 323.

Where the provisions of this section have been observed in the sale of lands affected with contingent interests, the
commissioner appointed to make the sale may effect the loaned out by him or otherwise invested as required by law until the happening of the contingency, except that it should be so modified as to require that interest on these loans be allowed the owners of the particular estate, whether the estate, under correct interpretation of the deed, be one for life to be enlarged into a fee, or a fee sempiterni, determinable on their death without issue, it appearing that they were given the usufruct of the land. Pendleton v. Williams, 175 N. C. 248, 249, 95 S. E. 500. It would seem then that by order of court, the reinvestment of the proceeds of sale or the proceeds of the estate, when it is properly made to appear that the best interest of the parties so require. Midyette v. Lycoming Timber, etc., Co., 185 N. C. 423, 117 S. E. 386.

The sale of an estate in remainder affected under the provisions of the section acquires a fee simple title, upon payment of the purchase money, and upon paying it into court, under its order, when it is properly established that the sale is required by the necessities of the case and the successful carrying out of the dominant purposes of the trust. Midyette v. Riggsbee, 179 N. C. 437, 441, 102 S. E. 780.

The sale of an estate in remainder affected under the terms of a will with certain ultimate and contingent interests, will not be affected by a clause in the will requiring the court to see to the application of the funds, its safety being taken care of by the court in its final decree. DeLaaney v. Clerk, 176 N. C. 286, 145 S. E. 398.

Same.—Takes Fee Simple Title.—A purchaser at a sale of land with contingent interests allowed under the provisions of the section acquires a fee simple title, upon payment of the purchase money, and upon paying it into court, under its order, is not required to see to the proper application of the funds, its safety being taken care of by the court in its final decree. DeLaaney v. Clerk, 176 N. C. 286, 145 S. E. 398.

Sale for Reinvestment.—A purchaser of devised lands affected with a life estate and contingent interest, the court should also require its completion within six months, with the terms and conditions imposed by the conveyance, in order that the transfer be validated by derivative jurisdiction in the superior court, on appeal, under the provisions of this section, it being required that the proceedings be originally and exclusively in the hands of an officer of the court with jurisdiction, and not preventing the administration of the trust estate, and not preventing the exercise of the powers of the court, to division and sale of such interest, when the circumstances of the case so require. Midyette v. Lycoming Timber, etc., Co., 185 N. C. 423, 117 S. E. 386.

The sale of timber growing upon lands affected with a life estate and contingent interest, the holder of the vested interest, may be supplied by amendment or supplementary decree. Pendleton v. Williams, 175 N. C. 248, 249, 95 S. E. 500.

Same.—Supplementary Decree. Where an order has been made for the sale of timber growing upon lands affected with contingent interests, the court should also require its completion within six months, with the terms and conditions imposed by the conveyance, and have them remotely interested represented by guardians ad litem for the protection of their interests; and where it is made to appear that the interest of all parties require, or that the property is required to be sold, either in purchasing or improving real estate, etc., or in vested temporarily to be held under the same contingencies, the proceeding be ordered to be sold.

Purchaser's Liability Ends When Money Paid into Court.—A purchaser of devised lands affected with a life estate and contingent interest under the provisions of the section acquires a fee simple title, upon payment of the purchase money, and upon paying it into court, under its order, is not required to see to the proper application of the funds, its safety being taken care of by the court in its final decree. DeLaaney v. Clerk, 176 N. C. 286, 145 S. E. 398.

Sale for Reinvestment.—A tenant for life in lands may not by adversary proceedings against the remaindermen compel the sale of the property, or any part thereof, for reinvestment, with the terms and conditions imposed by the conveyance, in order that the transfer be validated by derivative jurisdiction in the superior court, on appeal, under the provisions of this section, it being required that the proceedings be originally and exclusively in the hands of an officer of the court with jurisdiction, and not preventing the exercise of the powers of the court, to division and sale of such interest, when the circumstances of the case so require. Midyette v. Lycoming Timber, etc., Co., 185 N. C. 423, 117 S. E. 386.
to a purchaser she had secured for a certain price would enable her to make improvements on the land then without income, to make houses on other parts of the land more profitable for rental purpose, etc., that the property as it stood was rapidly depreciating, and there were no available funds, otherwise, to meet the necessary and in- sistent demands. Held, a demurrer was bad, and properly overruled. Middendorf v. Riggsbee, 179 N. C. 437, 102 S. E. 780.

Where the grantors in a deed have erroneously assumed that they had title to the lands they conveyed in fee, but which was affected by future contingent interest not at present ascertainable, and thereafter bring action to make title under the provisions of this section, which authorizes the sale of land affected by such contingencies, and in these proceedings have protected the interest of the remote re- mainderman by the appointment for a guardian ad litem, and have fully set forth the facts and circumstances of the former sale, and bring in the proceeds and submit them to the jurisdiction and orders of the court, the final judgment properly authorizing and confirming the sale, and being had in conformity with the provisions of the statute, perfects the title and same will inure to the benefit of the covenantee in the former deed, and for a breach of this covenant is recoverable. Myer v. Thompson, 183 N. C. 543, 112 S. E. 328.

This proceeding in which the order for the sale of the said lot has been made not was instituted and has not been conducted in accordance with this section. The power of sale has not been exercised by virtue of the statute. The proceeding was brought before the clerk, and not in term. The minors are not represented by guardian ad litem ap- pointed to represent next friend appointed by the clerk. The order of sale was signed, not during the term of the superior court in Haywood county, but by the judge holding the courts of the twentieth district (which in- cludes Haywood county) at Sylva, in Jackson county, in said district. The order of sale cannot therefore be held valid. Lide v. Wells, 190 N. C. 37, 128 S. E. 477, 480.

Where the complaint of a life tenant alleges that the land is unproductive and income therefrom is insufficient to pay the taxes and reasonable upkeep, and prays that the land be sold in accordance with this section, the demurrer of the vested remaindermen is improperly sustained, the complaint alleging at least one good cause for action. Stepp v. Stepp, 200 N. C. 237, 156 S. E. 804.

In a suit regarding the management of the trust estate where the trustee and the testator's wife and children are parties and the one living grandchild is made a party defend- ant and is represented by a guardian ad litem, who also represents as a class the other grandchildren not in esse, all parties having an interest in the estate are properly parties to the suit, and the judgment of the court is binding as to all interests. Spencer v. McClennigan, 202 N. C. 662, 163 S. E. 753.

§ 41-12. Sales or mortgages of contingent re- maindermen validated.—In all cases where property has been conveyed by deed, or devised by will, upon contingent remainder, executory devise, or other limitations, where a judgment of a superior court authorizing and confirming the sale, and being had in conformity with the provisions of the statute, perfects the title and same will inure to the benefit of the covenantee in the former deed, and for a breach of this covenant is recoverable. (Rev., s. 1591; 1905, c. 93; 1923, c. 64; 1935, c. 36; C. S. 1745.)

Cross Reference.—As to revocation of deeds of future inter- ests made to persons not in esse, see § 39-6.

Editor's Note.—By the amendment of 1905 this section was made to apply to mortgages and deeds of trust. The amendment also added the clause just preceding the proviso requiring the remote interest to vest before the validating act of 1905 this section was made to apply to mortgages and deeds of trust. The validation also added the clause just preceding the proviso requiring the remote interest to vest before the validating act of 1905.

Constitutionality and Validity.—The section is a valid exercise of legislative po-.er. Anderson v. Wilkins, 142 N. C. 154, 155 S. E. 272.

In all cases where property in being or whose estates had not then vested: Where the contingency had then happened were parties, in actions or special proceedings where all persons in being who would have taken such property if the contingency had then happened were parties, the contingency had then happened were parties,...
Chapter 42. Landlord and Tenant.


§ 42-1. Lessor and lessee not partners. — No lessor of property, merely by reason that he is to receive as rent or compensation for its use a share of the proceeds or net profits of the business in which it is employed, or any other uncertain consideration, shall be held a partner of the lessee. (Rev., s. 1982; Code, s. 1744; 1868-9, c. 156, s. 33) C. S. 2342.)

In General.—The lessor and lessee are not partners. State v. Keith, 126 N. C. 1114, 1115, 36 S. E. 169. Thus, where B. and W. was to do the work, and the crops were to be equally divided, it was held that this was not an agricultural partnership. Lawrence v. Week, 107 N. C. 119, 12 S. E. 120. See also Day v. Stevens, 88 N. C. 83, explaining and correcting Curtis v. Cash, 84 N. C. 41.

Duration.—A demise may be for a day as well as for a year, and may be terminable at the will of the lessor. It is not ended until the property is returned to the owner. United States v. Shea, 153 U. S. 178, 189, 190, 14 S. Ct. 519, 38 L. Ed. 403.

The legal understanding of a lease for years is a contract for the possession and profits of land, for a determinate period, with the compensation of rent. Thomas v. Railroad Co., 101 U. S. 71, 79, 25 L. Ed. 956. Effect of Words "Grant" and "Demise."—In a United State's Supreme Court case it was held that the words "grant" and "demise" in a lease for years create an implied warranty of title and a covenant of quiet enjoyment. See Scott v. Rutherford, 92 U. S. 107, 23 L. Ed. 486.

§ 42-2. Attornment unnecessary on conveyance of reversions, etc.—Every conveyance of any rent, reversion, or remainder in lands, tenements or hereditaments, otherwise sufficient, shall be deemed complete without attornment by the hold-}

ers of particular estates in said lands: Provided, no holder of a particular estate shall be prejudiced by any act done by him as holding under his grantor, without notice of such conveyance. (Rev., s. 947; Code, s. 1764; 4 Anne, c. 16, s. 9; 1868-9, c. 156, s. 17; C. S. 2342.)

Purpose of Section.—This section was passed to protect landlords who made verbal or written leases of real property of any kind in which is fixed a definite time for the payment of the rent reserved therein, there shall be implied a forfeiture of the term upon failure to pay the rent within ten days after a demand is made by the lessor or his agent on said lessee for all past-due rent, and the lessor may forthwith enter and dispossess the tenant without having declared such forfeiture or reserved the right of reentry in the lease. (1919, c. 34; C. S. 2343.)

§ 42-3. Term forfeited for nonpayment of rent. —In all verbal or written leases of real property of any kind in which is fixed a definite time for the payment of the rent reserved therein, there shall be implied a forfeiture of the term upon failure to pay the rent within ten days after a demand is made by the lessor or his agent on said lessee for all past-due rent, and the lessor may forthwith enter and dispossess the tenant without having declared such forfeiture or reserved the right of reentry in the lease. (1919, c. 34; C. S. 2343.)

Written into Leases.—The section writes into a contract of a lease of lands, when the lease is silent thereon, a forfeiture of the lease upon failure of the lessee to pay the rent within ten days after a demand is made by the lessor or his agent for all past due rent, with right of
the lessor to enter and dispossess the lessee. Ryan v. Rey-

§ 42-4. Recovery for use and occupation.—When any person occupies land of another by the permission of such other, without any express agreement for rent, or upon a parol lease which is void, the lessor is entitled to recover for the use and occupation, and if by such parol lease a certain rent was reserved, such reservation may be received as evidence of the value of the occupation. (Rev., s. 1986; Code, s. 1746; 1868-9, c. 156, s. 5; C. S. 2344.)

Cross Reference.—As to contracts requiring writing, see § 22-2.

§ 42-5. Rent apportioned, where lease terminated by death.—If a lease of and, in which rent is reserved, payable at the end of the year or other certain period of time, is determined by the death of any person during one of the periods in which the rent was growing due, the lessor or his personal representative may recover a part of the rent which becomes due after the death, subject to all just allowances; and if any security was given for such rent it shall be apportioned in like manner. (Rev., s. 1987; Code, s. 1747; 1869-9, c. 156, s. 6; C. S. 2345.)

§ 42-6. Rents apportioned, where right to payment terminated by death.—In all cases where rents, rent charges, annuities, pensions, dividends, or any other payments of any description, are made payable at fixed periods to successors in the lessors could only recover for the time the premises were occupied. Harty v. Harris, 120 N. C. 408, 411, 27 S. E. 90.

§ 42-7. In lieu of emblements, farm lessee holds out year, with rents apportioned.—When any lease for years of any land let for farming during a certain period of time, is determined by the death of the lessee, without any provision for successive owners, but the right to payment terminates upon the death of the lessee. Wells v. Guard-ian Life Ins. Co., 213 N. C. 173, 195 E. 394, 116 A. L. R. 130.

§ 42-8. Grantees of reversion and assigns of lease have reciprocal rights under covenants.—The grantor in a conveyance of reversion in land, disability or hereditaments has the like advantages and remedies by action or entry against the holders of particular estates in such
real property, and their assigns, for nonpayment of rent, and for the nonperformance of other conditions and agreements contained in the instruments by the tenants of such particular estates, as the grantor or lessor or his heirs might have; and the holders of such particular estates, and their assigns, have the like advantages and remedies against the grantee of the reversion, or any part thereof, for any conditions and agreements contained in such instruments, as they might have had against the grantor or his lessors or his heirs. (Rev., s. 1989; Code, s. 1765; 32 Hen. VIII, c. 34; 1868-9, c. 156, s. 18; C. S. 2348.)

§ 42-9. Agreement to rebuild, how construed in case of fire.—An agreement in a lease to repair a demised house shall not be construed to bind the contracting party to rebuild or repair in case the house shall be destroyed or damaged to more than one-half of its value, by accidental fire not occurring from the want of ordinary diligence on his part. (Rev., s. 1985; Code, s. 1752; 1868-9, c. 156, s. 11; C. S. 2349.)

Common Law Rule.—In 24 Cyc., 1089 the common law rule is stated as follows: "According to the common law, when a tenant is injured by fire, unless it is caused by his own fault, the landlord is liable to third persons for injuries caused by the failure to keep the premises in repair, the liability may be extended to the owner, where the condition existed at the time the premises were leased, and for months and years, and the owner knew of it and had opportunity to repair it at the solicitation of the tenant. Knight v. Foster, 163 N. C. 329, 79 S. E. 614.

§ 42-10. Tenant not liable for accidental damage.—A tenant for life, or years, or for a less term, shall not be liable for the demolition of demised premises accidentally, and notwithstanding reasonable diligence on his part, unless he so contract. (Rev., s. 1991; Code, s. 1751; 1868-9, C. 156, s. 10; C. S. 2350.)

Duty of Landlord and Tenant Distinguished.—I Jaggard Torts, 223, thus sums up the law: "Normally, the occupant and not the owner or landlord is liable to third persons for negligence while in the premises caused by accidental fire, and only where it is without fault," citing a number of cases. Chambers v. North River Line, 179 N. C. 199, 202, 102 S. E. 198.

Changes Made by Section.—This section was enacted to change the rule, formerly existing, but limits its application to the demolition of a house by accidental fire, and only where it is damaged to more than half its value. It does not apply to a case where the destruction is not by fire, but by ice and flood. Chambers v. North River Line, 179 N. C. 199, 202, 102 S. E. 198.

The word "maintain" is practically the same thing as repair, which means to restore to a sound or good state, after decay, injury, dilapidation, or partial destruction. Chambers v. North River Line, 179 N. C. 199, 202, 102 S. E. 198.

§ 42-11. Willful destruction by tenant misdemeanoor.—If any tenant shall, during his term or after its expiration, wilfully and unlawfully demolish, destroy, deface, injure or damage any tenement house, uninhabited house or other out-house, belonging to his landlord or upon his premises by removing parts thereof or by burning, or in any other manner, or shall unlawfully and willfully burn, destroy, pull down, injure or remove any fence, wall or other inclosure or any part thereof, built or standing upon the premises of such landlord, or shall willfully and unlawfully cut down or destroy any timber, fruit, shade or ornamental tree belonging to said landlord, he shall be guilty of a misdemeanor. (Rev., s. 3868; Code, s. 1761; 1883, c. 224; C. S. 2351.)

Cross References.—As to burning or destroying crops, see § 14-141. As to larceny of ungathered fruit and crops, see § 14-142. As to other regulations of landlord and tenant, see §§ 14-158, 14-359.

Meaning of "Willful."—The word willful as used in this section means something more than an intention to do a thing. It implies the doing of the act purposely and deliberately, indicating a purpose to do it, without authority—careless whether he has the right or not—in violation of law, and it is this which makes the criminal intent, without which one cannot be brought within the meaning of a criminal statute. State v. Whitener, 93 N. C. 590, 592.

Same.—Where Acts Bona Fide.—If the defendants reasonably believed the buildings to belong to them, and to be not illegally moved the buildings, etc., they are not guilty of removing them "willfully" so as to bring their act within the meaning of this section. State v. Rowland Lumber Co., 153 N. C. 614, 69 S. E. 59.

Right to Remove Certain Fixtures.—It is intimated that an away-going tenant has the right to remove fixtures put on the premises by himself for his own convenience. State v. Rowland Lumber Co., 153 N. C. 610, 612, 613, 69 S. E. 58. Approved in State v. Morgan, 156 N. C. 628, 630, 48 S. E. 670.

Houses Covered by Section.—For meaning of "tenement house," "uninhabited house," and "outhouse" as used in this section, see State v. Rowland Lumber Co., 153 N. C. 610, 612, 613, 69 S. E. 58.


The Indictment.—An indictment charging the defendant with burning a dwelling house occupied by him "as leasor," under the provisions of this section. State v. Graham, 121 N. C. 621, 28 S. E. 409.
Burdens of Proof.—In an indictment under this section the burden of proving that the act complained of was the act of the tenant or lessee is on the State to establish, first, that the relation of landlord and tenant existed, and, second, that during the tenant's term or after its expiration he did willfully and unlawfully injure the tenement-house. State v. Swearingen, 192 N. C. 457, 135 S. E. 896.

Evidence.—In the trial of an indictment for burning a dwelling house occupied by the defendant as lessee, evidence that defendant was not the owner of the property at a prior time is inadmissible. State v. Graham, 121 N. C. 623, 28 S. E. 499.

§ 42-12. Lessee may surrender, where building destroyed or damaged.—If a demised house, or other building, is destroyed during the term, or so much damaged that it cannot be made reasonably fit for the purpose for which it was hired, except at an expense exceeding one year's rent of the premises, and the damage or destruction occurs without negligence on the part of the lessee or his agents or servants, and there is no agreement in the lease respecting repairs, or providing for such a case, and the use of the house damaged or destroyed was the main inducement to the hiring, the lessee may surrender his estate in the demised premises by a writing to that effect delivered or tendered to the landlord within ten days from the damage or destruction, and by paying or tendering at the same time all rent in arrear, and a part of the rent growing due at the time of the damage or destruction, proportionate to the time between the last period of payment and the occurrence of the damage or destruction, and the lessee shall be henceforth discharged from all rent accruing afterwards; but the landlord is entitled to recover the rent for the unexpired term of the lease. This section shall not apply if a contrary intention appear from the lease. (Rev., s. 1993; Code, s. 1733; 1868-9, c. 156, s. 12; C. S. 2352.)

In General.—An inspection of this section will show that not only is it in terms confined to a demised house or other building but that it expressly excepts from its provisions those leases in which there is an "agreement respecting repairs." Also by its express terms it requires, as a condition precedent to its application, that a lessee "surrender his estate in the demised premises by a writing to that effect, delivered or tendered to the landlord within ten days after the damage or destruction," Chambers v. North River Line, 179 N. C. 199, 202, 102 S. E. 196.

Reasonable Time.—Where the controversy is made to depend upon the question whether, when the landlord had received the rent for May, it was held, that the rent had been paid, and as to June, because not ending with the month. Simons v. Varman, 122 N. C. 199, 29 S. E. 332, cited in notes in 25 L. R. A., N. S., 857, 858.

Verbal Notice Sufficient.—A verbal notice by landlord to tenant is sufficient. Section 1-585 applies to a different class of notices. Pinder v. Call, 182 N. C. 366, 109 S. E. 26. Notice in Certain Tenancies.—A tenancy from year to year may be terminated by a notice to quit given one month or more before the end of the current year of the tenancy; a tenancy from month to month by a like notice of seven days; a tenancy from week to week, of two days. (Rev., s. 1984; Code, s. 1750; 1891, c. 227; 1908-9, c. 156, s. 9; C. S. 2354.)

Local Modification.—Forsyth: 1935, c. 119; Halifax: 1935, c. 22; Hertford: 1939, c. 357; Montgomery: 1925, c. 196, s. 2; Randolph: 1925, c. 196, s. 2. }

Notice to quit a tenancy shall be for a reasonable time in which to make the repairs if made, and for a breach of the lease. Miles v. Walker, 179 N. C. 497, 102 S. E. 884.

Reasonable Time.—Where the controversy is made to depend upon whether the lessee is entitled to surrender the lease under its written terms, evidence that three days had elapsed or that one month or more had elapsed, upon the repairs necessary and the time the repairs were made, is sufficient to sustain an affirmative verdict that they were made in a reasonable time. Archibald v. Swearingen, 192 N. C. 476, 135 S. E. 896.

Where the terms of a lease fully provide for the rights of the parties upon destruction of the property by fire, such rights will be adjudged by the court according to the agreement, without reference to this section, or the common law. Grant v. Borden, 204 N. C. 415, 168 S. E. 492.

Damage Insufficient to Enable Lessee to Surrender Premises.—Carolina Mtg. Co. v. Massic, 205 N. C. 146, 183 S. E. 425.

§ 42-13. Wrongful surrender to other than landlord misdemeanor.—Any tenant or lessee of lands who shall willfully, wrongfully and with intent to defraud the landlord or lessor, give up the possession of the rented or leased premises to any person other than his landlord or lessor, shall be guilty of a misdemeanor. (Rev., s. 3682; Code, s. 1760; 1883, c. 138; C. S. 2336.)

§ 42-14. Notice to quit in certain tenancies.—A tenancy from year to year may be terminated by a notice to quit given one month or more before the end of the current year of the tenancy; a tenancy from month to month by a like notice of seven days; a tenancy from week to week, of two days. (Rev., s. 1984; Code, s. 1750; 1891, c. 227; 1908-9, c. 156, s. 9; C. S. 2354.)

Effect of Notice.—On May 18, 1897, a landlord gave a tenant from month to month notice "to get out within thirty days." The landlord had received the rent for May. It was held, that unless the rent had been paid, and as to June, because not ending with the month. Simmons v. Arman, 122 N. C. 199, 29 S. E. 332, cited in notes in 25 L. R. A., N. S., 857, 858.

Verbal Notice Sufficient.—A verbal notice by landlord to tenant is sufficient. Section 1-585 applies to a different class of notices. Poindexter v. Call, 182 N. C. 366, 109 S. E. 26. Tenancies at Will.—Where a person is put in possession of land by the owner, without any agreement for rent, and with an express provision that he shall quit when the owner may require him to do so, he is not a tenant at will. Where a tenant is originally put in possession as a tenant from year to year, and, after the commencement of a year, is there an express lease for a certain time and an agreement to quit at the end of that term, no notice of the tenancy will terminate the tenancy after such time. Williams v. Bennett, 26 N. C. 122.

Where one occupied land claiming it as his own, and, in possession was demanded refusal. It was held that he could not be held to have means to the judge, Heed v. Head, 52 N. C. 630, cited in note in 25 L. R. A., N. S., 405.
of the lease as far as the same may be applied to existing agricultural tenancies. Murrill v. Palmer, 164 N. C. 59, 80 S. E. 55; Holton v. Andrews, 151 N. C. 340, 66 S. E. 212; Harty v. Harris, 120 N. C. 408, 27 S. E. 90; Scheelk v. Koch, 119 N. C. 80, 21 S. E. 91; White v. Michael, 124 N. C. 291. But it is competent to rebut the presumption that he is a tenant from year to year by proof of a special agreement. Harris v. Harris, 120 N. C. 408, 27 S. E. 90.

Same Day Notice.—It was not error to charge the jury that, if the tenant leased the premises at five dollars per month and had held over several months, paying the same rent without any new agreement, he was a tenant from month to month, and entitled to fourteen days' (now seven days') notice to quit. Branton v. O'Briant, 93 N. C. 99.

Effect of Leaving Premises after Waiver of Notice.—A tenant from year to year, who waives his right to notice to quit, and goes out of possession, has no right to go back on the premises. Torrans v. Stricklin, 52 N. C. 50.

Different Agreement Not Prohibited.—This section does not preclude the parties from making a different agreement as to notice of intention to terminate tenancy. Cherry v. Whitehurst, 216 N. C. 340, 4 S. E. (2d) 909.

Art. 2. Agricultural Tenancies.

§ 42-15. Landlord's lien on crops for rents, advances, etc., enforcement.—When lands are rented or leased by agreement, written or oral, for agricultural purposes, or are cultivated by a cropper, unless otherwise agreed between the parties to the lease or agreement, any and all crops raised on said lands shall be deemed and held to be vested in possession of the lessor or his assigns at all times, until the rents for said lands are paid and until all the stipulations contained in the lease or agreement are performed, or damages in lieu thereof paid to the lessor or his assigns, and until said party or his assigns is paid for all advancements made and expenses incurred in making and saving said crops. A landlord, to entitle himself to the benefit of the lien herein provided for, must conform as to the prices charged for the advance to the provisions of the article Agricultural Liens, in the chapter Liens.

This lien shall be preferred to all other liens, and the lessor or his assigns is entitled, against the lessee or cropper, or the assigns of either, who removes the crop or any part thereof from the lands without the consent of the lessor or his assigns, or against any other person who may get possession of said crop or any part thereof, to the remedies given in an action upon a claim for the delivery of personal property.

Provided, that when advances have been made by the federal government or any of its agencies, to any tenant or tenants on lands under the control of any guardian, executor and/or administrator for the purpose of enabling said tenant or tenants to grow crops, and the crops grown on said land, the said guardian, executor, and/or administrator may waive the above lien in favor of the federal government, or any of its agencies, making said advances (Rev., s. 1928; Code, s. 1751; 1876-7, c. 283; 1917, c. 134; 1933, c. 219; C. 2353."

I. In General.

II. Lien of Lessor.

III. Possession and Title to Crop.

IV. Advancements.

V. Remedy of Lessor to Enforce Lien.

Cross References.

As to agricultural liens for advances, see § 44-52 et seq. As to laborer's crop lien date, see § 44-41. As to short form for lien in certain counties, see § 44-65.

I. IN GENERAL.

Editor's Note.—Public Laws 1933, c. 219, added the provisions now appearing in the section, the general effect of which is the summarization of the 1933 amendment, see 11 N. C. L. Rev., 265.

A Statutory Remedy.—In Howland v. Forlaw, 108 N. C. 597, 13 S. E. 73, the court held that the common-law remedy of a landlord for his crop is not a lien and that, except as specifically given by statute, a landlord has no lien on the product of the leased property for rent. Reynolds v. Taylor, 144 N. C. 165, 167, 56 S. E. 871.

Advances or Advances and Liens.—A statutory lien is only when lands are rented or leased for agricultural purposes. Reynolds v. Taylor, 144 N. C. 165, 167, 56 S. E. 871.

What "Crops" Include.—The words "crop raised" mean simply the crop grown or gathered during the year. The word "raised" appears nowhere else in the section, nor in succeeding sections, only the word "crops" is used. The Legislature had in mind no distinction between fructus industriales (products obtained by labor and cultivation) and fructus naturales (products which emanate from the power of nature alone), and therefore there is no need of any word "naturally grown" or the like. State v. Crooke, 123 N. C. 1053, 1056, 44 S. E. 32.

The section gives the landlord a lien for his rent "on any and all crops," that is, on all that is "raised, cut or gathered" in that season from his land. State v. Crooke, 123 N. C. 1053, 1057, 44 S. E. 32.

The operation of a mortgage or agricultural lien in respect to crops is confined to crops then or about to be planted, and when it is for expenses incurred in making and saving said crops. It is not to extend further than those planted in the season next after the execution of the instrument. Wooten v. Hill, 98 N. C. 49, 3 S. E. 846.

Same—Hay.—Hay is ordinarily embraced in the word "crops," as used in this section, because it naturally seems, when it is merely a spontaneous growth, as crab-grass, which sprang up after another crop is housed. State v. Crooke, 132 N. C. 1053, 1056, 44 S. E. 32.

What Constitutes One a Cropper.—An agreement by him who cultivates land that the owner who advances "guano, seed-wheat," etc., shall out of the crop be repaid in wheat for such advancements, constitutes the former a cropper, and not a tenant. State v. Burwell, 63 N. C. 561.

Cropper Has No Estate.—A cropper has no estate in the land, and his possession is that of the landlord. State v. Austin, 123 N. C. 740, 11 S. E. 731.

When Lessee Has Lien.—When a lessee sublets a part of the farm he becomes lessor to his sublessee and is entitled to the same lien on his crop which the statute gives a lessor. Moore v. Faison, 132 N. C. 52, 44 S. E. 71; Perry v. Perry, 127 N. C. 23, 37 S. E. 71; and therefore holds a prior lien to a mortgagor of the crops. Perry v. Perry, 127 N. C. 23, 37 S. E. 71. The lien of the original landlord is not, however, impaired. State v. Austin, 123 N. C. 740, 11 S. E. 731.

Agreements between Tenants.—Where A and B, tenants in common, agreed to make partition of lands and fix the boundaries, and A agreed that B should occupy the whole and pay to him a portion of the crop raised thereon, it was held, that although this was valid as an agreement for partition, it did not constitute a lease, so as to create the relationship of landlord and tenant between the parties. Medlin v. Steele, 75 N. C. 154.


II. LIEN OF LESSOR.

Landlord's Lien Superior.—The landlord's lien, where the same attaches, by the express terms of the statute is made to take precedence over that of any third person for advances, notwithstanding the priority of the latter in time. Sprull v. Arrington, 109 N. C. 12, 13 S. E. 779; Crinkley v. Egerton, 133 N. C. 444, 18 S. E. 669. And this presumption is to the extent of the advances made for the v. Hill, 98 N. C. 49, 3 S. E. 846. See Wise Supply Co. v. Davis, 194 N. C. 328, 139 S. E. 599.

A contract expressed and purporting to be a lease of lands for agricultural purposes, does not change the relationship of landlord and tenant between the parties upon
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the ground that if the amount of stipulated rent should be paid, and the landlord, before he had a right to credit upon the purchase of the land at a stated price, it not appearing that the transaction of the contemplated purchase had been made under option given; and that the landlord or one of his agents having validly assigned his lien may enforce his lien under this section in priority to the lien, under § 44-52, of one furnishing advancements for the cultivation of the crop. Wise Supply Co. v. Davis, 194 N. C. 359, 142 S. E. 599.

The landlord’s lien under this section does not attach to a crop made entirely in a year subsequent to that in which the crop was furnished to the tenant. Brooks v. Garrett, 195 N. C. 452, 142 S. E. 486.

The statutory landlord’s lien under this section is superior to that of one furnishing supplies to the tenant under § 44-52, and the landlord, with the landlord raises a certain crop, the lien for advancements attaches to such crop, and where the landlord has received the payment for the entire crop including the special crop under separate contract with the cropper and pays himself the amount due as rent, the lien for advancements attaches to the surplus and the holder of the lien may recover thereon from the landlord. Glover v. Dail, 194 N. C. 422, 142 S. E. 599.

Third Person Charged with Notice.—Every person who makes advancements to a tenant or cropper of another does so with the knowledge that the landlord has a lien that he may have on the tenant’s crop is preferred to all others, and the risk is his if the tenant does not satisfy the lien by complying with the contract and all stipulated obligations. Thigpen v. Maget, 107 N. C. 39, 46, 12 S. E. 272.

Same.—Caveat Emptor.—This section gives a landlord the title to the crop until the rent is actually paid (whether cash or crop, by state or personal), and such title is not impaired by the fact that the tenant conveys the crop to a third person, who takes without notice of the landlord’s claim. Rule caveat emptor applies. Belcher v. Grimes, 83 N. C. 88, 8 S. E. 185.

Liability to Other Lienholders.—A landlord is liable to account to persons who have a lien for supplies furnished for the value of such supplies furnishing the tenant, but not as lienholders. Crimble v. Egerton, 113 N. C. 142, 146, 18 S. E. 341.

Liability of Landlord for Marketing of Tenant’s Tobacco.—The landlord and tenant act (this section) gives the landlord a lien on the tenant’s crop until a division has been made and the share of the landlord had been set apart to him in severalty. Deaver v. Rice, 20 N. C. 567; Gordon v. Armstrong, 27 N. C. 409; Suggs v. Forlaw, 91 N. C. 659, 18 S. E. 98; Howland v. Forlaw, 108 N. C. 567, 569, 13 S. E. 173.

Section Applies Only to Landlord and Tenant.—Except in the case of land and tenant provided for specifically by this section, the lessor has no lien upon the product of the leased property as rent; it is for all purposes, until division, deemed vested in the tenant, and his sale to third persons before the rent is paid and advancement set apart constitutes good title. Howland v. Forlaw, 108 N. C. 567, 13 S. E. 173.

Where the occupant of land is a vendees or mortgagee of its owner, although he may for some purposes consider a tenant at will at the time of sale, at the time of sale, the improvements of this section, is vested in the landlord. Taylor v. Taylor, 112 N. C. 27, 16 S. E. 924.

Vested in Lessor.—All crops raised on the land, whether by tenant or cropper, are by this section deemed to be vested in the landlord, in the absence of an agreement to the contrary, until the rents and advancements are paid. State v. Austin, 123 N. C. 749, 31 S. E. 731; Smith v. Tindall, 107 N. C. 88, 12 S. E. 121; Batts v. Sullivan, 182 N. C. 127, 108 S. E. 111; Rhoads v. Smith-Douglass Fertilizer Co., 230 N. C. 21, 16 S. E. (2d) 408.

Same.—For His Protection.—For the lessor’s protection, as between him and the tenant, the possession of the crop is deemed vested in the lessor. State v. Higgins, 126 N. C. 1112, 36 S. E. 113.

Lessor May Use Force.—An attempt to appropriate and carry off the crop may be repelled by the landlord by force, provided no more force is used than is necessary to protect his possession. State v. Austin, 123 N. C. 749, 31 S. E. 731.

Actual Possession in Tenant.—Though the constructive possession of the crop is vested by statute in the landlord, yet, during the cultivation, and for all purposes of making and gathering the crop, the actual possession is in the tenant until the rent is paid and advancement set apart, or until such time as a division shall be made. State v. Copeland, 86 N. C. 692, 694.

Same.—May Maintain Action.—As against third parties the tenant may maintain an action in possessio both of the land and crop while it is being cultivated, and he may maintain an action in his own name for any injury thereto. Bridgers v. Dill, 97 N. C. 222, 1 S. E. 767. And the ownership of the crop is well recognized as his in the indictment. State v. Higgins, 126 N. C. 1112, 36 S. E. 113.

But in Desert Salt Co. v. Tarpey, 142 U. S. 241, 245, 31 S. Ct. 158, 35 L. Ed. 599, it was stated, as follows: "The
Tenant Has Insurable Interest.—That the possession and title to the crop are deemed vested in the landlord does not divest the tenant of an insurable interest in the crops before the crops have been harvested. "It is well settled that any person has an insurable interest in property by the existence of which he may gain an advantage, or by the destruction of which he will suffer a loss. 'Tis not that he has an interest in the crop, or any part of it, he becomes liable civilly and criminally. Jordan v. Bryan, 103 N. C. 59, 9 S. E. 135.

When Action Lies.—The action will lie, not only where the crops are removed from the land leased, but also in a case where the tenant or cropper, or any other person, takes the crops into his absolute possession and denies the right of the landlord thereto. Livingston v. Farish, 89 N. C. 140.

Collusion and Fraud.—Where landlord and tenants under a contract of sale entered into, or any other contract with his lessee, precluded the landlord's protection, and it cannot, either by the terms of the statute or by any fair construction, be resorted to before the time fixed for division, unless the tenant is about to remove the crop from the land leased, or from the land of which he has obtained possession under the contract; otherwise, the tenant might be sued for parcel of the crop as it was gathered. Neither the language nor the spirit of the statute permits this. Jordan v. Bryan, 103 N. C. 59, 65, 9 S. E. 135.

Not a Personal Property Exemption.—The right to enforce the landlord's lien cannot be defeated by the lessee's claiming the crop as a part of his personal property exemption. Durham v. Speck, 113 N. C. 172.

Action against Tenant by Third Party.—In an action against a tenant to recover damages for his failure to deliver a crop under his contract of sale, the defense that the tenant had paid in advance and that his contract was therefore illegal, is not available, when it is shown that the landlord had consented to the sale and had thereafter taken possession of the crop at the tenant's request. Lee v. Melton, 174 N. C. 794, 91 S. E. 997.

Lessee can of course, as against strangers, have no greater right of possession than his lessor.

Tenant's Liability.—If the tenant, at any time before satisfaction of the landlord's lien, takes the crops into his absolute possession and denies the right of the landlord thereto. Livingston v. Farish, 89 N. C. 140.

Tenants' Liability.—If the tenant, at any time before satisfaction of the landlord's lien, takes the crops into his absolute possession and denies the right of the landlord thereto. Livingston v. Farish, 89 N. C. 140.

Tenant's Remedy.—That the tenant's liability is not terminated by his being sued for the possession of the crop; otherwise, the tenant might be sued for parcel of the crop as it was gathered. Neither the language nor the spirit of the statute permits this. Jordan v. Bryan, 103 N. C. 59, 65, 9 S. E. 135.

Not a Personal Property Exemption.—The right to enforce the landlord's lien cannot be defeated by the lessee's claiming the crop as a part of his personal property exemption. Durham v. Speck, 113 N. C. 172.
§ 42-17. Action to settle disputes between parties.—When any controversy arises between the parties, and neither party avails himself of the provisions of this chapter, it is competent for either party to proceed at once to have the matter determined in the court of a justice of the peace, if the amount claimed is two hundred dollars or less, or in the superior court of the county where the property is situated if the amount so claimed is more than two hundred dollars. (Rev., s. 1995; Code, s. 1756; 1876-7, c. 283, s. 3; C. S. 2337.)

Editor’s Note.—This and the following section were formerly part of the same section and should be read together. This should be noted in considering the following annotations.

In General.—It is quite apparent that this and the following section contemplate an action to determine a dispute growing out of the agreement, and the rights of one without the possession of the lessee, cropper or assignee of either, and this intent is very clearly expressed in the terms used in the enactment. It is a method of settling a controversy without resort to any possessory actions authorized in the antecedent sections. Wilson v. Respass, 86 N. C. 112, 115.

Purpose.—The purpose of the section is to provide a summary mode for ascertaining a disputed liability, and, in case of delay, to secure the fruits of the judgment by requiring of the lessee, as a condition of his remaining in possession, to put the holder of the judgment in the enjoyment of what may be recovered. Deloatch v. Coman, 90 N. C. 185, 188.

No Application to Vendee.—This and the following sections, like section 43-15, are plainly inapplicable where the occupant of land is a vendee or mortgagee. Taylor v. Taylor, 112 N. C. 27, 31, 16 S. E. 924.

§ 42-18. Tenant’s undertaking on continuance or appeal.—In case there is a continuance or an appeal from the justice’s decision to the superior court, the lessee or cropper, or the assigns of either, shall be allowed to retain possession of said property upon his giving an undertaking to the lessor or his assigns, or the adverse party, in a sum double the amount of the claim, if such claim does not amount to more than the value of such property, otherwise to double the value of such property, with good and sufficient surety, to be approved by the justice of the peace or the clerk of the superior court, conditioned for the faithful payment to the adverse party of such damages as he shall recover in said action. (Rev., s. 1995; Code, s. 1756; 1876-7, c. 283, s. 3; C. S. 2338.)

§ 42-19. Crops delivered to landlord on his undertaking.—In case the lessee or cropper, or the assigns of either, at the time of the appeal or continuance mentioned in § 42-18, fails to give the undertaking therein required, then the constable or other lawful officer shall deliver the property into the actual possession of the lessor or his assigns, upon the lessor or his assigns giving to the adverse party an undertaking in double the amount of said property, to be justified as required in § 42-18, conditioned for the forthcoming of such property, or the value thereof, in case judgment is pronounced against him. (Rev., s. 1996; Code, s. 1757; 1876-7, c. 283, s. 4; C. S. 2359.)

Court Will Not Restrain Lessor.—Where the lessor has taken possession of the crop, and is solvent and has been required to give the bond of indemnity, the court will not restrain him from selling the crop. Wilson v. Respass, 86 N. C. 112. In such a case it seems that the tenant cannot lose any possession of the crop, and the crop is in the possession of the lessor 42-18 since that section contemplates non-intervention on the part of the court and not a removal of possession from one party to another. Id.

§ 42-20. Crops sold, if neither party gives undertaking.—If neither party gives the undertaking described in § 42-18 and § 42-19, it is the duty of the justice of the peace or the clerk of the superior court to issue an order to the constable or sheriff, or other lawful officer, directing him to take into his possession all of said property, or so
much thereof as may be necessary to satisfy the claimant's demand and costs, and to sell the same under the rules and regulations prescribed by law for the sale of personal property under execution, and to hold the proceeds thereof subject to the decision of the court upon the issue or issues pending between the parties. (Rev., s. 1997; Code, s. 1758; 1876-7, c. 283, s. 5; C. S. 2360.)

§ 42-21. Tenant's crop not subject to execution against landlord.—Whenever servants and laborers in agriculture shall by their contracts, oral or written, be entitled, for wages, to a part of the crops cultivated by them, such part shall not be subject to sale under executions against their employers, or the owners of the land cultivated. (Rev., s. 1998; Code, s. 1796; C. S. 2361.)

§ 42-22. Unlawful seizure by landlord or removal by tenant misdemeanor.—If any landlord shall unlawfully, willfully, knowingly and without process of law, and unjustly seize the crop of a tenant when there is nothing due him, he shall be guilty of a misdemeanor. If any lessee or cropper, or the assignees of either, or any other person, shall remove a crop, or any part thereof, from land without the consent of the lessor or his assigns, and without giving him or his agent five days notice of such intended removal, and before satisfying all the liens held by the lessor or his assignees, on said crop, he shall be guilty of a misdemeanor. (Rev., ss. 3664, 3665; Code, s. 1793; 1876-7, c. 283, s. 6; 1883, c. 83; C. S. 2362.)

I. In General. II. The Indictable Act. III. The Intent. IV. Notice. V. The Indictment.

I. IN GENERAL. Purpose of Section.—The leading and material part of the purpose is to keep the crops on the land, so that they may be easily seen, known, identified and protected, and to prevent fraud and fraudulent practices that would be greatly facilitated by preventing crops from being kept on the land, as is required by the statute. State v. Williams, 106 N. C. 646, 648, 10 S. E. 901. The purpose of this section is to render the statutory provisions and regulations of the preceding sections more effective. The section is not intended to confer or give any right or privilege that light and in that view. It embraces both the landlord and the tenant, and intends the more effectually to secure their respective rights as prescribed. State v. Ewing, 106 N. C. 755, 757, 11 S. E. 10.

Applies Only to Specified Liens.—It will be observed that the section does not extend to, and embrace, all liens the landlord. State v. Williams, 106 N. C. 646, 648, 10 S. E. 901. The gathering and preservation of crops was not the evil intended by the statute in severing the crops from the land and storing them on it simply for the purpose of protecting them has been doubted, but it has been held that he may do so in good faith for such purpose; he may not go beyond the statute in severing the crop to his own use, by feeding it to his stock without the consent of the landlord, this was a removal within the meaning of this section and indictable. Varner v. Spencer, 72 N. C. 381.

Extends to Receivers.—This section extends to and protects receivers charged with the management of lands. State v. Turner, 106 N. C. 693, 695, 10 S. E. 1025. The lessor's rights cannot be abridged by any statute. Varner v. Spencer, 72 N. C. 381; State v. Powell, 84 N. C. 921.

Implied from the Act. — The statute broadly forbids the removal of the crops, or any part of them, from the land, except in the case and in the way prescribed, and that without regard to the actual intent. The removal implies the intent in making the removal is material. State v. Williams, 106 N. C. 646, 10 S. E. 901; State v. Crook, 132 N. C. 615, 615, 44 S. E. 32.

II. THE WRONGFUL ACT. A Misdemeanor Only. — The offense of removing crops, without payment, or giving notice of such removal, although it may have been committed secretly, or at night, is a simple misdemeanor, and cannot be punished by imprisonment in the penitentiary. State v. Turner, 106 N. C. 691, 693, 10 S. E. 1026.

Actual Seizure Unnecessary. — To constitute the offense of an unlawful seizure of crops by the landlord, under this section, it is not essential that the landlord should take forcible or, even manual possession of them; the offense will be complete if he exercises that possession or control which prevents the tenant from gathering and removing his crop in a peaceable manner. State v. Ewing, 106 N. C. 755, 11 S. E. 10.

Possession Important. — An indictment for larceny will not lie against a lessee or cropper for secretly appropriating the crop to his own use, even if done with a felonious intent, where he is in the actual possession of the same. State v. Copeland, 132 N. C. 621, 132 S. E. 855. The indictment for larceny will lie against a lessee or cropper for secretly appropriating the crop to his own use, where his actual possession thereof has terminated by a delivery to the landlord. State v. King, 98 N. C. 648, 4 S. E. 44.

Gathering the Crop. — How far the tenant might be justified under the statute in severing the crops from the land and storing them on it simply for the purpose of protecting them has been doubted, but it has been held that he may do so in good faith for such purpose; he may not go beyond the statute in severing the crop to his own use, by feeding it to his stock without the consent of the landlord, this was a removal within the meaning of this section and indictable. Varner v. Spencer, 72 N. C. 381.

Without Notice.—An averment in an indictment for removing a crop, "without having given any notice of such intended removal" is equivalent to the averment that the tenant removed the crop without giving "five days' notice." State v. Powell, 94 N. C. 921.

Burden of Proof. — In order to convict the defendant of the offense of removing a crop without the consent of the landlord, the burden is on the State to show that the defendant had not given his landlord the statutory five days'
previous notice before the crop had been removed. State v. 
Fouchee, 117 N. C. 766, 767, 23 S. E. 247.

2. Where a tenant in possession of real estate 
holds over after his term has expired.

3. When any tenant or lessee of lands or ten-
ements, who is in arrear for rent or has agreed 
to cultivate the demised premises and to pay a 
lien on such crop as a security for the rent, desert the 
demised premises, and leaves them unoccupied and 
cultivated. (Rev., s. 2001; Code, ss. 1766; 1777; 4 Geo. II, 
c. 28; 1868-9, c. 156, s. 19; 1905, cc. 297, 299, 830; C. S. 345.)

Local Modification.—Johnston: 1933, c. 390.

I. Application and Scope.

II. Holding Over.

III. Breach of a Provision of Lease.

IV. Rights of the Parties.

V. The Action.

This section shall only apply to the counties of 
Anson, Ashe, Bladen, Brunswick, Columbus, Cumber-
land, Duplin, Gaston, Hoke, Lincoln, Fender, 
Robeson, Sampson, and Yadkin. (Pub. Loc. 1939, c. 40; Pub. 
Loc. 1935, c. 288; Pub. Loc. 1937, cc. 96, 600; Pub. Loc. 1941, 
c. 41; 1945, c. 68.)

§ 42-24. Turpentine and lightwood leases.—This chapter shall apply to all leases or contracts to lease turpentine trees, or use lightwood for pur-
poses of making tar, and the parties thereto shall be fully subjected to the provisions and penalties of 
this chapter. (Rev., s. 1999; Code, s. 1762; 1893, c. 517; 1876-7, c. 283; 7; C. S. 2363.)

Extension of Section 42-22.—This section extends sec-
tion 42-22 to "all leases or contracts to lease turpentine 
trees," and thus it is made a misdemeanor for the lessee of 
turpentine trees to remove any part of the turpentine crop 
in the like case as when the removal of the crop by an 
агricultural tenant is made such offense. State v. Turner, 
106 N. C. 691, 692, 10 S. E. 1026.

Cited in Farmville Oil, etc., Co. v. Bourne, 205 N. C. 
337, 339, 171 S. E. 368.

§ 42-25. Mining and timber land leases.—If in 
a lease of land for mining, or of timbered land 
for the purpose of manufacturing the timber into 
goods, rent is reserved, and if it is agreed in 
the lease that the minerals, timber or goods, or any portion thereof, shall not be removed until the payment of the rent, in such case the lessor shall 
have the rights and be entitled to the remedy 
given by this chapter. (Rev., s. 2000; Code, s. 
1763; 1868-9, c. 156, s. 16; C. S. 2364.)

Not a Lease.—Where the owner of lands conveys the 
timber standing and growing thereon, with provision that the 
timber for cutting and removing it will be extended upon 
payment of a certain sum, this is not a leasehold interest 
but an estate in fee. Carolina Timber Co. v. Wells, 171 N. 
C. 262, 83 S. E. 337.

Art. 3. Summary Ejectment.

§ 42-26. Tenant holding over may be disposed 
dissolved in certain cases.—Any tenant or lessee of 
any house or land, and the assigns under the 
tenant or legal representatives of such tenant or 
lessee, who holds over and continues in the pos-
session of the demised premises, or any part 
thereof, without the permission of the landlord, 
and after demand made for its surrender, may 
be removed from such premises in the manner 
hereinafter prescribed in any of the following 
cases:

1. When a tenant in possession of real estate 
holds over after his term has expired.

2. When the tenant or lessee, or other person 
under him, has done or omitted any act by which, 
according to the stipulations of the lease, his 
estate has ceased.

3. When any tenant or lessee of lands or ten-
ements, who is in arrear for rent or has agreed 
to cultivate the demised premises and to pay 
a part of the crop to be made thereon as rent, 
or who has given to the lessor a lien on such 
crop as a security for the rent, desert the 
demised premises, and leaves them unoccupied and 
cultivated. (Rev., s. 2001; Code, ss. 1766; 1777; 4 Geo. II, 
c. 28; 1868-9, c. 156, s. 19; 1905, cc. 297, 
299, 830; C. S. 345.)

Local Modification.—Johnston: 1933, c. 390.

I. Application and Scope.

II. Holding Over.

III. Breach of a Provision of Lease.

IV. Rights of the Parties.

V. The Action.
I. APPLICATION AND SCOPE.

The basis and scope of summary ejectment actions in actions between landlord and tenant are established by this section. Warren v. Breedlove, 219 N. C. 383, 387, 14 S. E. (2d) 43. Rights of Landlord to Tenancy in Possession—The summary remedy in ejectment provided by this section for the ousting of tenants who hold over after the expiration of the term is restricted to cases where the relation between the landlord and tenant is that of landlord and tenant. Looney v. Jordan, 146 N. C. 248, 59 S. E. 693; McCombs v. Wallace, 66 N. C. 481; Hughes v. Mason, 84 N. C. 473; McIver v. Seaboard Air Line R. Co., 163 N. C. 544, 545, 79 S. E. 1107. This section sets up in summary ejectment the relationship of landlord and tenant, and when title to the property is in issue, the jurisdiction of the court of justice in ejectment is properly dispensed with in case of nonsuit upon appeal to the Superior Court. Frudential Ins. Co. v. Totten, 203 N. C. 431, 16 S. E. (2d) 316.

Summary ejectment will lie only where the relationship of landlord and tenant existed between the parties under a lease, contract, express or implied, and the tenant has held over after the expiration of the term, and while it is necessary that the tenant's entry should have been under a demise, it need not be for a definite term, a tenancy at will being sufficient. Simons v. Leburn, 219 N. C. 42, 12 S. E. (2d) 644.

Not Coextensive with Doctrine of Estoppel.—The remedy by summary proceedings in ejectment given by this section is not the same as the court of general jurisdiction, where one enters and holds land under another, but is restricted to the case where the relation between the parties is simply that of landlord and tenant. McLaurin v. McIntyre, 167 N. C. 350, 83 S. E. 627; Hauser v. Morrison, 146 N. C. 248, 249, 59 S. E. 693.

Some Contract or Lease Required.—This section was only intended to provide an equitable remedy in ejectment, where the tenant entered into possession under some contract or lease, either written or implied, with the supposed landlord, or with some person under whom the landlord claimed in privity, or where the tenant entered into possession with some person who had so entered. McCombs v. Wallace, 66 N. C. 481.

Where Purchase Changed to Lease.—Where one unconditionally surrenders his rights under the contract of purchase and enters into the possession of the land, he may be evicted by summary proceedings under this section; and it is not necessary that he should actually surrender the possession of the land to the lessee at the hands of the lessor. Riley v. Jordan, 75 N. C. 180.

Two Classes Excluded.—The construction of this section excludes the operation of the act two classes, viz., tenants at will where the tenancy entered into possession under some contract or lease, either written or implied, with the supposed landlord, or with some person under whom the landlord claimed in privity, or where the tenant entered into possession with some person who had so entered. McCombs v. Wallace, 66 N. C. 481.

When Section Does Not Apply.—The remedy by summary ejectment before a justice of the peace, under this section et seq., is not available when there is a relation of mortgagor and mortgagee, or vendor and vendee.

Where a verbal lease does not provide for its termination by payment of relatively a reduction in the rental price fixed by his contract, he must prove that such eviction was caused by the plaintiff, or one acting under his authority, or one paying relatively a reduction in the rental price fixed by his contract, acceptance of rent by the landlord which is not coextensive with the doctrine of estoppel arising out of contract, express or implied, and the tenant has held over after the expiration of the term, and while it is necessary that the tenant's entry should have been under a demise, for instance, when title to the property is in issue, the jurisdiction of the court of justice in ejectment is properly dispensed with in case of nonsuit upon appeal to the Superior Court. Frudential Ins. Co. v. Totten, 203 N. C. 431, 16 S. E. (2d) 316.

When Payment of Rent Does Not Operate.—It seems that it is not a wrongful holding over when the tenant has been compelled to continue his occupation of necessity; for instance, when the tenant has paid rent after the expiration of the term, and while it is necessary that the tenant's entry should have been under a demise, for instance, when title to the property is in issue, the jurisdiction of the court of justice in ejectment is properly dispensed with in case of nonsuit upon appeal to the Superior Court. Frudential Ins. Co. v. Totten, 203 N. C. 431, 16 S. E. (2d) 316.

Effect of Recognition. The landlord may treat his tenant, who holds over, as a trespasser and eject him, or he may recognize him as tenant; but when such recognition is given, and the tenant acts in possession solely by reason of the necessity of holding over, the landlord is entitled to the use of such a character that removal could not be presently made without serious danger to the patient. Murrill v. Palmer, 164 N. C. 50, 54, 89 S. E. 55.

III. BREACH OF A PROVISION OF LEASE.

Condition Must Be in Lease.—A summary proceeding in ejectment is not the proper remedy when the lessee's term cannot be maintained where the contract of lease contained no condition, the breach of which would authorize a re-entry by the lessor. The mere failure to pay rent upon "a lease at dollars a year, paying relatively a reduction in the rental price fixed by his contract, he must prove that such eviction was caused by the plaintiff, or one acting under his authority, or one paying relatively a reduction in the rental price fixed by his contract, acceptance of rent by the landlord which is not coextensive with the doctrine of estoppel arising out of contract, express or implied, and the tenant has held over after the expiration of the term, and while it is necessary that the tenant's entry should have been under a demise, for instance, when title to the property is in issue, the jurisdiction of the court of justice in ejectment is properly dispensed with in case of nonsuit upon appeal to the Superior Court. Frudential Ins. Co. v. Totten, 203 N. C. 431, 16 S. E. (2d) 316.

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Suit for Rescission Cannot Be Sustained on Appeal. —Where one enters into possession under a lease, or reserve the right of re-entry for breach of the terms of the lease, the lessee cannot maintain actions in ejectment against the landlord for breach of such terms, and the action must be brought by the lessee before the lease expires. McKinnon v. Seaboard Air Line R. Co., 163 N. C. 544, 545, 79 S. E. 1107; McDonald v. Ingram, 124 N. C. 272, 274, 32 S. E. 677.


IV. RIGHTS OF THE PARTIES.

Tenant May Dispute Assignment.—A tenant cannot dispute the title of his landlord but where an action of ejectment is brought by one claiming to be an assignee of the landlord, the tenant may dispute the assignment. Readman v. Jones, 65 N. C. 388, 391.
§ 42-27. Local: Refusal to perform contract for ground for dispossession.—When any tenant or cropper who enters into a contract for the rental of land for the current or ensuing year willfully neglects or refuses to perform the terms of his contract, the owner of the land may recover the possession of the premises. This section applies only to the following counties: Alleghany, Anson, Beaufort, Bertie, Bladen, Brunswick, Burke, Cabarrus, Camden, Carteret, Caswell, Chatam, Chowan, Cleveland, Columbus, Craven, Cumberland, Currituck, Davidson, Duplin, Edgecombe, Franklin, Gaston, Gates, Greene, Guilford, Halifax, Harnett, Hertford, Hoke, Hyde, Jackson, Johnston, Jones, Lenoir, Martin, Mecklenburg, Montgomery, Nash, Northampton, Onslow, Pasquotank, Pender, Perquimans, Pitt, Polk, Randolph, Robeson, Rockingham, Rowan, Rutherford, Sampson, Swain, Tyrrell, Union, Wake, Wayne, Washington, Wilson, Yadkin, Moore, Surry and Stokes. (Rev. s. 2001, subsec. 4; Code, s. 1766, 1777; 4 Geo. II, c. 26; 1869-70, s. 19; 1905, c. 297, 299, 320; 1907, c. 45, s. 153; 1909, c. 40, 550; Pub. Loc. Ex. Sess. 1924, c. 66; 1931, c. 50, 194, 446; 1933, c. 56, 485; 1935, c. 39; 1943, c. 69, 115, 459; C. S. 2366.)

Editor's Note.—The Acts of 1931 added Moore, Rutherford, Stokes and Surry counties to this section. Public Laws 1933, c. 86, 485, added Pasquotank and Polk counties to this section, although Pasquotank had already been added by chapter 66 of the Public-Law Local Laws of the 1924 Extra Session.

Public Laws 1935, chapter 39 added Guilford to the list of counties to which this section is applicable. The 1943 amendments made this section applicable to Hoke, Brunswick and Davie counties.

§ 42-28. Summons issued by justice on verified complaint.—When the lessor or his assigns, or his or her agent or attorney, makes oath in writing, before any justice of the peace of the county in which the demised premises are situated, stating such facts as constitute one of the cases described in § 42-26 and § 42-27, and describing the premises and asking to be put in possession thereof, the justice shall issue a summons reciting the substance of the oath, and requiring the defendant to appear before him or some other justice of the county, at a certain place and time (not to exceed five days from the issuing of the summons) to be determined by the court, and if the same be found for the plaintiff, an estoppel of the defendant to appear before him or some other justice of the county, at a certain place and time (not to exceed five days from the issuing of the summons, without the consent of the plaintiff or his agent or attorney), to answer the complaint. The plaintiff or his agent or attorney may in his oath claim rent in arrear, and damage for the occupation of the premises since the cessation of the tenancy of the lessee: Provided, the sum claimed shall not exceed two hundred dollars; but if he omits to make such claim, he shall not be thereby prejudiced in any other action for their recovery. (Rev. s. 2002; Code, s. 1767; 1868-9, c. 156, s. 20; 1869-70, c. 212; C. S. 2367.)

When Defendant Denies Tenancy.—In a proceeding before a justice of the peace under this section, where the defendant denies the alleged tenancy, it is the duty of the justice to require and try the issue of tenancy. Foster v. Perry, 77 N. C. 160.

Question of Jurisdiction.—The question of jurisdiction is not to be determined by matter set up in the answer, but the issues in the case of the existence of the tenancy and the burden of proving that the tenancy has terminated is on the plaintiff. Poindexter v. Call, 182 N. C. 366, 109 S. E. 26.

Evidence.—See Hargrove v. Cox, 180 N. C. 360, 104 S. E. 757.
§ 42-29. Service of summons.—The officer receiving such summons shall immediately serve it by the delivery of a copy to the defendant or by leaving a copy at his usual or last place of residence, with some adult person, if any such be found there; or, if the defendant has no usual place of residence in the county and cannot be found therein, by fixing a copy on some conspicuous part of the premises claimed. (Rev., s. 2003; Code, s. 1768; 1868-9, c. 156, s. 21; C. S. 2368.)

§ 42-30. Judgment by default or confession.—The summons shall be returned according to its tenor, and if on its return it appears to have been duly served, and if the defendant fails to appear, or admits the allegations of the complaint, the justice shall give judgment that the defendant be removed from, and the plaintiff be put in possession of, the demised premises; and if any rent or damages for the occupation of the premises after the cessation of the estate of the lessee, not exceeding two hundred dollars, be claimed in the oath of the plaintiff as due and unpaid, the justice may find the fact to be. (Choate Rental Co. v. Justice, 211 N. C. 54, 188 S. E. 609.)

Tenant May Hold after Adverse Judgment.—Where both plaintiff and an interpleading third party claim to be landlords of the defendant, if a judgment by default is taken against the tenant, no writ of possession can issue until the determination of the controversy between the plaintiff and the interpleading defendant. Rollins v. Rollins, 76 N. C. 264.

Same.—When Evicted.—If in an action for the recovery of real estate in which a third person claiming as landlord of the defendant has been made a party defendant, judgment is taken against the tenant defendant and he is evicted, he retains the rights of a tenant under the instrument of writing required in actions in summary ejectment, it does not provide an exception to the requirement of § 1-57, that "every action must be prosecuted in the name of the real party in interest." (Rev., s. 2004; Code, s. 1779; 1868-9, c. 156, s. 22; C. S. 2370.)

Effect of Provision for Renewal.—A provision for renewal in a lease is not itself a renewal so as to vest an estate, yet it gives an equity which may be set up as a defense in a summary proceeding in ejectment. (McAdoo v. Callum Bros. & Co., 86 N. C. 419.)

Typographical Error.—The section is, however, subject to the common law rule that the landlord and tenant or a lessee and the lessor are not bound by the acquiescence of either in a lease or renewal clause, for the reason that the landlord and tenant or lessee and lessor are not parties to such a clause but are bound only by the contract of lease as actually executed. (Rev., s. 2005; Code, s. 1775; 1868-9, c. 156, s. 23; C. S. 2370.)

Cross Reference.—As to jury trial in the court of a justice of the peace, see § 7-150 et seq.

§ 42-31. Trial by justice; jury trial; judgment; execution.—If the defendant by his answer denies any material allegation in the oath of the plaintiff, the justice shall hear the evidence and give judgment as he shall find the facts to be. If either party demands a trial by jury, it shall be granted under the rules prescribed by law for other trials by jury before a justice; and if the jury finds that the allegation in the plaintiff's oath, which entitles him to be put in possession, is true, the justice shall give judgment that the defendant be removed from and the plaintiff put in possession of the demised premises, and also for such rent and damages as shall have been assessed by the jury, and for costs; and shall issue his execution to carry the judgment into effect. (Rev., s. 2005; Code, s. 1770; 1868-9, c. 156, s. 23; C. S. 2370.)

§ 42-32. Damages assessed to trial.—On appeal to the superior court, the jury trying the issue joined shall assess the damages of the plaintiff for the detention of his possession to the time of the trial in that court, and judgment for the rent in arrear and for the damages assessed may, on motion, be rendered against the sureties to the appeal. (Rev., s. 2006; Code, s. 1775; 1868-9, c. 156, s. 28; C. S. 2371.)

§ 42-33. Rent and costs tendered by tenant.—If, in any action brought to recover the possession of demised premises upon a forfeiture for the nonpayment of rent, the tenant, before judgment given in such action, pays or tenders the rent due and the costs of the action, all further proceedings in such action shall cease. If the plaintiff further prosecutes his action, and the defendant pays into court for the use of the plaintiff a sum equal to that which shall be found to be due, and the costs, to the time of such payment, or to the time of a tender and refusal, if one has occurred, the defendant shall recover from the plaintiff all subsequent costs; the plaintiff shall be allowed to receive the sum paid into court for his use, and the proceedings shall be stayed. (Rev., s. 2007; Code, s. 1773; 4 Geo. II, c. 25, s. 4; 1868-9, c. 156, s. 29; C. S. 2372.)

To Protect Tenant.—This section was passed in the interest of the tenant. A landlord could bring an action after demand as required by the statute, when each installment of rent was due. The tenant had to pay the rent and cost
before judgment or get out. This section was to protect
the tenant from hasty eviction, at the same time the land-

§ 42-34. Undertaking on appeal; when to be in-
creased.—Either party may appeal from the judg-
ment of the justice, as prescribed in other cases of
appeal from the judgment of a justice; upon ap-
peal to the superior court either plaintiff or de-
defendant may demand that the same shall be tried
at the first term of said court after said appeal is
docketed in said court, and said trial shall have
precedence in the trial of all other cases, except
the cases of exceptions to homesteads: Provided,
that said appeal shall have been docketed at least
ten days prior to the convening of said court:
Provided, further, that the presiding judge, in his
discretion, may take up for trial in advance any
pending case in which the rights of the parties
or the public requirement require a trial com-
mending the removal of a defendant from the
possession of the demised premises shall be sus-
pected until the defendant gives an undertak-
ing in an amount not less than one year's rent
of the premises, with sufficient surety, who shall
justify and be approved by the justice, to be void
if the defendant pays any judgment which in that
or any other action the plaintiff may recover for
rent, and for damages for the detention of the
land. At any term of the superior court of the
county in which such appeal is docketed after
the lapse of one year from the date of the filing
of the undertaking above mentioned, the tenant
and sureties may be taken up for trial. Where a
defendant has been duly exe-
cuted on him, may be required to show cause
why said undertaking should not be increased to
an amount sufficient to cover rents and damages
for such period as to the court may seem proper,
and if such tenant fails to show proper cause and
does not file such bond for rents and damages as
the court may direct, or make affidavit that he
is unable so to do and show merits, his appeal
shall be dismissed and the judgment of the jus-
tice shall be affirmed. (Rev., s. 2009; Code, s.
17-150, c. 155, s. 25; 1883, c. 316; 1921, c. 90; Fx. Sess., 1924, c. 17; 1923, c. 154;
1937, c. 294; C. 2-735.)

Local Modification.—Burke: Pub. Lee, 1927, c. 57, Davie,
Granville, Iredell, Mecklenburg, Swain, Watauga: C. 2573.
Justice Has Discretion as to Surety.—On an application
to a justice of the peace for a suspension of execution after
a recovery has been had against a tenant, his justice has a
discretion as to the sufficiency of the surety, which a judge
will not review, in the absence of any suggestion that the
justice acted dishonestly or capriciously. Steadman v.
Jones, 65 N. C. 388.

Power to Increase Bond.—If the bonds should become im-
paired or if the litigation should become protracted to
such an extent as to require additional security to protect
the plaintiffs in their rents, then under this section the
superior court can require additional security. Feath-
ernote v. Carr, 122 N. C. 800, 802, 44 S. E. 592.

Not only is it within the jurisdiction and power of the
superior courts to have the bonds increased or strengthened,
but under their general powers in equity, outside of that
section, if they are of a quasi-judicial nature or if their power
must be shown by proper averment and proof, or an action
against the sureties will be premature. Blackmore v. Wind-
ers, 144 N. C. 212, 67 S. E. 874.

Judgment Prior to Action on Bond.—A bond, with sure-
ty conditioned upon the payment of any judgment given in
summary proceedings in ejectment, makes the obtaining of
the judgment a condition precedent to a recovery thereon
against the sureties; and the obtaining of such a judgment
must be shown by proper averment and proof, or an action
against the sureties will be premature. Blackmore v. Wind-
ers, 144 N. C. 212, 67 S. E. 874.

Precedence in Trial.—An appeal from the judgment of a
Justice in the trial of all other cases, except those involving exceptions to homesteads, is entitled to the prece-
dence in the trial of the term of the superior court commencing next
after the docketing of the appeal. Roediger v. Sapos, 217 N. C.
95, 6 S. E. (2d) 801.

§ 42-35. Restitution of tenant, if case quashed, etc., on appeal.—If the proceedings before the jus-
tice are brought before a superior court and quashed, or judgment is given against the plaintiff,
the superior or other court in which final judg-
mence is given shall, if necessary, restore the de-
defendant to the possession, and issue such writs
as are proper for that purpose. (Rev., s. 2009;
Code, s. 17-150, c. 155, s. 25; 1883, c. 316;
1921, c. 90; Fx. Sess., 1924, c. 17; 1923, c. 154;
1937, c. 294; C. 2-735.)

When Writ Given.—When a party is put out of possession
of land, or compelled to pay money, under a judgment which
is afterwards reversed or set aside, the court will restore the
party to the possession, and order the judgment to be set
aside at the time of the Superior Court commencing next
after the docketing of the appeal. Lytle v. Lyle, 94 N. C.
522.

A Part of the Judgment.—Whenever a party is put out of
possession by process of law, and the proceedings are ad-
judged void, an order for a writ of restitution is a part of
the judgment. Perry v. Tupper, 70 N. C. 538; Meroney v.
Wright, 84 N. C. 336.

Where on trial of summary ejectment before a justice of the
peace, judgment was rendered for the plaintiff, who was
put in possession by process of law, and the judgment was
decided against the defendant, upon the ground that the lease
had not terminated, the defendant is entitled to a writ of
restitution as a part of the judgment in his favor. Meroney v.
Wright, 84 N. C. 336.

§ 42-36. Damages to tenant for dispossession, if
proceedings quashed, etc.—If, by order of the jus-
tice, the plaintiff is put in possession, and the pro-
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ceedings shall afterwards be quashed or reversed, the defendant may recover damages of the plaintiff for his removal. (Rev., s. 2010; Code, s. 1776; 1868-9, c. 156, s. 30; C. S. 2375.)

Sufficient Allegation.—A complaint in an action by a tenant for wrongful eviction by summary proceedings, alleging that by reason thereof the plaintiff was deprived of his house and garden for shelter and support of his family, and was distressed in body and mind and put to great mortification and shame and loss of employment, sufficiently alleges damages other than the loss of crops. Burwell v. Brodie, 134 N. C. 546, 47 S. E. 47.

Assessment of Damages.—Under this section a tenant who secures the reversal of summary proceedings against him may have damages for eviction assessed in the original or in a separate action. Burwell v. Brodie, 134 N. C. 546, 47 S. E. 47.

Recovery by Landlord.—Where a landlord wrongfully evicts a tenant he can recover for advancements to the tenant before the eviction but not for labor performed by himself after the eviction. Burwell v. Brodie, 134 N. C. 546, 47 S. E. 47.

Art. 4. Forms.

§ 42-37. Forms sufficient.—The following forms, or substantially similar, shall be sufficient in all proceedings under this chapter:

Oath of Plaintiff

North Carolina, .... County.

A. B., plaintiff, against C. D., defendant. Summary proceedings in ejectment.

The plaintiff (his agent or attorney) maketh oath that the defendant entered into the possession of a piece of land in said county (describe the land) as a lessee of the plaintiff (or as lessee of E. F., who, after the making of the lease, assigned his estate to the plaintiff, or otherwise, as the fact may be); that the term of the defendant expired on the day of ......... 19, (or that his estate has ceased by nonpayment of rent, or otherwise, as the fact may be); that the plaintiff has demanded the possession of the premises of the defendant, who refused to surrender it, but holds over; that the estate of the plaintiff is still subsisting, and the plaintiff asks to be put in possession of the premises.

The plaintiff claims....dollars for rent from the...... day of ......... 19, to the...... day of ......... 19, and also....dollars for the occupation of the premises since the...... day of ......... 19, to the date hereof.

A. B., plaintiff.

Subscribed and sworn to before me, this...... day of ......... 19....

J. K., J. P.

Summons

North Carolina, .... County.

A. B., plaintiff, against C. D., defendant. Summary proceedings in ejectment.

A. B. (his agent or attorney) having made and subscribed before me the oath, a copy of which is annexed, you are required to appear before me on the...... day of ......... 19, at ........., then and there to answer the complaint; otherwise judgment will be given that you be removed from the possession of the premises.

Witness my hand and seal this...... day of ......... 19....

J. K., J. P. (Seal).

To C. D., defendant.

The justice attaches the oath of the plaintiff to the summons and delivers them, and a copy of both of them to the officer, and makes the following entry on his docket, or varies it according to the facts:

Docket Entries

A. B., plaintiff, Summary proceedings against C. D., defendant. in ejectment for (describe the premises.)

Oath of plaintiff (his agent or attorney) filed on the...... day of ......... 19....

Plaintiff claims....dollars for rent from ......... to ........., and....dollars for occupation from ......... to .........

Summons issued the...... day of ......... 19,..., to ........., constable (or sheriff, as the case may be).

The officer serves the summons and returns it to the justice with the oath of the plaintiff, and with his return indorsed:

Return of Officer

On this day I served the within summons on the defendant, C. D., by delivering to him a copy thereof, and of the oath of A. B. annexed (or by leaving a copy thereof and of the oath of A. B., annexed, at the usual place of residence of the defendant, C. D., with an adult found there) (or the said C. D. not being found in my county, and having no usual or last place of residence therein) (or no adult person being found at his usual or last place of residence, by posting a copy of the summons and of the oath of A. B., annexed, on a conspicuous part of the premises claimed).

N. M., Constable.

The...... day of ......... 19....

Record to Be Entered on Docket

A. B., plaintiff, Summary proceedings against C. D., defendant. in ejectment.

It appearing that the summons, with a copy of the oath of the plaintiff (his agent or attorney), was duly served on defendant,* and whereas the defendant fails to appear (or admits the allegations of the plaintiff), I adjudge that the defendant be removed from and the plaintiff put in possession of the premises described in the oath of the plaintiff. I also adjudge that the plaintiff recover of defendant....dollars for rent from the...... day of ......... 19, to the...... day of ......... 19, and....dollars for damages for occupation of the premises from the...... day of ......... 19, to this day, and....dollars for his costs; the...... day of ......... 19....

If the defendant admits part of the allegations of plaintiff, but not all, the judgment must be varied accordingly; for example: follow the foregoing to the asterisk (*), and then proceed:

And whereas the defendant appears and admits the first and second allegations of the plaintiff, and denies the residue; and whereas both parties waived a trial by jury, I heard evidence upon the matters in issue, and find, (here state the findings on the matters in issue separately).

Supposing the findings are for the plaintiff, the record would proceed:

I therefore adjudge that the defendant (and so
acknowledge ourselves indebted to .......... in the sum of .......... dollars;
Witness our hands and seals, this the ...... day of .........., A. D. 19......

Whereas on the ...... day of .........., A. D. 19......, before ......... a justice of the peace for .......... county, A. B. recovered a judgment against C. D. for .......... and for .......... dollars damages for the detention of said real estate from the ...... day of .........., A. D. 19......, to the ...... day of .........., A. D. 19......; and whereas the said .......... ha........ prayed an appeal to the superior court from said judgment, and also asks that execution on said judgment shall be suspended: Now, therefore, if the said .......... shall pay any judgment which, in this or in any other action, the said .......... may recover for the rent of said premises, and for damages for detention thereof, then this obligation shall be void; otherwise to remain in full force and virtue.

(Seal.)
(Seal.)
(Seal.)

Stay of Execution

The State of North Carolina, to any officer havin........ an execution in favor of A. B., plaintiff, v. C. D., defendant, in a summary proceeding in ejectment, signed by .......... The defendant having given bond to me, as required by law, on his appeal to the superior court of .......... county, in the above case, you will stay further proceedings upon said execution and immediately return the same to me, with a statement of your action under it. Witness my hand and seal this ...... day of .........., 19...... C. D., defendant .........., J. P. (Seal.)

Certificate on Return of Appeal

The annexed are the original oath, summons and other papers, and a copy of the record of the proceedings in the case of a summary proceeding in ejectment, A. B., plaintiff, v. C. D., defendant .........., J. P. (Seal.) (Here state all the costs, to whom paid or due, and by whom.) (All the papers must be attached.) (Rev., s. 2011; Code, s. 1720; C. S. 2376.)

Chapter 43. Land Registration.

Sec.


43-1. Jurisdiction in superior court.

Art. 2. Officers and Fees.

43-4. Examiners appointed by clerk.
43-5. Fees of officers.

Art. 3. Procedure for Registration.

43-6. Who may institute proceedings.
43-7. Land lying in two or more counties.

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§ 43-1. Jurisdiction in superior court.—For the purpose of enabling all persons owning real estate within this state to have the title thereto settled and registered, as prescribed by the provisions of this chapter, the superior court of the county in which the land lies in the state shall have exclusive original jurisdiction of all petitions and proceedings had thereupon, under the rules of practice and procedure prescribed for special proceedings except as herein otherwise provided. (1913, c. 90, s. 1; C. S. 2377.)


§ 43-2. Proceedings in rem; vests title. — The proceedings under any petition for the registration of land, and all proceedings in the court in relation to registered land, shall be proceedings in rem against the land, and the decrees of the court shall operate directly on the land, and vest and establish title thereto in accordance with the provisions of this chapter. (1913, c. 90, s. 2; C. S. 2378.)

§ 43-3. Rules of practice prescribed by attorney-general. — The attorney-general, with the approval of the supreme court, shall from time to time make, change, revise and revoke rules of practice in the superior court for the administration of this chapter. He shall in like manner prescribe forms for use in such court, and in the notation of the registry of titles of memorials, claims, liens, lis pendens, and all other involuntary charges upon and to such registered lands. Whenever a question shall arise in the administration of this chapter as to the proper method


§ 43-4. Assurance fund provided; investment. 43-50. Action for indemnity. 43-51. Satisfaction by third person or by treasurer. 43-52. Payment by treasurer, if assurance fund is insufficient. 43-53. Treasurer subrogated to right of claimant. 43-54. Assurance fund not liable for breach of trust; limit of recovery. 43-55. Statute of limitation as to assurance fund.


Sec. 43-17. Issuance of certificate upon death of registered owner; petition and contents.
43-17.2. Publication of notice; service of process.
43-17.3. Answer by person claiming interest.
43-17.4. Hearing by clerk of superior court; orders and decrees; cancellation of old certificate and issuance of new certificate.
43-17.5. Issuance of new certificate validated.
43-18. Registered owner’s estate free from adverse claims; exceptions.
43-19. Adverse claims existing at initial registry; affidavit; limitation of action.
43-20. Decree and registration run with the land.
43-21. No right by adverse possession.
43-22. Jurisdiction of courts; registered land affected only by registration.
43-23. Priority of right.
43-24. Compliance with this chapter due registration.
43-25. Release from registration.

Art. 5. Adverse Claims and Corrections after Registration.

43-26. Limitations.
43-27. Adverse claim subsequent to registry; affidavit of claim requisite to enforcement; limitation.
43-28. Suit to enforce adverse claim; summons and notice necessary.
43-29. Judgment in suit to enforce adverse claim; register to file.
43-30. Correction of registered title; limitation of adverse claims.

Art. 6. Method of Transfer.

43-31. When whole of land conveyed.
43-32. Conveyance of part of registered land.

Editor’s Note.—This chapter is known generally as the Torrens Law. The principle of the “Torrens System” is conveyance by registration and certificate instead of by deed, and assimilates the transfer of land to the transfer of stocks in corporations. For a discussion of the history and development of the Torrens system, see Cape Lookout Co. v. Gold, 167 N. C. 63, 83 S. E. 3; and “The Torrens System—After Thirty-Five Years," 30 N. C. L. Rev. 359.

Chapter to Be Liberally Construed.—This statute is not in derogation of common right, but is of a remedial character, and should be liberally construed according to its intent. Cape Lookout Co. v. Gold, 167 N. C. 63, 83 S. E. 2; Dillon v. Brocker, 178 N. C. 65, 100 S. E. 191; Perry v. Morgan, 219 N. C. 377, 14 S. E. (2d) 46.

Amendment of Pleadings and Parties.—Under the provisions of this section, the judge of the superior court is given authority over the whole proceedings before the clerk, and may require reformation of the process, pleadings or decrees, or entries, and therefore he has authority to allow parties defendant to be made and enlarge the time within which to file answers. Empire Mfg. Co. v. Spruill, 169 N. C. 618, 86 S. E. 522.

Consolidation of Proceedings.—A proceeding for the purpose of registering title and an injunction to prevent trespass, involving the same land and the same parties may be consolidated. Blount v. Sawyer, 189 N. C. 210, 126 S. E. 512.

Cited in Brinson v. Lacy, 195 N. C. 394, 396, 142 S. E. 517.

§ 43-3. Rules of practice prescribed by attorney-general. — The attorney-general, with the approval of the supreme court, shall from time to time make, change, revise and revoke rules of practice in the superior court for the administration of this chapter. He shall in like manner prescribe forms for use in such court, and in the notation of the registry of titles of memorials, claims, liens, lis pendens, and all other involuntary charges upon and to such registered lands. Whenever a question shall arise in the administration of this chapter as to the proper method
of protecting or asserting any right or interest under the law, and the method of procedure is in doubt, it shall be the duty of the clerk or register of deeds to notify the attorney-general, who, with the approval of the supreme court, shall prescribe a rule covering such case. (1913, c. 90, s. 31; C. S. 2379.)

Art. 2. Officers and Fees.

§ 43-4. Examiners appointed by clerk. — The clerk of the superior court of each county shall appoint three or more examiners of titles, who shall be licensed attorneys at law, residing in the state of North Carolina. They shall qualify by taking oath before the clerk to faithfully discharge the duties of such office, which oath shall be filed in the office of the clerk. The term of office shall be two years. Examiners of titles shall have and exercise the jurisdiction and perform the duties hereinafter prescribed, and receive the fees herein provided. They shall not appear in or have any connection with any proceeding instituted under the provisions of this chapter, and they shall be subject to removal at will by such clerk or judge of the superior court. (1913, c. 90, s. 3; 1917, c. 63; C. S. 2380.)

§ 43-5. Fees of officers. — The fees to be allowed the clerks and sheriffs in this proceeding shall be the same as now allowed by law to clerks and sheriffs in other special proceedings. The examiner hereinbefore provided for shall receive, as may be allowed by the clerk, a minimum fee of five dollars for such examination of each title of property assessed upon the tax books at the amount of five thousand dollars or less; for each additional thousand dollars of assessed value of property so examined he shall receive fifty cents; for examination outside of the county he shall receive a reasonable allowance. There shall be allowed to the register of deeds for copying the plat upon registration of titles book one dollar; for issuing the certificate and new certificates under this chapter, fifty cents for each; for noting the entries or memorandum required and for the entries noting the cancellation of mortgages and all other entries, if any, herein provided for, a total of twenty-five cents for the entry or entries connected with one transaction. The county or other surveyor employed under the provisions of this chapter shall not be allowed to charge more than forty cents per hour for his time actually employed in making the survey and the map, except by agreement with the petitioner; Provided, however, that a minimum fee of two dollars in any case may be allowed. There shall be no other fees allowed of any nature except as herein provided, and the bond of the register, clerk and sheriff shall be liable in case of any mistake, malfeasance, or misfeasance as to the duties imposed upon them by this chapter in as full a manner as such bond is now liable by law. (1913, c. 90, s. 30; C. S. 2381.)

Art. 3. Procedure for Registration.

§ 43-6. Who may institute proceedings. — Any person, being in the peaceable possession of land within the state and claiming an estate of inheritance therein, may prosecute a special proceeding in rem against all the world in the superior court for the county in which such land is situate, to establish his title thereto, to determine all adverse claims and have the title registered. Any number of the separate parcels of land claimed by the petitioner may be included in the same proceeding, and any one parcel may be established in several parts, each of which shall be clearly and accurately described and registered separately, and the decree therein shall operate directly upon the land and establish and vest an indefeasible title thereto. Any person in like possession of lands within the state, claiming an interest or estate less than the fee therein, may have his title thereto established under the provisions of this chapter, without the registration and transfer features herein provided. (1913, c. 90, s. 4; C. S. 2382.)


§ 43-7. Land lying in two or more counties. — In every proceeding to register title, in which it is alleged in the petition or made to appear that the land therein described, whether in one or more parcels, is situated partly in one county and partly in another, or is situated in two or more counties, that is to say, when an entire tract, or two or more entire tracts, are situated in two or more counties (but not separate or several tracts situated in different counties) it shall be competent to institute the proceedings before the clerk of the superior court of any county in which any part of such tract lying in two or more counties is situated, and said clerk shall have jurisdiction both of the parties and of the subject-matter as fully as if the land was situated wholly in his county; but upon the entry of a final decree of registration of title, the clerk by or before whom the same was rendered shall certify a copy thereof to the register of deeds of every county in which said land or any part thereof is situated, and the same shall be there filed and recorded; and every such register of deeds, upon demand of the person entitled and payment of requisite fees therefor, shall issue and deliver a certificate of title for that part of said land situated in his county. This section shall apply and become effective in all cases or proceedings heretofore conducted before any clerk of the superior court of this state for registration of title, as in this chapter authorized, when the land described in the petition as an entire tract was situated in two or more counties, as aforesaid; and upon the filing and recording of a certified copy of the final decree or decree of registration therein, the register of deeds shall issue and deliver a certificate of title to the present owner or person entitled to the same, for that part of the land situated in his county, as aforesaid, upon payment or tender of proper fees therefor. (1919, c. 82, s. 1; C. S. 2383.)

§ 43-8. Petition filed; contents. — Suit for registration of title shall be begun by a petition to the court by the persons claiming, singly or collectively, to own or have the power of appointing or disposing of an estate in fee simple in any land, whether subject to liens or not. Infants and other persons under disability may sue by guardian or trustee, as the case may be, and corporations as in other cases now provided by law; but
deemed an admission of the allegations of the petition. The petition shall be signed and sworn to by each petitioner, and shall contain a full description of the land to be registered as hereinafter provided, together with a plot of same by metes and bounds, corners to be marked by permanent markers of iron, stone or cement; it shall show when, how and from whom it was acquired, and whether or not it is now occupied, and if so, by whom; and it shall give an account of all known liens, interests, equities, and claims, adverse or otherwise, vested or contingent, upon such land. Full names and addresses, if known, of all persons who may be interested by marriage or otherwise, including ad-joining owners and occupants, shall be given. If any person shall be unable to state the metes and bounds, the clerk may order a preliminary survey. (1913, c. 90, s. 5; C. S. 2984.)

See note under § 43-50.

Attaching Proceedings under Torrens Act Because Clerk Did Not Sign Jurat.—Where the petitioner, to have his title to land registered under the provisions of the Torrens Act has signed an oath reciting that he has been duly sworn, he may not contend that the oath lacked validity under the requirement of this section upon the ground that the clerk of the court had not signed the jurat, and that in consequence the proceedings which followed were absolutely void, and thereafter, upon his own motion have them set aside. Morgan v. Beaufort, etc., R. Co., 197 N. C. 559, 152 S. E. 235. 1937 N. C. 142 S. E. 317.


§ 43-9. Summons issued and served; disclaimer.—The clerk of the court shall issue a summons directed to the sheriff of every county in which persons named as interested may reside, such persons being made defendants, and the summons shall be returnable as in other cases of special proceedings, except that the return shall be at least thirty days from the date of the summons. The summons shall all be served at least ten days before the return thereof and the return recorded in the same manner as in other special proceedings, and all parties under disabilities shall be represented by guardian, either general or ad litem. If the persons named as interested are not residents of the state of North Carolina, and their residence is known, which must appear by affidavit, the summons must be served on such nonresidents as is now prescribed by law for service of summons on nonresidents.

Any party defendant to such proceeding may file a disclaimer of any claim or interest in the land described in the petition, which shall be deemed an admission of the allegations of the petition, and the decree shall bar such party and all persons thereafter claiming under him, and such party shall not be liable for any costs or expenses of the proceeding except such as may have been incurred by reason of his delay in pleading. (1913, c. 90, s. 5; C. S. 2385.)


§ 43-10. Notice of petition published.—In addition to the summons issued, prescribed in the foregoing section, the clerk of the court shall, at the time of issuing such summons, publish a notice of the filing thereof containing the names of the petitioners, the names of all persons named in the petition, together with a short but accurate description of the land and the relief demanded, in some secular newspaper published in the county wherein the land is situate, and having general circulation in the county; and if there be no such paper, then in a newspaper in the county nearest thereto and having general circulation in the county wherein the land lies, once a week for eight issues of such paper. The notice shall set forth the title of the cause and in legible or conspicuous type the words "To whom it may concern," and shall give notice to all persons of the relief demanded and the return day of the summons: Provided, that no final order or judgment shall be entered in the cause until there is proof and adjudication of publication as in other cases of publication of notice of summons. The provisions of this section, in respect to the issuing and service of summons and the publication of the notice, shall be mandatory and essential to the jurisdiction of the court to proceed in the cause: Provided, that the recital of the service of summons and publication in the decree or in the final judgment in the cause, and in the certificate issued to the petitioner as hereinafter provided, shall be conclusive evidence thereof. The clerk of the court shall also record a copy of said notice in the list pendens docket of his office and cross-index same as other notices of lis pendens and shall also certify a copy thereof to the Superior Court of each county in which any part of said land lies, and the clerk thereof shall record and cross index same in the list pendens records of his office as other notices of lis pendens are recorded and cross-indexed. (1913, c. 90, s. 7; 1915, c. 128, s. 1; 1919, c. 82, s. 2; 1925, c. 257; C. S. 2386.)

See note under § 43-50.

Editor's Note.—The last sentence of the section was added by the Public Laws of 1925, ch. 257.

Sufficiency of Publication.—Where the summons in proceedings to register lands has been issued and served under the provisions of section 43-9, it is not requisite to the validity of the proceedings that the publication of notice of filing should have been made on exactly the day the summons was issued, if the publication has been made in the manner prescribed by this section. Cape Lookout Co. v. Gold, 167 N. C. 63, 83 S. E. 3.

Waiver of Objection to Publication.—In proceedings to register a title, where a party claiming an interest in the lands waives his rights to object on the grounds of the irregularity in the publication of notice by appearing and answering the petition, Cape Lookout Co. v. Gold, 167 N. C. 63, 83 S. E. 3.


§ 43-11. Hearing and decree.—1. Referred to Examiner.—Upon the return day of the summons the petition shall be set down for hearing upon the pleadings and exhibits filed. If any party claiming an interest in the land described in the petition, or any lien thereon, shall file an answer, the petition and answer, together with all exhibits filed, shall be referred to the examiner of titles, who shall proceed, after notice to the petitioner and the persons who have filed answer or answered, to hear the cause upon such parol or documentary evidence as may be offered or called for—take testimony, and in addition thereto make such independent examination of the title as may be necessary. Upon his request the clerk shall issue a commission under the seal of the court for taking such testimony as shall be beyond the jurisdiction of such examiner.

2. Examiner's Report.—The examiner shall, within thirty days after such hearing, unless for
good cause the time shall be extended, file with the clerk a report of his conclusions of law and fact, setting forth the state of such title, any liens or encumbrances thereon, by whom held, amount due thereon, together with an abstract of title to the lands and any other information in regard thereto affecting its validity.

3. Exceptions to Report.—Any of the parties to the proceeding may, within twenty days after such report is filed, file exceptions, either to the conclusions of law or fact. Whereupon the clerk shall transmit the record to the judge of the superior court for his determination thereof; such judge may on his own motion certify any issue of fact arising upon any such exceptions to the superior court of the county in which the proceeding is pending, for a trial of such issue by jury, and he shall so certify such issue of fact for trial by jury upon the demand of any party to the proceeding. If, upon consideration of such record, or the record and verdict of issues to be certified and tried by jury, the title be found in the petitioner, the judge shall enter a decree to that effect, ascertaining all limitations, liens, etc., declaring the land entitled to registration accordingly, and the same, together with the record, shall be docketed by the clerk of the court as in other cases, and a copy of the decree certified to the register of deeds of the county for registration as hereinafter provided. Any of the parties may appeal from such judgment to the supreme court, as in other special proceedings.

4. No Judgment by Default.—No judgment in any proceeding under this chapter shall be given by default, but the court must require an examination of the title in every instance except as respects the rights of parties who, by proper pleadings, admit the petitioner’s claim. If, upon the return day of the summons and the day upon which the petition is set down for hearing, no answer be filed, the clerk shall refer the return day of the summons and the day upon which the petition is set down for hearing, no answer be filed, the clerk shall refer the

§ 43-12. Effect of decree; approval of judge.—Every decree rendered as hereinbefore provided shall bind the land and bar all persons and corporations claiming title thereto or interest therein; quiet the title thereto, and shall be forever binding and conclusive upon and against all persons and corporations, whether mentioned by name in the order of publication, or included under the general description, “to whom it may concern”; and every such decree so rendered, or a duly certified copy thereof, as also the certificate of title issued thereon to the person or corporation therein named as owner, or to any subsequent transferee or purchaser, shall be conclusive evidence that such person or corporation is the owner of the land therein described, and no other evidence shall be required in any court of this state of his or its right or title thereto. It shall not be an exception to such conclusiveness that the person is an infant, lunatic or is under any disability, but such person may have recourse upon the indemnity fund hereinafter provided for, for any loss he may suffer by reason of being so concluded. Such decrees shall not be binding on and include the State of North Carolina or the State Board of Education unless notice of such proceeding and copy of petition, etc., as provided in this chapter, are served on the Governor and on the State Board of Education personally and generally. Such decree shall, in addition to being signed by the clerk of the court, be approved by the judge of the superior court, who shall review the whole proceeding and have power to require any reformation of the process, pleading, decrees or entries. (1913, c. 90, s. 9; 1919, c. 82, s. 3; 1925, c. 263; C. S. 2388.)

§ 43-13. Manner of registration.—The county commissioners of each county shall provide for the register of deeds in the county a book, to be called Registration of Titles, in which the register shall enroll, register and index, as hereinbefore mentioned, all the decrees so rendered, and the copy of the petition and all subsequent transfers of title, and note all voluntary and involuntary transactions in any wise affecting the title to the land, authorized to be entered thereon. If the title be subject to trust, condition, encumbrance or the like, the words “in trust,” “upon condition,” “subject to encumbrance,” or like appropriate insertion shall indicate the fact and fix any person dealing with such certificate with notice of the particulars of such limitations upon the title as appears upon the registry. No erasure, alteration, or amendment shall be made upon the registry after entry and issuance of a certificate of title except by order of a court of competent jurisdiction. (1913, c. 90, s. 10; 1919, c. 236, s. 1; C. S. 2389.)

§ 43-14. Cross-indexing of lands by registers of deeds. — Where any land is brought into the Torrens’ System and under said system is registered in the public records of the registrar’s office,
said register shall cross-index the registration in the general cross-index for deeds in his office. (1931, c. 286, s. 2.)

§ 43-15. Certificate issued. — Upon the registration of such decree the register of deeds shall issue an owner's certificate of title, under the seal of his office, which shall be delivered to the owner or his agent duly authorized, and shall be substantially as follows:

State of North Carolina—County of .

The certificate of

... hereby certify that the title is registered in the name of , the to and situate in said county and state, described as follows: (Here describe land as in decree.)

Estate ........ (here name the estate and any limitation or encumbrance thereon, as fee simple, upon condition, in trust, subject to incumbrance, and the like).

Under decree of the land court of ......... county, entitled ............

Registered No. ......., Book No. ......., page .......

Witness my hand and seal, at office at ......... this ....... day of ........., A. D. 19....

(Seal) ............ Register of Deeds. (1913, c. 90, s. 10; C. S. 2390.)

§ 43-16. Certificates numbered; entries thereon.—All certificates of title to land in the county shall be numbered consecutively, which number shall be retained as long as the boundaries of the land remain unchanged, and a separate page or more, with appropriate space for subsequent entries, shall be devoted to each title in the registration of titles book for the county. Every entry made upon any certificate of title in such book or upon the owner's certificate, under any of the provisions of this chapter, shall be signed by the register of deeds and minutely dated in conformity with the dates shown by the entry book. (1913, c. 90, s. 11; C. S. 2391.)

§ 43-17. New certificate issued, if original lost. —Whenever an owner's certificate of title is lost or destroyed, the owner or his personal representative may petition the court for the issuance of a new certificate. Notice of such petition shall be published once a week for four successive weeks, under the direction of the publisher with the clerk of the court, showing a general circulation in the county in which the land is situated, a notice signed by the clerk of the superior court, setting forth in substance the nature of the petition, a description of the land affected thereby, and the relief therein prayed for, and notifying all persons having or claiming any interest or estate in the land to appear at a time therein specified, which shall be at least thirty days after the first publication of said notice, to show cause, if any exists, why the relief prayed for in the petition should not be granted. An affidavit shall be filed by the publisher with the clerk of the court, showing a full compliance of this requirement. Upon a filing of said petition, the petitioner shall serve upon all persons, firms or corporations known to have any interest or estate in the lands referred to in the petition, and the personal representative, the devisees, if any, and all heirs at law of the deceased registered owner of the said land. In the event any of the persons upon whom service of summons is to be made are nonresidents of the state of North Carolina, service may be made by publication in the manner prescribed by law for the service of summons in special proceedings. (1943, c. 466, s. 1.)

§ 43-17.2. Publication of notice; service of process. — Upon the filing of such duly verified petition, the petitioner shall cause to be published once a week for four weeks, in some newspaper having a general circulation in the county in which the land is situated, a notice signed by the clerk of the superior court, setting forth in substance the nature of the petition, a description of the land affected thereby, and the relief therein prayed for, and notifying all persons having or claiming any interest or estate in the land to appear at a time therein specified, which shall be at least thirty days after the first publication of said notice, to show cause, if any exists, why the relief prayed for in the petition should not be granted. An affidavit shall be filed by the publisher with the clerk of the court, showing a full compliance of this requirement. Upon a filing of said petition, the petitioner shall serve upon all persons, firms or corporations known to have any interest or estate in the lands referred to in the petition, and the personal representative, the devisees, if any, and all heirs at law of the deceased registered owner of the said land. In the event any of the persons upon whom service of summons is to be made are nonresidents of the state of North Carolina, service may be made by publication in the manner prescribed by law for the service of summons in special proceedings. (1943, c. 466, s. 1.)

§ 43-17.3. Answer by person claiming interest. — Any person asserting a claim or any interest in such registered land may, at any time prior to December 31 of the year in which the proceeding is completed for in section 43-17.4, file such answer or other pleadings as may be proper, asserting his rights or claims to the property referred to in the petition. (1943, c. 466, s. 1.)

§ 43-17.4. Hearing by clerk of superior court; orders and decrees; cancellation of old certificate and issuance of new certificate. — The clerk of the superior court shall hear and deter-
mine all matters presented upon the petition and such pleadings as may be filed in this proceeding, and shall make such orders and decrees therein as may be found to be proper from the facts as ascertained and determined by the court. The court is authorized and empowered to order and direct that the outstanding registered certificate of title to the land shall be surrendered and cancelled in the office of the register of deeds, and that a new certificate of title shall be issued, showing therein the owner or owners of the land described in the original certificate and the nature and character of such ownership: Provided, the clerk of the superior court shall not authorize the issuance of the new certificate of title until the fees provided in § 43-49 have been paid. Upon the surrender and cancellation by the register of deeds of the outstanding certificate of title, the new certificate of title shall be registered and cross-indexed in the same manner provided for the registration of the original certificate, and the register of deeds shall issue a new certificate of title in the same manner and form as provided for the original certificate. The said new certificate shall have the same force and effect as the original certificate of title and shall be subject to the same provisions of law with reference thereto. (1943, c. 466, s. 1.)

§ 43-17.5. Issuance of new certificate validated. Whenever heretofore any registered certificate of title has been surrendered by the heirs or devisees of any deceased registered owner of any registered title and the registered certificate of title of such deceased owner has been surrendered and cancelled and a new certificate of title issued to a purchaser or to such heirs or devisees, the same is hereby validated and confirmed and made effectual to the same extent as though such new certificate had been issued in compliance with the provisions of this chapter. (1943, c. 466, s. 1.)

§ 43-18. Registered owner’s estate free from adverse claims; exceptions.—Every registered owner of any estate or interest in land bought under this chapter shall, except in cases of fraud to which he is a party or in which he is a privy, without valuable consideration paid in good faith, and except when any registration has been procured through forgery, hold the land free from any and all adverse claims, rights or encumbrances not noted on the certificate of title, except (1) liens, claims or rights arising or existing under the laws or constitution of the United States which the statutes of this state cannot require to appear of record under registry laws; (2) taxes and assessments thereon due the state or any county, city or town therein, but not delinquent; (3) any lease for a term not exceeding three years, under which the land is actually occupied. (1913, c. 90, s. 25; C. S. 2393.)

§ 43-19. Adverse claims existing at initial registry; affidavit; limitation of action.—Any person making any claim to or asserting any lien or charge upon registered land, existing at the initial registry of the same and not shown upon the register or adverse to the title of the registered owner, and for which no other provision is herein made for asserting the same in the registry of titles, may make an affidavit thereof setting forth his interest, right, title, lien or demand, and how and under whom derived, and the character and nature thereof. The affidavit shall state his place of residence and designate a place at which all notices relating thereto may be served. Upon the filing of such affidavit in the office of the clerk of the superior court, the clerk shall order a note thereof as in the case of charges or encumbrances, and the same shall be entered by the register of deeds. Action shall be brought upon such claim within six months after the entry of such note, unless for cause shown the clerk shall extend the time. Upon failure to commence such action within the time prescribed therefor, the clerk shall order a cancellation of such note. If any person shall wantonly or maliciously or without reasonable cause procure such notation to be entered upon the registry of titles, having the effect of a cloud upon the registered owner’s title, he shall be liable for all damages the owner may suffer thereby. (1913, c. 90, s. 25; C. S. 2394.)

§ 43-20. Decree and registration run with the land.—The obtaining of a decree of registration and the entry of a certificate of title shall be construed as an agreement running with the land, and the same shall ever remain registered land, subject to the provisions of this chapter and all amendments thereof. (1913, c. 90, s. 26; C. S. 2395.)

§ 43-21. No right by adverse possession.—No title to nor right or interest in registered land in derogation of that of the registered owner shall be acquired by prescription or adverse possession. (1913, c. 90, s. 27; C. S. 2396.)

§ 43-22. Jurisdiction of courts; registered land affected only by registration.—Except as otherwise specially provided by this chapter, registered land and ownership therein shall be subject to the jurisdiction of the courts in the same manner as if it had not been registered; but the registration shall be the only operative act to transfer or affect the title to registered land, and shall date from the time the writing, instrument or record to be registered is duly filed in the office of the register of deeds, subject to the provisions of this chapter; no voluntary or involuntary transaction shall affect the title to registered lands until registered in accordance with the provisions of this chapter: Provided, that all mortgages, deeds, surrendered and canceled certificates, when new certificates are issued for the land so deeded, the other paper-writings, if any, pertaining to and affecting the registered estate or estates herein referred to, shall be filed by the register of deeds for reference and information, but the registration of titles book shall be and constitute sole and conclusive legal evidence of title, except in cases of mistake and fraud, which shall be corrected in the manner and provided for the correction of papers authorized to be registered. (1913, c. 90, s. 38; C. S. 2397.)

No Distinction between Original Parties and Purchasers. —The statute draws no distinction between the original parties to deeds or contracts affecting title of lands registered under its provisions and creditors or purchasers, and in respect to such registration these stand upon the same footing. Dillon v. Brooker, 178 N. C. 65, 100 S. E. 191. [221]
§ 43-23. Priority of right.—In case of conflicting claims between the registered owners the right, title or estate derived from or held under the older certificate of title shall prevail. (1913, c. 90, s. 29; C. S. 2398.)

§ 43-24. Compliance with this chapter due registration. — When the provisions of this chapter have been complied with, all conveyances, deeds, contracts to convey or leases shall be considered duly registered, as against creditors and purchasers, in the same manner and as fully as if the same had been registered in the manner herefore provided by law for the registration of conveyances. (1913, c. 90, s. 32; C. S. 2399.)

§ 43-25. Release from registration. — Whenever the record owner of any estate in lands, the title to which has been registered or attempted to be registered in accordance with the provisions of this chapter, desires to have such estate released from the provisions of said chapter in so far as said chapter relates to the form of conveyance, so that such estate may ever thereafter be conveyed, either absolutely or upon condition or trust, by the use of any desired form of conveyance, other than the certificate of title as prescribed by said chapter, such owner may present his owner's certificate of title to such registered estate to the register of deeds of the county wherein such land lies, with a memorandum or statement written by him on the margin thereof in the words following, or words of similar import, to wit: “(I or we) .................., being the owner (or owners) of the registered estate evidenced by this certificate of title, do hereby release said estate from the provisions of chapter forty-three of the General Statutes of North Carolina in so far as said chapter relates to the form of conveyance, so that hereafter the said estate may, and shall be forever until again hereafter registered in accordance with the provisions of said chapter and acts amendatory thereof, conveyed, either absolutely or upon condition or trust, by any form of conveyance other than the certificate of title prescribed by said chapter, and in the same manner as if said estate had never been registered.” Which said memorandum or statement shall further state that it is made pursuant to the provisions of this section, and shall be signed by such record owner and attested by the register of deeds under his hand and official seal, and a like memorandum or statement so entered, signed and attested upon the margin of the record of the said owner's certificate of title in the registration of titles book in said register's office, with the further notation made and signed by the register of deeds on the margin of the certificate of title in the registration of titles book showing that such entry has been made upon the owner's certificate of title; and thereafter any conveyance of such registered estate, or any part thereof, by such owner, his heirs or assigns, by means of any desired form of conveyance other than such certificate of title shall be as valid and effectual to pass such estate of the owner according to the tenor and purport of such conveyance in the same manner and to the same extent as if such estate had never been so registered. (Ex. Sess. 1924, c. 40.)

Art. 5. Adverse Claims and Corrections after Registration. § 43-26. Limitations. — No decree of registration heretofore issued, and no certificate of title heretofore issued pursuant thereto, shall be adjudged invalid, revoked, or set aside, unless the action or proceeding in which the validity of such decree or of the certificate of title issued pursuant thereto is attacked or called in question be commenced or the defense alleging the invalidity thereof be interposed within twelve months from March 10, 1919.

No decree of registration hereafter entered and no certificate of title hereafter issued pursuant thereto shall be adjudged invalid or revoked or set aside, unless the action or proceeding in which the validity of such decree or of the certificate of title issued pursuant thereto is attacked or called in question be commenced or the defense alleging the invalidity thereof be interposed within twelve months from the date of such decree.

No action or proceeding for the recovery of any right, title, interest, or estate in registered land adverse to the title established and adjudicated by any decree of registration heretofore entered shall be maintained unless such action or proceeding be commenced within twelve months from the date last mentioned; and no action or proceeding for the recovery of any right, title, interest, estate in registered land, adverse to the right established by any decree of registration hereafter shall be maintained unless such action or proceeding be commenced within twelve months from the date of such decree.

No action or proceeding for the enforcement or foreclosure of any lien upon or charge against registered land which existed at the date when any decree of registration was heretofore entered, and which was not recognized or established by such decree, shall be maintained, unless such action or proceeding be commenced within twelve months from the date above mentioned; and no action or proceeding for the enforcement or foreclosure of any lien upon or charge against registered land in existence at the date of any decree of registration hereafter entered, and which is not recognized and established by such decree, shall be maintained, unless such action or proceeding be commenced within twelve months from the date of such decree. (1919, c. 236, s. 1; C. S. 2400.)

§ 43-27. Adverse claim subsequent to registry; affidavit of claim prerequisite to enforcement; limitation. — Any person claiming any right, title, or interest in registered land adverse to the registered owner thereof, arising subsequent to the date of the original decree of registration, may, if no other provision is made for registering the same, file with the register of deeds of the county in which such decree was rendered or certificate of title thereto was issued, a verified statement in writing, setting forth fully the right, title, or interest so claimed, how or from whom it was acquired, and a reference to the number, book, and page of the certificate of title of the registered owner, together with a description of the land by metes and bounds, the adverse claimant's place of residence and his post-office address, and, if a nonresident, he shall designate or appoint the said register of deeds to
receive all notices directed to or to be served upon such adverse claimant in connection with the claim by him made, and such statement shall be noted and filed by said register of deeds as an adverse claim; but no action or proceeding to enforce such adverse claim shall be maintained unless the same be commenced within six months of the filing of the statement thereof. (1919, c. 236, s. 1; C. S. 2401.)

§ 43-28. Suit to enforce adverse claim; summons and notice necessary. — Upon the institution of any action or proceeding to enforce such adverse claim, notice thereof shall be served upon the register of deeds, who shall enter upon the registry a memorandum that suit has been brought or proceeding instituted to determine the validity of such adverse claim; and summons or notice shall be served upon the holder or claimant of the registered title or certificate or other person against whom such adverse claim is alleged, as provided by law for the institution of suits or proceedings in the courts of this state.

If no notice of the institution of an action or proceeding to enforce an adverse claim be served upon the register of deeds and upon the holder of the registered title or certificate, or other person, as aforesaid, within seven months from the date of filing the statement of adverse claim, the register of deeds shall cancel the adverse claim so filed and make a memorandum setting out that no notice of suit or proceeding to enforce the same had been served upon him within seven months as herein required, and that such adverse claim was therefore canceled; and thereafter no action or proceeding shall be begun or maintained to enforce such adverse claim in any of the courts of this state. (1919, c. 236, s. 1; C. S. 2402.)

§ 43-29. Judgment in suit to enforce adverse claim; register to file. — The court shall certify its judgment to the register of deeds; if such adverse claim be held valid, the register of deeds shall cancel such adverse claim upon the registry, noting thereon the adverse claimant of the registered title or certificate or other person against whom such adverse claim was therefore canceled; and thereafter no notice of suit or proceeding to enforce the same shall be done by order or judgment of the court, or he may file and record a certified copy of the judgment or order of the court thereon; if such adverse claim be held invalid the register of deeds shall cancel such adverse claim upon the registry, noting thereon that the same was done by order or judgment of the court, or he may file and record a certified copy of the judgment or order of the court thereon. (1919, c. 236, s. 1; C. S. 2403.)

§ 43-30. Correction of registered title; limitation of adverse claims. — Any registered owner or other claimant under the registered title may at any time apply to the court in which the original decree was entered, by petition, setting out that registered interests of any description, whether vested, contingent, expectant or inchoate, have terminated and ceased, or that new interests have arisen or been created which do not appear upon the certificate, or that any error or omission was made in entering or issuing the certificate or any duplicate thereof, or that the name of any person on the certificate has been changed, or that the registered owner had married or, if registered as married, that the marriage has been terminated, or that a corporation which owned registered lands has been dissolved, without conveying the same or transferring its certificate within three years after the dissolution, or any other reasonable and proper ground of correction or relief; and such court may hear and determine the petition after notice to all parties in interest, and may make such order or decree as may be appropriate and lawful in the premises; but nothing in this section shall be construed to authorize any such court to open any original decree of registration which was entered more than twelve months prior to the filing of such petition, and nothing shall be done or ordered by the court to divest or impair the title or other interest of a purchaser who holds a transfer or certificate of title for value and in good faith. No action or proceeding shall be commenced or maintained to set up or establish any right, claim, interest or estate adverse to the order or decree or certificate of title issued thereon made or entered upon any petition or other proceeding authorized by this section, unless the same shall be brought and instituted within six months from the date of such order or decree authorized by this section. (1919, c. 236, s. 1; C. S. 2404.)

Art. 6. Method of Transfer.

§ 43-31. When whole of land conveyed. — Whenever the whole of any registered estate is transferred or conveyed the same shall be done by a transfer or conveyance upon or attached to the certificate substantially as follows:

A B and wife (giving the names of the parties owning land described in the certificate and their wives) hereby, in consideration of ........ dollars, sell and convey to C D (giving name of purchaser) the lot or tract of land, as the case may be, described in the certificate of title hereto attached.

The same shall be signed and properly acknowledged by the parties and their wives and shall have the full force and effect of a deed in fee simple: Provided, that if the sale shall be in trust, upon condition, with power to sell or other unusual form of conveyance, the same shall be set out in the deed, and shall be entered upon the registration of titles book as hereinafter provided; that upon presentation of the transfer, together with the certificate of title, to the register of deeds, the transaction shall be duly noted and registered in accordance with the provisions of this chapter, and certificate of title so presented shall not be cancelled and a new certificate with the same number issued to the purchaser thereof, which new certificate shall fully refer by number and also by name of holder to former certificate just canceled. (1913, c. 90, s. 12; C. S. 2405.)

Necessity of Affidavit and Notation. — A contract to convey lands where the owner has registered it, under the Torrens Law, cannot be specifically enforced until the complainant has filed an affidavit and had notation made on the books as required by this section. Dillon v. Broeker, 178 N. C. 65, 140 S. E. 191.

§ 43-32. Conveyance of part of registered land. — The transfer of any part of a registered estate, either of an undivided interest therein or of a separate lot or parcel thereof, shall be made by an instrument of the transfer or conveyance similar in form to that herein provided for the
§ 43-33. Duty of register of deeds upon part conveyance. — Upon presentation to the register of deeds of an instrument of transfer or conveyance of an undivided interest in a registered estate, in proper form as above prescribed, it shall be his duty to cancel the certificate of title attached thereto and to issue to each owner a new certificate of title, each bearing the same number as the original certificate of title and accurately specifying and describing the extent and the amount of the interest retained or of the interest transferred, as the case may be. Upon presentation to the register of deeds of an instrument of transfer or conveyance of a separate lot or parcel of a registered estate, in proper form as above prescribed, it shall be his duty to cancel the certificate of the title attached thereto and to issue to each owner a new certificate of title, each bearing a new number and describing the separate lot or parcel retained or transferred, as the case may be, either by metes and bounds or by reference to a map or plat attached thereto. (1919, c. 82, s. 4; C. S. 2407.)

§ 43-34. Subdivision of registered estate.—Any owner of a registered estate who may desire to subdivide the same may make application in writing to the register of deeds for the issuance of a new certificate of title for each subdivision, to which application shall be attached a map having clearly indicated thereon the boundaries of the whole of the registered estate in question and of each lot or parcel for which he desires a new certificate of title. Thereupon it shall be the duty of the register of deeds, upon payment by such applicant of necessary surveyor's fees, if any are required, and of the amount herein provided for issuing the certificates of title and recording the map, to cancel the certificate of title attached to said application and to issue to each owner new certificates of title, each bearing a new number, for each lot or parcel shown upon the said map, describing such lot or parcel in such certificates either by metes and bounds or by reference to a map or plat attached thereto. (1919, c. 82, s. 4; C. S. 2408.)

§ 43-35. References and cross-references entered on register. — In all cases the register of deeds shall place upon the register of title books and upon the certificate of title of each registered estate therein, references and cross-references to the new certificates issued as above provided, in accordance with the provisions of this article, and the new certificates issued shall fully refer by number and by name to the holder to the canceled certificate in place of which they are issued. (1919, c. 82, s. 4; C. S. 2409.)

§ 43-36. When land conveyed as security. — 1. Whole land conveyed. Whenever the owner of any registered estate shall desire to convey same as security for debt, it may be done in the following manner, by a short form of transfer, substantially as follows, to wit: A B and wife (giving names of all owners or holders of certificates and their wives) hereby transfer to C. D. the tract or lot of land described as No. __________ in registration of titles book for __________ county, a certificate for the title for same being hereto attached, to secure a debt of __________ dollars, due to __________ of __________ county and state, on the __________ day of __________, __________, evidenced by bond (or otherwise as the case may be) dated the __________ day of __________, __________. In case of default in payment of said debt with accrued interest, __________ days notice of sale required.

The same shall be signed and properly acknowledged by the parties making same, and shall be presented, together with the owner's certificate, to the register of deeds, whose duty it shall be to note upon the owner's certificate and upon the certificate of title in the registration of titles book the name of the trustee, the amount of debt, and the date of maturity of same.

2. Part of land conveyed. When a part of the registered estate shall be so conveyed, the register of deeds shall note upon the book and owner's certificate the part so conveyed, and if the same be required and the proper fee paid by the trustee, shall issue what shall be known as a partial certificate, over his hand and seal, setting out the portion so conveyed.

3. Effect of transfer. All transfers by such short form shall convey the power of sale upon due advertisement at the county courthouse and in some newspaper published in the county, or adjoining county, in the same manner and as fully as is now provided by law in the case of mortgages and deeds of trust and default therein.

4. Other encumbrances noted. All registered encumbrances, rights or adverse claims affecting the estate represented thereby shall continue to be noted, not only upon the certificate of title in the registration book, but also upon the owner's certificate, until same shall have been released or discharged. And in the event of second or other subsequent voluntary encumbrances the holder of the certificate may be required to produce such certificate for the entry thereon or attachment thereto of the note of such subsequent charge or encumbrance as provided in this article.

5. Other forms of conveyance may be used. Nothing in this section nor this chapter shall be construed to prevent the owner from conveying such land, or any part of the same, as security for a debt by deed of trust or mortgage in any form which may be agreed upon between the parties thereto, and having such deed of trust or mortgage recorded in the office of the register of deeds as other deeds of trust and mortgages are
recorded: Provided, that the book and page of the record at which such deed of trust or mortgage is recorded shall be entered by the register of deeds upon the owner's certificate and also on the registration of titles book.

6. Sale under lien; new certification. Upon foreclosure of such deed of trust or mortgage, or sale under execution for taxes or other lien or charge, the fact of such foreclosure or sale shall be reported by the trustee, mortgagee or other person authorized to make the same, to the register of deeds of the county in which the land lies, and, upon satisfactory evidence thereof, it shall be his duty to call in and cancel the outstanding certificate of title for the land so sold, and to issue a new certificate in its place to the purchaser or other person entitled thereto; and the production of such outstanding certificate and its surrender by the holder thereof may be compelled, upon notice to him, by motion before and order of the clerk of the superior court in the original proceeding or the clerk of the superior court of the county in which the land lies; but the right of appeal from such order may be exercised and shall be allowed as in other special proceedings, and pending any such appeal the rights of all parties shall be preserved. (1913, c. 90, s. 14; 1915, c. 245; 1919, c. 82, s. 5; C. S. 2410.)

§ 43-37. Owner's certificate presented with transfer. — In voluntary transactions the owner's certificate of title must be presented along with the writing or instrument conveying or effecting the sale, and thereupon and not otherwise the register shall be authorized to register the conveyance or other transaction upon proof of payment of all delinquent taxes or liens, if any, or if such payment be not shown the entry and new certificate shall note such taxes or liens as having priority thereto. (1913, c. 90, s. 15; C. S. 2411.)

§ 43-38. Transfers probated; partitions; contracts. — All transfers of registered land shall be duly executed and probated as required by law upon like conveyances of other lands, and in all cases of change in boundary by partition, subdivision or addition of land there shall be an accurate survey and permanent marking of boundaries and accurate plots, showing the courses, distances and markings of every portion thereof, which shall be duly proved and registered as upon the initial registration. Such transfers shall be presented to the register of deeds for entry upon the registration of titles book and upon the owner's certificate within thirty days from the date thereof, or become subject to any rights which may accrue to any other person by a prior registration. All leases or contracts affecting land for a period exceeding three years shall be in writing, duly proved before the clerk of the superior court, recorded in the register's office, and noted upon the registry and upon the owner's certificate. (1913, c. 90, ss. 15, 32; C. S. 2412.)

§ 43-39. Certified copy of court noted. — In voluntary transactions a certificate from the proper state, county or court officer, or certified copy of the order, decree or judgment of any court of competent jurisdiction shall be authority for him to order a proper notation thereof upon the registration of titles book, and for the register of deeds to note the transaction under the direction of the court. (1913, c. 90, s. 16; C. S. 2413.)

§ 43-40. Production of owner's certificate required. — Whenever owner's certificate is not presented to the register along with any writing, instrument or record filed for registration under this chapter, he shall forthwith send notice by registered mail to the owner of such certificate, requesting him to produce the same in order that a memorial of the transaction may be made thereon; and such production may be required by subpoena duces tecum or by other process of the court, if necessary. (1913, c. 90, s. 17; C. S. 2414.)

§ 43-41. Registration notice to all persons. — Every voluntary or involuntary transaction, which if recorded, filed or entered in any clerk's office would affect unregistered land, shall, if duly registered in the office of the proper register as the case may be, and not otherwise, be notice to all persons from the time of such registration, and operate, in accordance with law and the provisions of this chapter, upon voluntary registered land in the county of such registration. (1913, c. 90, s. 18; C. S. 2415.)

§ 43-42. Conveyance of registered land in trust. — Whenever a writing, instrument or record is filed for the purpose of transferring registered land in trust, or upon any equitable condition or limitation expressed therein, or for the purpose of creating or declaring a trust or other equitable interest in such land, the particulars of the trust, condition, limitation or other equitable interest shall not be entered on the certificate, but it shall be sufficient to enter in the book and upon the certificates a memorial thereof by the terms "in trust" or "upon condition" or in other apt words, and to refer by number to the writing, instrument or record authorizing or creating the same. And if express power is given to sell, encumber or deal with the land in any manner, such power shall be noted upon the certificates by the term "with power to sell" or "with power to encumber," or by other apt words. (1913, c. 90, s. 19; C. S. 2416.)

§ 43-43. Authorized transfer of equitable interests registered. — No writing or instrument for the purpose of transferring, encumbering or otherwise dealing with equitable interests in registered land shall be registered unless the power thereto enabling has been expressly conferred by or has been reserved in the writing or instrument creating such equitable instrument, or has been declared to exist by the decree of some court of competent jurisdiction, which decree must also be registered. (1913, c. 90, s. 20; C. S. 2417.)

§ 43-44. Validating conveyance by entry on margin of certificate. — In all cases where the owner of any estate in lands, the title to which has been registered or attempted to be registered in accordance with the provisions of this chapter, has before August 21, 1904, and subsequent to such registration made any conveyance of such estate, or any portion thereof, by any form of conveyance sufficient in law to pass the title thereto if the title
to said lands had not been so registered, the record owner and holder of the certificate of title covering such registered estate may enter upon the margin of his certificate of title in the registration of titles book a memorandum showing that such registered estate, or a portion thereof, has been so conveyed, and further showing the name of the grantee or grantees and the number of the book and the page thereof where such conveyance is recorded in the office of the register of deeds, and make a like entry upon the owner's certificate of title held by him, both of such entries to be signed by him and witnessed by the register of deeds and attested by the seal of the office of the register of deeds upon said owner's certificate, with the further notation made and signed by the register of deeds on the margin of the certificate of title in the registration of titles book showing that such entry has been made upon the owner's certificate of title, and thereupon such conveyance shall become and be as valid and effectual to pass such estate of the owner according to the tenor and purport of such conveyance as if the title to said lands had never been so registered, whether such conveyance be in form absolute or upon condition of trust; and in all cases where such conveyance has been made before August 21, 1924, upon the making of the entries herein authorized by the record owner and holder of such owner's certificate of title, the grantee and his heirs and assigns shall thereafter have the same right to convey the said estate or any part of the same in all respects as if the title to said lands had never been so registered. (Ex. Sess. 1924, c. 41.)

Editor's Note.—The effect of this section is summarized in 3 N. C. Law Rev. 19.

Art. 7. Liens upon Registered Lands.

§ 43-45. Docketed judgments.—Whenever any judgment of the superior court of the county in which the registered estate is situated shall be duly docketed in the office of the clerk of the superior court, it shall be the duty of the clerk to certify the same to the register of deeds. The register of deeds shall thereupon enter the certificate of title, the date, and the amount of the judgment, and the same shall be a lien upon unregistered lands of the judgment debtor. (1913, c. 90, s. 22; C. S. 2418.)

Cited in In re Wallace, 212 N. C. 490, 193 S. E. 819.

§ 43-46. Notice of delinquent taxes filed. — It shall be the duty of the sheriff or other collector of taxes or assessments of each county and town, not later than the first day of March in each year, to file an exact memorandum of the delinquency, if any, of any registered land for the non-payment of the taxes or assessments thereon, including the penalty thereon, in the office of the register of deeds for registration, and if such officer fails to perform such duty, and there shall be subsequent to such day a transfer of the land as hereinbefore provided, the grantee shall acquire a good title free from any lien for such taxes and assessments, and such sheriff or other collector of taxes and his sureties shall be liable for the payment of the taxes and assessments with the penalty and interest thereon. (1913, c. 90, s. 21; C. S. 2419.)

§ 43-47. Sale of land for taxes; redemption.—Whenever any sale of registered land is made for delinquent taxes or levies, it shall be the duty of the sheriff or other officer making such sale to file forthwith a memorandum thereof for registration in the office of the register of deeds; and thereupon the registered owner shall be required to produce his certificate for cancellation, and a new owner's certificate shall be issued in favor of the purchaser, and the land shall be transferred on the land books to the name of such purchaser, unless such delinquent charges and all penalties and interest thereon be paid in full before the expiration of ninety days from the date of such sale; and the certificate of title shall be entered upon the certificate of title and also upon any such new owner's certificate, reserving the privilege of redemption in accordance with the law. In case of any redemption under this section of land sold for taxes, a note of the fact shall be duly registered, and if an owner's certificate has been issued to any purchaser, the same shall be canceled and a new one shall be issued to the person who has redeemed. (1913, c. 90, ss. 22, 23; C. S. 2420.)

§ 43-48. Sale of unredeemed land; application of proceeds. — If there be no redemption of land under the preceding section, in accordance with the law, it shall be the duty of the sheriff or other collector of taxes in the county or town in which the land lies to sell the same at public auction for cash, first giving such notice of the time and place of sale as is prescribed for execution sales, and the proceeds of sale shall be applied, first, to the payment of all taxes and assessments then due to the state, county and town, with interest, penalty and costs; second, to the payment of all sums paid by any person who purchased at the former tax sale, with interest and the additional sum of five dollars; third, to the payment of a commission to the officer making the sale of five per centum on the first three hundred dollars and two per centum on the residue of the proceeds; fourth, to the satisfaction of any liens other than the taxes and assessments registered against the land in the order of their priorities; fifth, and the surplus, if any, to the person in whose name the land was previous to sale for taxes, subject to redemption as provided herein, his heirs, personal representatives or assigns. A note of the sale under this section shall be duly registered, and a certificate shall be entered and an owner's certificate issued in favor of the purchaser in whom title shall be thereby vested as registered owner, in accordance with the provisions of this chapter. Nothing in this section shall be so construed as to affect or divert the title of a tenant in reversion or remainder to any real estate which has been returned delinquent and sold on account of the default of the tenant for life in paying the taxes or assessments thereon. (1913, c. 90, s. 23; C. S. 2421.)


§ 43-49. Assurance fund provided; investment. —Upon the original registration of land and also upon the entry of certificate showing the title as registered owners in heirs or devisees, there shall be paid to the clerk of the court one-tenth of one per cent of the assessed value of the land for
taxes, as an assurance fund, which shall be paid over to the state treasurer, who shall be liable therefor upon his official bond as for other monies received by him in his official capacity. He shall keep all the principal and interest of such fund invested, except as required for the payment of indemnities, in bonds and securities of the United States, of this state, or of counties and other municipalities within the state. Such investment shall be made upon the advice and concurrence of the governor and council of state, and he shall make report of such funds and the investment thereof to the general assembly biennially. (1913, c. 90, s. 33; C. S. 2423.)

Cross Reference.—As to investment by state treasurer in bonds issued or guaranteed by the United States, see § 53-44.

§ 43-50. Action for indemnity.—Any person who, without negligence on his part, sustains loss or damage or is deprived of land, or of any estate or interest therein, through fraud or negligence or in consequence of any omission, mistake, misfeasance, or misdescription in any certificate of title or in any entry or memorandum in the registration book, and who, by the provisions of this chapter, is barred or in any way precluded from bringing an action for the recovery of such land or interest or estate therein or claim upon same, may bring an action in the superior court of the county in which the land is situate for the recovery of compensation for such loss or damage from the assurance fund. Such action shall be against the state treasurer and all other persons who may be liable for the fraud, negligence, omission, mistake or misfeasance; but if such claimant has the right of action against another for the recovery of such property, or of the estate or interest therein, or of the claim upon same, he shall exhaust such remedy before resorting to the assurance fund. (1913, c. 90, s. 34; C. S. 2423.)

Negligence of Plaintiff Barring Recovery.—A Torrens proceeding under this chapter duly commenced prior to the enactment of Public Laws 1919, c. 31 (§ 1-117 and § 1-118), constituted a “lis pendens.” So such proceedings while pending was notice to a mortgagee of the land without the necessity of the filing of a formal lis pendens, and where the mortgagee failed to protect himself under the provisions and operation of this chapter before the hearing of said motion, the said Clerk of the Superior Court shall issue a citation to all names of all persons owning an interest in said land, or of the estate or interest therein, or of the claim upon same, he shall exhaust such remedy before resorting to the assurance fund. (1913, c. 90, s. 35; C. S. 2423.)

§ 43-51. Satisfaction by third person or by treasurer.—If there are defendants other than the state treasurer, and judgment is rendered in favor of the plaintiff and against the treasurer and some or all of the other defendants, execution shall first be issued against the other defendants, and if such execution is returned unsatisfied in whole or in part, and the officer returning the same shall certify that it cannot be collected from the property and effects of the other defendants, or if the judgment be against the treasurer only, the clerk of the court shall cause notice to be given to the execution to the state auditor, who shall issue his warrant therefor upon the state treasurer, and the same shall be paid. In all such cases the treasurer may employ counsel who shall receive reasonable compensation for his services from the assurance fund. (1913, c. 90, s. 35; C. S. 2423.)

§ 43-52. Payment by treasurer, if assurance fund insufficient.—If the assurance fund shall be insufficient at any time to meet the amount called for by any such certificate, the treasurer shall pay the same from any funds in the treasury not otherwise appropriated; and in such case any amount thereafter received by the treasurer on account of the assurance fund shall be transferred to the general funds of the treasury until the amount advanced shall have been paid. (1913, c. 90, s. 36; C. S. 2423.)

§ 43-53. Treasurer subrogated to right of claimant.—In every case of payment by the treasurer from the assurance funds under the provisions of this chapter the treasurer shall be subrogated to all the rights of the plaintiff against all and every other person or property or securities to a trustee, or by the improper exercise of any power of sale in benefit of the assurance fund. (1913, c. 90, s. 37; C. S. 2423.)

§ 43-54. Assurance fund not liable for breach of trust; limit of recovery. —The assurance fund shall not be liable to pay any loss, damage or deprivation occasioned by a breach of trust, whether expressed, constructive or implied, by any registered owner who is a trustee, or by the improper exercise of any power of sale in a mortgage or deed of trust. Nor shall any plaintiff recover as compensation under the provisions of this chapter more than the fair market value of the land at the time when he suffered the loss, damage or deprivation thereof. (1913, c. 90, s. 38; C. S. 2423.)

§ 43-55. Statute of limitation as to assurance fund.—Action for compensation from the assurance fund shall be begun within three years from the time the cause of action accrued. In cases of infancy or other disability now recognized by law, persons under such disability shall have one year after the removal of such disability within which to begin the action. (1913, c. 90, s. 39; C. S. 2428.)


§ 43-56. Proceedings.—Any land brought under the provisions and operation of this chapter before April 16, 1931, may be removed and excluded therefrom by a motion in writing filed in the original cause wherein said land was brought under the provisions and operation of said chapter, and upon the filing of a petition therein showing the names of all persons owning an interest in said land and of all lien holders, mortgagees and trustees of record, and the description of said land. Upon the filing of said petition the Clerk of the Superior Court shall issue a citation to all parties interested and named in the petition, and upon the return date of said citation and upon the hearing of said motion, the said Clerk of the Superior Court may enter a decree in said cause removing and excluding said land from the provisions and operation of this chapter, and transfer and conveyance of said land may be made therefor as other common law conveyances. (1931, c. 286, s. 1.)

Editor’s Note.—No procedure is provided for in case the petition should be contested. And while the legislature rather loosely provides that the clerk, upon rendering his decree excluding the land, also may decree that subsequent
transfers of said land may be made "as other common law conveyances," it obviously means that such transfers should be effected by deeds duly probated and registered under our present laws. The amendment makes no specific provision for the recordation of the Clerk's decree as notice that the particular tract of land is no longer registered under the Torrens Act.

The Torrens system of land registration, though highly desirable from many points of view, has never been extensively used in North Carolina. Since 1913, when the Act was passed, scarcely five hundred titles have been registered under it. The present amendment now makes possible the 'unregistering' of these titles. 9 N. C. Law Rev. 392.

§ 43-57. Existing liens unaffected.—Nothing in § 43-56 shall be construed to impair or remove any lien or encumbrance existing against said land.

(1931, c. 286, s. 3.)

Chapter 44. Liens.


Sec. 44-1. On buildings and property, real and personal.
44-2. On personal property repaired.
44-3. Laborer's lien on lumber and its products.
44-4. Lien for processing certain goods.
44-5. Sale of goods at public auction.

Art. 2. Subcontractors', etc., Liens and Rights against Owners.

44-6. Lien given subcontractors, etc., on real estate.
44-7. [Repealed.]
44-8. Statement of contractor's indebtedness to be furnished to owner; effect.
44-9. Subcontractors, laborers and materialmen may notify owner of claim; effect.
44-10. Sums due by statement to constitute lien.
44-11. Where sums due contractor from owner insufficient; payment pro rata.
44-12. Contractor failing to furnish statement, or not applying owner's payments to laborer's claims, misdemeanor.
44-13. Laborer for railroad contractor may sue company; conditions of action.
44-14. Contractor on municipal building to give bond; action on bond.

Art. 3. Liens on Vessels.

44-15. For towage and for supplies at home port.
44-16. For labor in loading and unloading.
44-17. Filing lien; laborer's notice to master.
44-20. Liens not to exceed amount due contractor.
44-21. Owner to see laborers paid.
44-22. Owner may refuse to settle with contractor till laborers paid.
44-23. Owner may pay orders for wages.
44-24. Laborer's right of action against owner.
44-25. Stevedore's false oath punishable as perjury.
44-26. Stevedores to be licensed; omission misdemeanor.
44-27. Tax and bond on procuring license.

Art. 4. Warehouse Storage Liens.

44-28. Liens on goods stored for charges.
44-29. Enforcement by public sale.

Art. 5. Liens of Hotel, Boarding and Lodging-House Keepers.

44-30. Lien on baggage.
44-31. Baggage may be sold.
44-32. Notice of sale.

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§ 44-1. On buildings and property, real and personal.—Every building built, rebuilt, repaired or improved, together with the necessary lots on which such building is situated, and every lot, farm or vessel, or any kind of property, real or personal, not herein enumerated, shall be subject to the lien to the party to the contract, was followed by the enactment of the price and value of work performed and materials furnished in the construction of any building or structure. The lien 'for the payment of all debts contracted for labor performed. 'The mechanic's lien is broader and includes the 'work done,' i.e., the 'building built' or superstructure placed on the premises, Broyhill v. Gaither, 142 Wis. 245, 142 N. E. 355.

Art. 11. Liens for Internal Revenue.

§ 44-65. Filing notice of lien.

Art. 12. Liens on Leaf Tobacco.

§ 44-69. Effective period for lien on leaf tobacco sold in auction warehouse.
contract for the furnace at the price itemized in the statement. King v. Elliott, 197 N. C. 93, 147 S. E. 701.

Priority of the Lien.—The lien for labor and materials furnished for the building under § 44-6, from asserting a lien under this section, to was entire. King v. Elliott, 197 N. C. 93, 147 S. E. 701.

Finding that Contract Entire.—Where it has been agreed by the parties that the trial judge finds the facts upon the trial of the question of the sufficiency of a lien filed for labor and materials furnished to the owner of a building under the provisions of the first delivery and work done under the contract, and is superior to a mortgage lien subsequently given and properly recorded. King v. Elliott, 197 N. C. 93, 147 S. E. 701.

Meaning of Term “Contracted.”—The lien is given for the amount due upon debts contracted. But in this connection it is extremely important that the larger meaning—agreed to be paid—thereby giving a highly remedial statute an operation commensurate with its purpose. Ball v. Daquin, 140 N. C. 83, 95, 52 S. E. 410.

The existence of a debt arising out of a contract, done by the owner of the property, is a necessary predicate to the existence of a lien for labor and materials. Brown v. Ward, 231 N. C. 344, 30 S. E. (2d) 334.

III. PERSONS ENTITLED TO LIEN.

Lien to "Laborers and Mechanics,” Exclusive. In Whittaker v. Smith, 81 N. C. 340, 341, it was held that this section gave a lien to “Laborers and Mechanics” exclusively, and that an "overseer” was not a laborer, and reference was made to "a piece of land, and it was held that it is the mechanic or laborer, within the meaning of the lien laws, is one who performs manual labor—regularly employed at any hard work, or one who does work that requires labor, skill, or the materials in a material manner. See Lester v. Houston, 101 N. C. 605, 8 S. E. 362, wherein it is held that the contractor or materialmen need not themselves furnish the labor or the materials.

In Whittaker v. Smith, 81 N. C. 340, it was held that an overseer is not a mechanic or laborer under the lien laws, and that the materials furnished or labor performed, for the price or value of his services. The case of Cook v. Ross, 117 N. C. 195, 23 S. E. 252, is also to the same effect. There was no work to be done and work was done by the owner of a mill in purchasing machinery and superintends the installation of the same and the repairing of the mill, so to put in proper condition for the manufacture of yarns, was it legislated expressly for or mechanics or laborers.

Whatever may be the law, as declared in other jurisdictions, it is held that the acts passed to carry it into effect, were intended to give protection to that class of persons who were totally dependent upon their manual toil for subsistence. The lien was designed exclusively for mechanics or laborers.

V. PROPERTY COVERED.

Any Real Property.—The phraseology of this section and the purpose of it are comprehensive. The lien prescribed attaches, in the case provided for, to any real property, whether it be denominated "a lot or farm," or a storehouse, warehouse, or factory, or buildings, and premises, where his work is done or labor performed, for the price or value of his services. The case of Cook v. Ross, 117 N. C. 195, 23 S. E. 252, is also to the same effect. There was no work to be done and work was done by the owner of a mill in purchasing machinery and superintends the installation of the same and the repairing of the mill, so to put in proper condition for the manufacture of yarns, was it legislated expressly for mechanics or laborers.

Hayes v. Hicks, 156 N. C. 239, 241, 72 S. E. 353.
Lien on Property is Dependent upon Possession.—While this section provides for a lien not only upon buildings and lots, but also upon "any kind of property, real or personal," other sections of the lien law provide the conditions upon which the lien is to come into existence and continue; and in case of personal property the lien is dependent upon possession and labor does not extend or apply to public buildings is not applicable to public buildings, etc., do not rest by common law but strictly by statute, and the provisions of the statute must be followed; and where the property is not subject to this lien, such as public buildings, etc., do not rest by common law but strictly by statute, and the provisions of the statute must be followed; and where the property is not subject to this lien, such as public buildings, etc., do not rest by common law but strictly by statute, and the provisions of the statute must be followed.

The rights of laborers and materialmen to acquire liens against the property of the owner for work done upon it and for material furnished to the contractor in the erection of his building, etc., do not rest by common law but strictly by statute, and the provisions of the statute must be followed; and where the property is not subject to this lien, such as public buildings, etc., do not rest by common law but strictly by statute, and the provisions of the statute must be followed.

VI. APPLICATION TO PUBLIC CONSTRUCTIONS.

Not Applicable to Public Buildings, etc.—The lien laws were not intended to be so construed as to embarrass property devoted, by the very terms of the contract, to a public purpose, and to be used by the State for the support of public or quasi public corporation in the exercise of its delegated sovereign powers. McNeile Pipe, etc., Co. v. Howl. et al., 29 Wash. Co., 111, 191, 645, 657.

The rights of laborers and materialmen to acquire liens against the property of the owner for work done upon it and for material furnished to the contractor in the erection of his building, etc., do not rest by common law but strictly by statute, and the provisions of the statute must be followed; and where the property is not subject to this lien, such as public buildings, etc., do not rest by common law but strictly by statute, and the provisions of the statute must be followed; and where the property is not subject to this lien, such as public buildings, etc., do not rest by common law but strictly by statute, and the provisions of the statute must be followed; and where the property is not subject to this lien, such as public buildings, etc., do not rest by common law but strictly by statute, and the provisions of the statute must be followed. Gastonia v. McEntire-Peterson, etc., Co., 131 N. C. 363, 17 S. E. 176; Snow v. Board, 190 N. C. 250, 129 S. E. 583.

Same—Court House.—A courthouse cannot be made subject to any lien for labor material. Snow v. Board, 112 N. C. 335, 17 S. E. 176; Pratt Lumber Co. v. Gill Co., 278 Fed. 783, 787.

Same—Schools.—A building used for graded school purpose pursues the owner of the same, no lien or claim can be held or acquired, except with legislative sanction. Gastonia v. McEntire-Peterson, etc., Co., 131 N. C. 363, 17 S. E. 176; Snow v. Board, 112 N. C. 335, 17 S. E. 176; Morganton Farm Warehouse Co. v. Morganton Graded Schools, 131 N. C. 507, 66 S. E. 593.

Same.—Highways.—One contracting to construct a highway, under this section, no lien or the highway; nor has any person, building contractor or materialman, Pratt Lumber Co. v. Gill Co., 278 Fed. 783.

Same—Reason of the Rule.—The reason upon which the courts hold that the statutory lien given contractors, subcontractors, materialmen, and laborers upon buildings or other improvements upon real property for work, material, and labor does not extend or apply to public buildings is that such buildings, being held for public governmental purposes, cannot be sold under execution or other final process, and this reason applies with peculiar force to materials furnished or labor performed in the construction or repair of Public highways. Pratt Lumber Co. v. Gill Co., 273 Fed. 783, 787.

VI. APPLICATION TO RAILROADS.

Not Applicable to Railroads.—This section does not apply to railroads. Tommey v. Spartanburg, etc., R. Co., 7 Fed. 429, 433. This conclusion is supported by the importation of §§ 44-12 of the Code of 1869-70, which sections provide: "Whenever a railway company shall take any lands or mengives the company notice of the completion of such work, and the property is not subject to this lien, such as public buildings, etc., do not rest by common law but strictly by statute, and the provisions of the statute must be followed. Gastonia v. McEntire-Peterson, etc., Co., 131 N. C. 363, 17 S. E. 176; Snow v. Board, 190 N. C. 250, 129 S. E. 583. Gastonia v. McEntire-Peterson, etc., Co., 131 N. C. 363, 17 S. E. 176; Snow v. Board, 190 N. C. 250, 129 S. E. 583.

The Supreme Court of Iowa in Nelson v. R. R. Co. * * * construing a statute, which resembles this section, held that a railway was not a building within the meaning of their mechanic's lien law. Tommey v. Spartanburg, etc., R. Co., 7 Fed. 429, 433.

VII. WAIVER OF LIEN, HOMESTEAD, AND MISCELLANEOUS MATTERS.

Waiver of the Lien.—In an action brought to subject a vessel to a lien for materials furnished in its construction, it was found that, at or before the filing of the notice of lien, the vessel was sold on a second mortgage on the vessel as security. It was held that such agreement was a waiver of the lien, and the lienor was discharged without exhausting the entire tract. Broyhill v. B.Witcaither, 119 583, 61 S. E. 31.

The rights of laborers and materialmen to acquire liens against the property of the owner for work done upon it and for material furnished to the contractor in the erection of his building, etc., do not rest by common law but strictly by statute, and the provisions of the statute must be followed; and where the property is not subject to this lien, such as public buildings, etc., do not rest by common law but strictly by statute, and the provisions of the statute must be followed. Gastonia v. McEntire-Peterson, etc., Co., 131 N. C. 363, 17 S. E. 176; Snow v. Board, 190 N. C. 250, 129 S. E. 583.

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State and in addition to the common-law lien given arti-sans and mechanics which arises upon true possession, for the reasonable value of the repairs, provides for its enforcement by foreclosure in accordance with its stated terms. Johnson v. Yates, 183 N. C. 24, 110 S. E. 603.

The rights and liabilities of the lienor are limited, however, within its terms all persons whose authorized possession is of such character as to make reasonable repairs necessary to the proper use of the property, and which were evidently intended at the time of the execution of the contract of sale. Johnson v. Yates, 183 N. C. 24, 110 S. E. 603.

Same.—Vendee of Car with Mortgage to Vendor.—Where the vendee of a car with a mortgage made repairs on the prop-erty and transfers the possession to the vendee for an indefinite period, it is with the implied authority in the ven-pee that he may use the machine and keep it in such rea-sonable and just repair as the use will require; and where, at the vendee's instance, a mechanic has repaired the same, his reasonable charge for such repairs creates a lien on the automobile, retained in his possession, superior to that of the vendor's mortgage. Johnson v. Yates, 183 N. C. 24, 110 S. E. 603.

Retention of Possession Essential.—At Common Law.—At common law, a laborer repaired a wagon and surren-dered it to the owner for payment. He had no lien. Possession is absolutely necessary to the existence of the lien. Tedder v. Wilmington, etc., R. Co., 124 N. C. 342, 32 S. E. 8. 

Same.—Under this Section.—The lien on personal property given by this section applies when possession is retained by the mechanic. Glazener v. Gloucester Lumber Co., 167 N. C. 229, 147 S. E. 753; McDougall v. Crapon, 95 N. C. 292. 

Retention of Possession Essential—At Common Law.—At common law, a laborer repaired a wagon and surren-dered it to the owner before payment was made. It was held that the laborer had no lien on the wagon, either at common law or under the statute for his work done and materials furnished in making the repairs. McDougall v. Crapon, 95 N. C. 292.

The mechanic or artisan may exercise his common law right to retain the property, and this section, recognizing the right, authorizes him to advertise and sell and pay himself, after the specified period of possession. It is a neces-sary consequence that the lien is lost when possession is given to the owner. The mechanic, to the same extent as the owner under the common law, has a lien on personal property, the possession of which is lost. The mechanic is thus enabled to enforce his lien by sale of the property. McDougall v. Crapon, 95 N. C. 292. 

The mechanic retains possession of the property until his lien is discharged by payment. Huntsman Bros. & Co. v. Wilmington, etc., R. Co., 122 N. C. 583, 29 S. E. 838. See next section.

Priority of Lien.—The lien created by this section is su-perior to a vendor's lien, or to a mortgage lien. Johnson v. Yates, 183 N. C. 24, 110 S. E. 603.

A mechanic's lien is given preference under this section to a mortgage lien though the latter be prior in point of time. Johnson v. Yates, 183 N. C. 24, 110 S. E. 603. See next section.

Sale Restrained Where Mechanic's Claim Controverted.—Where one, who has the right under this section to retain possession of and to sell personal property for the purpose of defraying his charges, is made a party to an action in the nature of a creditor's bill against the owner in which the nature and amount of claimant's debt are in dispute, he will be restrained from proceeding with the sale as long as such contests are settled. Huntsman Bros. & Co. v. Linville River Lumber Co., 122 N. C. 583, 29 S. E. 838.

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the said justice of the peace. If the owner cannot be located, then notice shall be given by attaching said notice on the logs or lumber, wood pulp, acid wood or tan bark upon which the labor sued for was performed, and any person buying said logs, wood pulp, acid wood or tan bark after such notice has been given, with the nearest justice of the peace, shall be deemed to have bought the same with notice thereof, but no action shall be maintained against the owner of said logs or lumber, wood pulp, acid wood or tan bark or the purchaser thereof under the provisions of this section unless same is commenced within thirty days after notice is filed with the justice of the peace by such laborer, as above provided. (1913, c. 150, s. 6; 1929, c. 69; C. S. 2436.)

Local Modification.—Avery, Mitchell, Yancey: 1941, c. 129.

Editor's Note.—The Act of 1929 added the word "logging" in the second line and "logs" in the third line of this section.

Under the provision of this section, prior to the amendment of 1929, persons who cut and logged timber to a mill under a contract to do so at a fixed price were not entitled to a lien for such services, this interpretation of this section being strengthened by the fact that the amendment of 1929 includes within the scope of the statute laborers employed in logging engaged in logging to the mill. Graves v. Dockery, 200 N. C. 317, 150 S. E. 506.

Reason for Enactment of Section.—It was because a lien could not be obtained for labor performed in the manufacture of lumber unless the party claiming it retained possession, that the Legislature enacted this section. Elek Creek Lbr. Co. v. F. C. Walls, 84 F. (2d) 144. F. (2d) 147. 144.

Work Done Directly by Claimant and in Betterment of Property.—Under this section the work must have been done directly by the claimant in betterment of the property upon which a lien is sought to be obtained, that is, making the lumber by taking the boards from the saw as they were cut, is entitled to a lien, but one who is employed in the blacksmith shop as repairer of cars upon the plant, and one, who worked on the car track and repaired the bridges are not so entitled. Thomas v. Merrill, 169 N. C. 633, 637, 86 S. E. 993.

Compliance with Statutory Requirements Necessary. — In an action to establish a laborer's lien upon manufactured lumber, under the provisions of this section, the plaintiff must prove his compliance with the various statutory requirements; and a charge to the jury that the plaintiff should return a verdict for the plaintiff should they find that he attached "the notice to the lumber," and on the defendant's failure to show service of the notice in less than five days after filing the notice with the justice of the peace, or that he could not be found. Bryan v. Gloucester Lumber Co., 167 N. C. 576, 83 S. E. 696.

Laborer Has No Lien unless He Complies with Section or Retains Possession.—A laborer who engages in the manufacture of lumber has a lien thereon under section 44-2, for his just and reasonable charges so long as he retains possession of the lumber. A laborer, even though he does not retain possession, is entitled to a lien for wages for not exceeding thirty days if he gives the notice required by this section. But he obtains no lien unless he complies with this section or unless he retains possession so that he may assert a lien thereon. § 44-2. Elek Creek Lbr. Co. v. Hambly, 84 F. (2d) 144, 147.

Preferred Lien Only When Section Strictly Complied with.—This section gives to laborers engaged in logging, sawing, etc., a lien on the lumber of the mill, and the material and supplies thereon or upon which any part of the amount for which goods are to be sold is used or is intended to be used, which is superior to all other claims thereon, except that of a purchaser for value without notice. It gives this preferred lien, however, only for the wages of not exceeding thirty days if he gives the notice required by this section. But he obtains no lien unless he complies with this section or unless he retains possession so that he may assert a lien thereon. § 44-2. Elek Creek Lbr. Co. v. Hambly, 84 F. (2d) 144, 147.

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Employs Another Contractor against the Owner.—Where a laborer in the manufacture of lumber employs another laborer to assist him in his work, and the latter seeks to enforce the lien given by this section, for the wages of not exceeding thirty days, it may be made to appear that the owner owed his own contractor, for the lien claimed can only be enforced to that extent, the object of the statute being to protect the laborer against any transfer of the lumber by the owner, who, while indebted to his contractor, and insolvent, might otherwise pass the title to a bona fide purchaser for value, without notice of the lien. Bryson v. Gennett Lumber Co., 171 N. C. 706, 89 S. E. 26.

Repairing Railroad Track or Equipment. — Under conditions stated in the section, one of the defendants agreed to operate a large lumber plant, including a railroad equipment for handling the logs owned by the other defendant, and assumed the payment of all employees, several of whom filed liens against logs and lumber saved, in a justice's court, for the non-payment of wages. It was held that work done in repairing the track, equipment, etc., was not in contemplation of this section, so as to give those performing these services a lien on logs and lumber manufactured, etc., by the owner, but the owner owned the other defendant, and the assumption of the work by the defendant was not in contemplation of this section, so as to give those performing these services a lien on logs and lumber manufactured, etc., by the owner, but the material had not been used in its construction as betterments. Glazener v. Gloucester Lumber Co., 167 N. C. 576, 83 S. E. 696.

Priority of Lien.—The lien given to the person "doing the work of cutting or sawing logs into lumber," etc., by this section is superior to the lien given to the contractor therefor, or any other person. Glazener v. Gloucester Lumber Co., 167 N. C. 576, 83 S. E. 696.

§ 44-4. Lien for processing certain goods. — All persons, firms, partnerships and corporations engaged in the business of finishing, bleaching, mercerizing, manufacturing, dyeing, weighing and printing or otherwise processing cotton, wool, silk, artificial silk or goods of which cotton, wool, silk, or artificial silk forms a component part, shall be entitled to a lien upon the property and goods of others, which may come into their possession for work, labor, and materials furnished in any of said processing and said lien shall extend to any unpaid balance on account for work, labor, and materials furnished in the course of any of said processing in respect to any of said goods of the same owner wherever the lienor's possession is terminated. The word "owner", as used in this and the following sections shall include a factor, consignee, or other agent entrusted with the possession of the goods held under said lien or with the bill of lading consigning the same to him with authority to sell the same or to deliver them to the lienor for the purpose of being processed. (1931, c. 48, s. 1.)

§ 44-5. Sale of goods at public auction. — If any part of the amount for which goods are held under said lien remains unpaid for a period of sixty days after the earliest item of said amount became due and payable the lienor may sell such goods at public auction first publishing a notice of the time and place of said sale once in each of two successive weeks in a newspaper published in the town, if any, otherwise in the county, in which the said goods are situated, or if no newspaper is published in said county, then in a newspaper published in an adjoining county and having general circulation in the county where the sale is to take place, and at the court house door, the last publication not to be less than five days prior to the sale, and also giving five days' notice of said sale by posting in five or more public places in said county, one whereof shall be in the town or city ward in which said goods are situated, and, if the residence or past address of owner of said goods is known or can be established, sending by registered mail a copy of said notice to the owner at his last known or past address at least five days before the date of sale: Provided, that if said goods are readily divisible no more thereof shall be so sold than is necessary to discharge the underlying indebtedness and to cover the expenses of the sale. The
proceeds of sale shall be applied to payment of said indebtedness and said expenses, and the balance, if any, shall be paid to the owner or person entitled thereto. The remedy herein provided to enforce said lien shall be in addition to any other provided by law. (1931, c. 48, s. 2; 1943, c. 543.)

Cross Reference.—As to advertisement for judicial sale of personal property generally, see § 1-356.

Editor's Note.—The above contract was inserted in the provision as to a newspaper published in an adjoining county.

Art. 2. Subcontractors', etc., Liens and Rights against Owners.

§ 44-6. Lien given subcontractors, etc., on real estate.—All subcontractors and laborers who are employed to furnish or who do furnish labor or material for the building, repairing or altering any house or other improvement on real estate, have a lien on said house and real estate for the amount of such labor done or material furnished, which lien shall be preferred to the mechanics' lien now provided by law, when notice thereof shall be given as required in this section and section 44-7, and, in addition to any other liens in this chapter, except where it is otherwise provided; but the sum total of all the liens due subcontractors and material men shall not exceed the amount due the original contractor at the time of notice given. (Rev., s. 1801, 1803; 1880, c. 44, ss. 1, 3; C. S. 2437.)

In General.—Soon after the enactment of section 44-1 et seq., it was held by the Supreme Court that no right to a lien was conferred by that section unless there was a contract, express or implied, with the owner, creating the relation of creditor and debtor (Wilkie v. Bray, 71 N. C. 205), and as a result, subcontractors were excluded from its benefits, because they had no express contract with the owner, and none could be implied from the use of the materials as they were furnished to the contractor, and under the express contract between him and the owner. This led to the enactment of this and the following sections relative to the subcontractor's lien. Morganton Mfg. et al., Co. v. Andrews, 165 N. C. 285, 292, 81 S. E. 418; 176 N. C. 426, 432, 97 S. E. 372.

Definition of Subcontractor.—Mr. Phillips in his book on Mechanics' Liens, sec. 44, describes a subcontractor: "One who, though not having the power or authority to contract for the performance of an act with the person who has already contracted for its performance." And Mr. Kalland in his book on the same subject, sec. 3, uses language of similar import, and says: "Although the original contractor may sublet his entire contract, and neither himself performs, or furnish labor or materials in a literal sense, yet he will be entitled to a lien, for each subcontractor is as much entitled to be paid as though he had his own contract, and the contract of the agent is in law the act of his principal." Lester v. Houston, 101 N. C. 605, 611, 8 S. E. 566.

Persons employed by an agent of the principal contractor to perform certain work on the premises may not under this section recover of the owner for the value of such labor done or material furnished, and the owner receives the benefit thereof. Price v. Asheville Gas Co., 207 N. C. 796, 178 S. E. 567.

Contractor's Lien Not Superceded.—The lien given by this section was not intended to supersede the lien of the contractor, for it in direct terms gives the lien in favor of subcontractors, laborers, and materialmen a preference, "notwithstanding the law of the place where the work is done to the contrary." And it is manifest of itself that when notice is given, the aggregate of such liens shall not exceed the amount then due the original contractor. The legislation is intended to extend the remedy to those whose work is done in accordance with section 44-1 and which the owner derives a benefit in the improvement of his property, even where there are no contract relations between them and the owner, and enables them to secure the payment of what is due them, thereby removing the entire subcontractor to the original contractor. Morganton Mfg. et al., Co. v. Andrews, 165 N. C. 285, 293, 81 S. E. 418; Lester v. Houston, 101 N. C. 605, 8 S. E. 566.

Relation of Debtor and Creditor between the Owner and the Subcontractor.—It is declared in many cases that the basis for mechanics' liens is the relation of creditor and debtor, between the owner and the contractor. Morganton Mfg. et al., Co. v. Andrews, 165 N. C. 285, 293, 81 S. E. 418; Lester v. Houston, 101 N. C. 605, 8 S. E. 566.

It is evident that the statute does not in express terms create this relation between the owner and the subcontractor, and that a relation must be inferred by implication. The basis of such implication may be traced to the fact that the contract, express or implied, with the owner, creating the relation of debtor and creditor between the owner and the contractor, is in direct terms given to the contractor, and the act of the agent is in law the act of his principal. Contractor's Lien Though Subordinated, Not Lost. — It is quite manifest that our statute gives to the contractor, its enforcement would be prejudicial to them, when these subcontractors were excluded from its benefits, because they had no express contract with the owner, and none could be implied from the use of the materials, and that the principal contractor is an agent of the owner for the purpose of creating valid debts. 3 N. C. Law Rev. 564.

Whatever may be the basis of the inference that there exists the relation of debtor and creditor between the owner and the subcontractor, it is apparent that this section does not, even by implication, create a relationship of debtor and creditor except as to the extent of liens acquired in accordance with its provisions. Morganton Hdw. Co. v. Morganton Graded Schools, 151 N. C. 507, 66 S. E. 583. Ed. N. C. 409.

No privity of contract between the owner and the subcontractor is established by this section, so as to enable the former to sue the latter for a debt; but it merely confers upon the materialman a lien upon the property, if the property is subject to lien, but not if he fails to acquire a lien by the laches of himself or of the contractor, whose negligence will be imputed to himself; and, also, an interest in the trust funds in the hands of the owner and due to the contractor, which funds are to be distributed pro rata among all those furnishing material after the last creditor not being in strictness a lien, but a right to have an accounting in an ordinary civil action and judgment for the amount due by the owner to the contractor. Charlotte Pipe, etc., Co. v. Southern Aluminum Co., 172 N. C. 704, 90 S. E. 523.

Subcontractor's Lien and Double Security. — The statute (this section and section 44-11) furnishes a double security to those furnishing material, etc., to the contractor and who give the statutory notice to the owner in giving them a lien thereon upon the property. It furnishes also a lien for the amount of any labor or materials subsequently earned under the contract, and, also, an interest in the trust funds in the hands of the owner and due to the contractor, which funds are to be distributed pro rata among all those furnishing material after the last creditor not being in strictness a lien, but a right to have an accounting in an ordinary civil action and judgment for the amount due by the owner to the contractor. Charlotte Pipe, etc., Co. v. Southern Aluminum Co., 172 N. C. 704, 90 S. E. 523.

Subcontractor Substituted to the Rights of Contractor. — Where the lien arises under the provisions of this section, it does so by substituting the claimant to the rights of the contractor, enforceable against any and all sums which may be due from the owner at the time of notice given or which are subsequently earned under the terms and stipulations of the original contract, and, also, an interest in the trust funds in the hands of the owner and due to the contractor, which funds are to be distributed pro rata among all those furnishing material after the last creditor not being in strictness a lien, but a right to have an accounting in an ordinary civil action and judgment for the amount due by the owner to the contractor.
mand regardless of the state of accounts between the con-
tractor and the subcontractor. Borden Brick, etc., Co. v.
Pullen, 178 N. C. 355, 148 S. E. 596; Powell v. King Lumber
Co., 168 N. C. 552, 84 S. E. 1032.

Time and How Subcontractors’ Right Determined.—The
right of a subcontractor to recover on a lien as a con-
tractor, or lien upon the building does not depend upon the state of
the account between the contractor and the subcontractor,
but upon the amount due the contractor by the owner at the
time the lien was given upon a higher item in the manner and
form required. Atlas Powder Co. v. Denton, 176 N. C. 426,
97 S. E. 923.

Amount Due from Owner a Trust Fund for Subcontractor.—
The principal contractor is a necessary party to an action
to enforce the lien of a subcontractor, but a trustee in a
case of materialmen who have filed their statutory notice is not
a debt due by the owner to the materialmen in the ordinary
sense, but a fund held in trust for them strictly arising from
the operation of the statute, in conformity with its terms,
and the statute imposes no duty upon the owner when the
materialmen have not filed the required notice or acquired
their lien accordingly. Charlotte Pipe, etc., Co. v. Southern
Aluminum Co., 172 N. C. 704, 90 S. E. 923.

Priority over Subsequent Liens.—The lien of the sub-
contractor, when duly filed, has precedence over all other liens
attaching to the property subsequent to the time the work
was commenced or the material furnished. Lookout Lumber
Co. v. Mansion Hotel, etc., R. Co., 109 N. C. 658, 14 S. E.
35.

Elements Essential to Recovery.—To recover under this
section, plaintiff must prove: (1) his subcontract; (2) work
done and labor performed in fulfillment thereof; (3) a bal-
count tendered by the owner; (4) notice to the owner as
required by statute; and (5) a balance due the contractor.
Upon such showing, the law requires the owner to apply the unex-
peaded contract price due him and pay to the subcontractor
amounts due subcontractors and materialmen of whose
claims the owner has received notice, pro rata if necessary.

The principal contractor is a necessary party to an action
to enforce the lien of a subcontractor, but a trustee in a
conveyance subject to the lien is not an essential party.
Lookout Lumber Co. v. Mansion Hotel, etc., R. Co., 109 N. C.
658, 14 S. E. 35.

No Lien on Public Buildings.—Neither by the enforcement
of a lien, nor by anything in the nature of an equitable
process, or by a suit directly arising out of the deed or
execution, was it the intent of the Legislature to subject one of its public corpora-
tions, organized as necessary to the administration of its
governmental affairs, to the privation or loss of its buildings
for public school purposes. Morganton Hdw. Co. v. Mor-
ganton Graded Schools, 151 N. C. 507, 66 S. E. 583.

No Lien on Highway.—Under this section subcontractors
and materialmen are assured of a lien upon the property when
they have constructed. Pratt Lumber Co. v. Gill Co., 276 Fed. 783.

Liability of Municipality—No Lien against it.—Though no
lien can be filed against a municipality, yet it will be liable
to enforce the lien of a subcontractor, but a trustee in a
conveyance subject to the lien is not an essential party.
Lookout Lumber Co. v. Mansion Hotel, etc., R. Co., 109 N. C.
658, 14 S. E. 35.

Estoppel to Assert Lien under Section 44-L.—By electing
to assert a lien as a subcontractor under this section, plain-
tiff is estopped from thereafter asserting a lien as a con-
tractor or material furnisher under § 44-1, and plaintiff is
entitled to recover of defendant only the amount due the
contractor by the owner on the date notice was, given as a
subcontractor or material furnisher. Doggett Lbr. Co. v.
Perry, 212 N. C. 713, 194 S. E. 475.

When plaintiff is estopped by its election in asserting a
lien under this section, from asserting a lien under § 44-1
and § 44-8, it is not relieved of the consequences of its
estoppel because of such election, plaintiff’s remedy is by
instituting another action to recovercess for materials fur-
ished the contractor and used in the construction of the
building under this section. Doggett Lbr. Co. v. Perry, 213
N. C. 533, 196 S. E. 831.

Cited in Piedmont Electric Co. v. Vance, etc., Electric
Co., 165 W. N. C. 475, 149 S. E. 583.

§ 44-7: Repealed by Session Laws 1943, c. 543.

Editor’s Note.—The provisions of this section are now in-
cluded in § 44-8.

§ 44-8. Statement of contractor’s indebtedness to
be furnished to owner; effect. — When any
contractor, architect or other person makes a
contract for building, altering or repairing any
building or vessel, or for the construction or repair
of a railroad, with the owner thereof, it is his duty
to furnish to the owner or his agent, before receiv-
ing any part of the contract price, as it may be-
come due, an itemized statement of the amount
owing to any laborer, mechanic or artisan employed
by such contractor, architect or other person, or
to any person for materials furnished, and upon de-
ivery to the owner or his agent of the itemized
statement aforesaid, it is the duty of the owner to
retain from the money then due the contractor a
sum not exceeding the price contracted for, which
will be sufficient to pay such laborer or mechanic
or for labor done, or such person for such mate-
rials furnished, which said amount the owner
shall pay directly to the laborer, mechanic, arti-
سان or person furnishing materials. The owner
may retain in his hands until the contract is com-
pleted such sum as may have been agreed on be-
 tween him and the contractor, architect or other
person employing laborers, as a guaranty for the
faithful performance of the contract by such con-
tractor. When such contract has been per-
formed by the contractor such fund reserved as a
 guaranty shall be liable to the payment of the
labor done, or the person furnishing the ma-
terials as hereinafter provided. (Rev., s. 2021;
1887, c. 67; 1891, c. 203; 1899, c. 335; 1903, c. 478;
C. S. 2439.)

Purpose of Section—Owner Cannot Force Contractor to
Supply Statement.—The purpose of the section is to compel
the contractor to supply the itemized statement, so that the
laborer may be benefited, have his right facilitated, and the
owner of the property may be reasonably protected. There
is no liability created on the part of the owner if the item-
ized statement is not supplied to him; he cannot compel
the contractor to furnish him with it, nor is he permitted
to know that he has not paid the laborer or mechanic, or
that he owes him any particular sum. Pkston v. Young,
104 N. C. 102, 106, 10 S. E. 131.

For Whose Benefit Section Enacted.—This section while
enacted primarily for the benefit or protection of the work-
men and materialmen, is also for the protection of the owner
against a guaranty of his agent or person furnishing the
materials as hereinbefore provided. (Rev., s. 2021;
1887, c. 67; 1891, c. 203; 1899, c. 335; 1903, c. 478;
C. S. 2439.)

Owner Liable for Paying Contractor after Receipt of
Latter’s Statement.—Where the owner voluntarily pays to
the contractor, after the completion and acceptance of his
building, the full balance of the contract price, having re-
ceived the contractor’s statement of persons and materials
still owed by him thereon, his conduct in so doing is wrong-
ful to the materialmen, of which he will not be permitted
to take advantage to the loss of the surety on the contract-
or’s indemnifying bond, in his action to recover thereon.
Pulley v. F. W. Woolworth Co., 150 N. C. 141, 63 S.
E. 611. See annotations to § 44-9.

Personal Action by Materialmen against Owner.—A per-
son acting for the defendant has a right to retain a sum to
pay the subcontractor, when the contractor has furnished
him a statement of indebtedness, can be maintained against
the owner if the subcontractor has been notified by him or the
contractor of his claim before the owner completed payment
to the contractor. Economy Pumps v. F. W. Woolworth

Duty of Owner to Reserve Funds to Pay Materialmen,
etc.—The act requires the owner to program and em-
ployers, and amounts he owes for materials, when complied
with, makes it the duty of the owner to retain from the
amount due the contractor, so far as it extends, the
§ 44-9

CH. 44. LIENS.—SUBCONTRACTORS', ETC. § 44-9

amounts due by the latter to the materialmen, and pay it to them, and under section 44-9, no payment to the contractor after such notice shall be a credit on or discharge of the lien of the materialmen, etc., upon the building, according to the decision of the North Carolina Lumber Mfg. Co. v. Holladay, 178 N. C. 417, 100 S. E. 597.

Remedy of Subcontractors.—The subcontractor and material furnisher having given the owner an itemized statement of the amount due, and being paid by them, acquisitions the lien for the payment of their claims and may maintain a civil action thereon against the owner under the provisions of this section and §§ 44-9 and 44-10 without being required to file their liens within six months, etc., under the provisions of § 44-39 or bring suit within six months thereafter, under those of § 44-43. Campbell v. Hall, 187 N. C. 464, 121 S. E. 760.

Section Not Repealed by Later Act Nor in Conflict with § 44-13.—This and the following two sections are not repealed by c. 150, Laws 1913, the later act expressly purposing to extend their provisions to those who furnish materials to the subcontractors of railroads, and, construing the above sections in connection with section 44-39 as amended, the furnisher of materials to the contractor out of an entire contract may file his itemized statement with the railroad company within six months after its completion, and maintain his action to enforce his lien, when commenced within six months after the notice of completion, and subject to the contractor or subcontractor's lien so acquired. Porter v. Case, 187 N. C. 650, 122 S. E. 483.

Effect of Mortgages Subsequent to Notice.—Where the owner has given the notice of the subcontractor's claim upon the building, or the contractor filed his lien in accordance with the statute before the justice of the peace or clerk, as the case may be, the right to the money still due the materialman, and the lien exists, the contractor cannot be itemized. Upon the delivery of the itemized statement, the laborer's lien will arise and be effective. Oxford Pumps v. F. W. Woolworth Co., 220 N. C. 499, 17 S. E. (2d) 639.

For Whose Benefit Section Enacted.—This section while enacted primarily for the benefit or protection of the workmen and materialmen, is also for the protection of the owner and the surety on the contractor's bond. Guilford Lumber Mfg. Co. v. Hall, 178 N. C. 417, 100 S. E. 597.

Assignment of Lien.—The statutory lien of a laborer or materialman under the provisions of this section, is assignable as in case of ordinary business contracts. Horne-Wilson v. Wheeler, 157 N. C. 597, 72 S. E. 197.

Notice to Be Given before Settlement with Contractor.—It is necessary, to enforce a lien on a building for materials furnished the contractor, acquired no lien on the building, under former acts of that date. It is necessary, to enforce a lien on a building for materials furnished the contractor, that the materialman file with the owner an itemized statement of the amounts due for materials, or that he give notice to the owner of the amount due him before the owner settles with the contractor, but he is not required to file such itemized statement, the amounts due by the contractor to the materialman under the provisions of this section, is assign-able as in case of ordinary business contracts. Orinoco Supply Co. v. Masonic, etc., Home, 163 N. C. 513, 79 S. E. 964; Schnepp v. Richardson, 222 N. C. 228, 22 S. E. (2d) 555.

Same.—Rule Not Affected by § 44-8. — This rule is not affected by section 44-8. That section is directed against the contractor, and is intended to compel him to furnish to the owner of the building a statement necessary to give notice of claims of subcontractors, etc. If the contractor shall furnish the itemized statement, the laborer's lien will arise and be effective. Pinkston v. Young, 104 N. C. 302, 104 S. E. 15.

Same.—Otherwise No Lien Attaches.—When the required notice has not been given before the last payment has been made to the contractor, who fails to complete the building, and the owner has disbursed the balance of the contract price, no lien attaches. Orinoco Supply Co. v. Masonic, etc., Home, 163 N. C. 513, 79 S. E. 964. And the owner is justified in making payment to the contractor. Clark v. Edwards, 163 N. C. 513, 79 S. E. 964.

Same.—Even Though Payment in Full Is Made in Advance. — In Rose v. Davis, 188 N. C. 355, 124 S. E. 576, it was held a furnisher of material, used in the building by a contractor, acquired no lien on the building, under former § 44-7, by notice to the owner filed after the owner had paid to the contractor the full contract price; and that it was immaterial that payment in full had been made in advance, in accordance with the contract between the owner and contractor.

Same.—Right Statutory and Dependent upon Notice, — To share in the fund due by the owner to the contractor and to have that fund distributed pro rata among the claimants therein, is a statutory lien which is created by law, and is founded on the property by giving the notice to the owner. Charlotte Pipe, etc., Co. v. Southern Aluminum Co., 172 N. C. 704, 707, 91 S. E. 923.

Lien on materials given the furnisher of material on the building of the owner to the contractor, etc., are strictly statutory and no lien can be acquired therefor unless notice has been given, nor is it contemplated or provided by the statute that the lien can be enforced against the building by suit against it, or by suit against the contractor by agreement in advance of his work. Rose v. Davis, 188 N. C. 355, 124 S. E. 576.

Purpose of You,—In case of a furnisher of material on the building of the owner to the contractor, etc., are strictly statutory and no lien can be acquired therefor unless notice has been given, nor is it contemplated or provided by the statute that the lien can be enforced against the building by suit against it, or by suit against the contractor by agreement in advance of his work. Rose v. Davis, 188 N. C. 355, 124 S. E. 576.

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requirements, and is insufficient to create the lien. Norfolk

That Laborers Are Working on Building Is Not Of Itself Notice to Owner.—That laborers and subcontractors are working on a building is not notice to the owner, not to pay out to the contractor until it is ascertained how much is due by the letter to each and every subcontractor, laborer, materialman, etc. Clark v. Edwards, 119 N. C. 115, 15 S. E. 794.

Mere knowledge of the owner that certain laborers are at work on a building, or that certain persons or firms have supplied materials, furnished labor, or performed services, under the provisions of any section, of any claim of lien thereon. Norfolk Bldg., etc., Co. v. Elizabeth City Hospital Co., 176 N. C. 87, 97 S. E. 146.

Unpaid Balance at Time of Notice Subject to Lien.—Where the owner of the building has paid his contractor to the time of filing the statutory claim for material furnished, the moneys thereafter becoming due the contractor, under the same contract, are subject to the lien. Blue Pearl Granite Co. v. Merchants' Bank, 172 N. C. 354, 90 S. E. 312.

Lien Only to the Extent of Unpaid Balance at Date of Notice.—Any person furnishing material for the building; and a statement of the amounts then due to those who have done labor upon or furnished materials, etc. Hildebrand v. Vanderbilt, 147 N. C. 639, 61 S. E. 620.

Notice to Owner's Architects Not Notice to the Owner.—That laborers are working on building is not of itself notice to the owner by enforcing his lien by action within the six months, acquires no superior right in the pro rata distribution of the trust funds, but only the additional security of his lien. Charlotte Pipe, etc., Co. v. Southern Aluminum Co., 172 N. C. 704, 90 S. E. 921.

Notice to Owner's Architects Not Notice to the Owner.—The object of the notice required by the statute to be given to the owner of property only to the extent of any unpaid balance at the time of giving the notice to the owner, of the subscontractor's claim. Clark v. Edwards, 119 N. C. 115, 15 S. E. 794.

Notice of Lien to Justice or Clerk Not Necessary.—The lien of the subcontractor is acquired by notice to the owner, and filing of the notice of the lien with a justice or a clerk of the county, as provided by section 44-10. Morgananton Mfg., etc., Co. v. Andrews, 165 N. C. 285, 294, 81 S. E. 418; Porter v. Case, 187 N. C. 629, 639, 191 S. E. 481; Charlotte Pipe, etc., Co. v. Southern Aluminum Co., 172 N. C. 794, 706, 90 S. E. 833.

Notice to Owner's Architects Not Notice to the Owner.—The object of the notice required by the statute to be given to the owner of property only to the extent of any unpaid balance at the time of giving the notice to the owner of the subscontractor's claim. Morgananton Mfg., etc., Co. v. Andrews, 165 N. C. 285, 294, 81 S. E. 418; Porter v. Case, 187 N. C. 629, 639, 191 S. E. 481; Charlotte Pipe, etc., Co. v. Southern Aluminum Co., 172 N. C. 794, 706, 90 S. E. 833.

Cited in Dixon v. Ipock, 212 N. C. 363, 213 S. E. 392; Schnepp v. Richardson, 222 N. C. 228, 22 S. E. (2d) 555.

§ 44-10. Sum due by statement to constitute lien.—The sums due to the mechanic, mechanic or artisan for labor done, or the person furnishing materials, as shown in the itemized statement rendered to the owner, shall be a lien on the building, vessel or railroad built, altered or repaired, without any lien being filed before a justice of the peace or the superior court. (Rev., s. 2023; 1887, c. 67, s. 2; C. S. 2441.)

Acquisition of Lien without Filing Notice.—By virtue of section 44-10, the lien of a contractor must be filed in six months, but by this section, the lien of the mechanic or artisan can be acquired without filing if a statement of the amounts is rendered the owner. (See sections 44-39 to 44-43, inclusive.) However acquired, the lien is lost under section 44-43 if action thereon is not begun in six months. Birdalbrad v. Vanderbilt, 147 N. C. 639, 641, 61 S. E. 609. Schnepp v. Richardson, 222 N. C. 228, 22 S. E. (2d) 555.

Cited in Dixon v. Ipock, 212 N. C. 363, 213 S. E. 392; Schnepp v. Richardson, 222 N. C. 228, 22 S. E. (2d) 555.

§ 44-11. Where sums due contractor from owner insufficient; payment pro rata. — If the amount due the contractor by the owner is insufficient to pay in full the laborer, mechanic or artisan, for his labor, and the person furnishing materials, for materials furnished, it is the duty of the owner to distribute the amount pro rata among the several claimants, as shown by the itemized statement furnished the owner, or of which notice has been given the owner by the claimant. (Rev., s. 2023; 1887, c. 67, s. 3; 1913, c. 150, s. 5; C. S. 2442.)

Provisions of Section 44-40 Do Not Affect Distribution Under This Section.—Where the contractor under contract has not sufficient funds in his hands to pay all the liens thereon for material furnished, the amount due the contractor, subject to the liens, shall be distributed among the several claimants under the provisions of this section; and construing this section with other relevant sections of the code, it is held that the notice of lien filed by the owner with the clerk, for this latter section relates to lien filed with the proper officers, and does not affect the provisions as to subcontractors who acquire a lien by notice to the owner. Morgananton Mfg., etc., Co. v. Andrews, 155 N. C. 285, 81 S. E. 418.

Remedy by Accounting.—A right to have an accounting in an ordinary civil action and judgment for the amount due by the owner to the contractor, are incidents of the rights given the subcontractor by the provisions of this section. Schnepp v. Richardson, 222 N. C. 228, 22 S. E. (2d) 555.

Notice to Owner's Architects Not Notice to the Owner.—The object of the notice required by the statute to be given to the owner of property only to the extent of any unpaid balance at the time of giving the notice to the owner of the subscontractor's claim. Morgananton Mfg., etc., Co. v. Andrews, 165 N. C. 285, 294, 81 S. E. 418; Porter v. Case, 187 N. C. 629, 639, 191 S. E. 481; Charlotte Pipe, etc., Co. v. Southern Aluminum Co., 172 N. C. 794, 706, 90 S. E. 833.

Cited in Dixon v. Ipock, 212 N. C. 363, 213 S. E. 392; Schnepp v. Richardson, 222 N. C. 228, 22 S. E. (2d) 555.

§ 44-12. Contractor failing to furnish statement, or not applying owner's payments to laborer's claims, misdemeanor. — If any contractor or architect shall fail to furnish to the owner an itemized statement of the sums due to every one of the laborers, mechanics or artisans employed by him, or the amount due for materials, before receiving any part of the contract price, he shall be guilty of a misdemeanor. If any contractor shall fail to apply the contract price paid him by the owner or his agent to the payment of bills for labor and material, he shall be guilty of a misdemeanor and upon conviction thereof shall be fined or imprisoned, or both, at the discretion of the court. (Rev., s. 3563; 1887, c. 67, s. 4; 1913, c. 150, s. 8; C. S. 2443.)

§ 44-13. Laborer for railroad contractor may sue company; conditions of action. — As often as any contractor for the construction of any part of a railroad which is in progress of construction is indebted to any laborer for thirty or less number of days labor performed in constructing said road, or is indebted for more than thirty days to any person furnishing material for the construction of said road, such laboror or material man may give notice of such indebtedness to said company in a manner herein provided, and said company shall thereupon become liable to pay such laborer or material man the amount so due for labor or material, and action may be maintained against said company therefor. Such notice shall be given by said laboror to said company within twenty days after the performance of the number of days labor for which the claim is made, and such notice shall be given within thirty days after the materials have been furnished. Such
notice to be given by the laborer shall be in writ- 
ing and shall state the amount and the number of 
days labor and the time when the labor was per-
formed for which the claim is made, and the 
name of the contractor from whom due, and 
and shall be signed by such laborer or his attorney; 
and such notice of the material man shall be in 
writing and shall state the amount of material 
and furnished, and when furnished, and the name 
of the contractor to whom furnished and by whom 
due, and shall be signed by such material man. The 
notice shall be served on an engineer, agent or superintendent employed 
by said company having charge of the section of 
road on which such labor was performed or ma-
terial furnished, personally or by leaving the 
same at the office or usual place of business of 
said engineer, agent, or superintendent, with 
some person of suitable age. But no action shall 
be maintained against any company under the 
provisions of this section unless the same is com-
menced within ninety days after notice is given 
to the company by such laborer or material man 
as above provided. (Rev., s. 1818; Code, s. 1942; 
1871-8, c. 138, s. 12; 1913, c. 150, s. 1; C. S. 5444.)

No Conflict between this and Section 44-B.—There is 
no conflict between Section 44-B and this section 
and it is the legislative intent to extend the provisions of 
the law relative to materialmen and subcontractors of railroads. 

Application to Contractors Constructing Railroads.— 
This section applies only to laborers "constructing railroads." 
Grazener v. Gloucester Lumber Co., 167 N. C. 676, 678, 83 S. E. 496.

A Logging Railroad within this Section.—A logging road 
operated by the use of steam is a railroad within the 
meaning of this section, and by following the requirements 
of the section named herein, and upon the same 
principle, show a substantial compliance with the require-
ments of this section. Wray v. Harris, 77 N. C. 17; 
Cook v. Colby, 163 N. C. 705; Moore v. Cape Fear, 
etc., R. Co., 112 N. C. 236, 17 S. E. 132.

Where, in an action by the assignee of a number of claims 
due laborers by the contractors, the complaint and exhibits 
failed to show affirmatively that each of the laborers not 
only claimed a specific sum, but had substantially com-
plied with the statute in respect to notice, etc., previous 
to the assignment of his account, it was held that a de-
murrer to the complaint was properly sustained. — 
Moore v. Cape Fear, etc., R. Co., 112 N. C. 236, 17 S. E. 152.

Assignment of Claim after Compliance with Statute.— 
After complying with the requirements of this section a 
contractor or subcontractor who does work or furnishes material for 
the construction, though done under an independent contractor. 

Substantial Compliance with Statute Necessary.— 
The right to look beyond the contract of employment to an arti-
ficial responsibility that may be thrust upon the company 
under the provisions of this section is a creature of the 
statute, and one who claims the benefit of it must, like 
a mechanic seeking to enforce a lien, and upon the same 
principle, show a substantial compliance with the require-
ments of this section. Glazener v. Gloucester Lumber Co., 
167 N. C. 676, 678, 83 S. E. 496.

§ 44-14. Contractor on municipal building to 
give bond; action on bond. — Every county, city, 
town or other municipal corporation which lets 
a contract for the building, repairing or altering 
any building, public road, or street, shall require 
the contractor for such work (when the contract 
price exceeds five hundred dollars) to execute 
who is to be a party would not be a fatal misjoinder. 
Moore v. Cape Fear, etc., R. Co., 112 N. C. 236, 17 S. E. 152.

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days. Proof of such service shall be made by affidavit as provided in case of the service of summonses by publication. All persons entitled to bring and prosecute an action on the bond shall have the right to intervene in said action, set up their respective claims, provided that such intervention shall be made within six months from the bringing of the action, and where the contractor has not object to the suit being brought and prosecuted in the manner therein. If the recovery on the bond shall be inadequate to pay the amounts found due to all of the claimants, judgment shall be given to each claimant pro rata of the amount of the recovery. The surety on such bond may pay into court for distribution among the claimants the full amount of his liability, to wit, the penalty named in the bond, and upon so doing, such surety shall be relieved from further liability. (1913, c. 150, s 2; 1915, c. 191, s. 1; 1923, c. 100; 1927, c. 151; 1935, c. 55; C. S. 2445.)

See 13 N. C. Law Rev. 99, for relation of this section to the law of contracts.

See 13 N. C. Law Rev. 368, for an analysis of the 1935 amendment to this section.

Editor's Note.—The policy underlying this section is the manifest public interest in protecting governmental agencies from undue interferences which tend to mitigate the efficient operation of the governmental mechanism. Should such agencies be subject to the general law permitting liens on public buildings, the results in the forfeiture of public funds, and the like, would be quite different. Under this section the lien thereon is given for their benefit in lieu of the right to acquire a lien thereon. Robinson Mfg. Co. v. Blaylock, 192 N. C. 407, 135 S. E. 291; Noland Co. v. Board, 199 N. C. 250, 129 S. E. 577; Fore v. Feimster, 171 N. C. 551, 88 S. E. 977; L. R. A. 1916 F, 481.

Whether Materials Were Actually Used or Not Immaterial.—The materialmen have a claim against the surety on the bond required by this section, whether the materials were actually used in the building or not; for otherwise the materialmen would be compelled to stand over and compel the contractor to incorporate them in the work, and the result of such a rule would destroy business confidence and security. Standard Land, etc., Co. v. Fidelity, etc., Co., 191 N. C. 313, 131 S. E. 754. See Moore v. Builders Material Co., 192 N. C. 418, 450, 135 S. E. 113.

Municipality May Not Withhold Funds of Contractor.—Unlike the provisions of law governing the subcontractors' and materialmen's liens on private buildings, etc., this section provides an express substitute for the lien statutes in an effort to place public construction on a parity with private work of a similar kind, does not contain any provision whereby the owner may withhold funds belonging to the contractor for any work not done or materials not furnished, but only requires that the work done or material furnished by him to the contractor has not been paid for; nor would the owner be justified in withholding funds due the contractor upon receipt of such notice. The contract of the laborer or materialman is with the contractor, and in the absence of agreement or statutory provision allowing it, the owner would not be relieved, even pro tanto, of his obligation to the contractor by paying one or more of those who have supplied material or labor to the contractor. An obiter suggestion to the contrary, made in Schefflow v. Pierce, 176 N. C. 91, 97 S. E. 95, was disapproved in Nolan Co. v. Board, 199 N. C. 250, 129 S. E. 577; Robinson Mfg. Co. v. Blaylock, 192 N. C. 407, 412, 135 S. E. 136.

Bond Held Void.—In Maryland Casualty Co. v. Fowler, 31 Fed. (2d) 881, affirming 27 Fed. (2d) 421 it was held that under this section a school building contractor's bond, which provided that no right of action thereon should accrue to any person other than the obligee, was void in so far as it affected the claims of laborers and materialmen protected by bonds given to the State Highway Commission.

Liability of Sureties.—Under this section the sureties on a contractor's bond for the erection of a municipal building are liable for any amount in excess of the penalty of the bond, and a judgment against the surety is not erroneous, and the surety may relieve himself from liability by paying one or more of those who work for or furnish materials to the contractor. An obiter suggestion to the contrary, made in Schefflow v. Pierce, 176 N. C. 91, 97 S. E. 95, was disapproved in Nolan Co. v. Board, 199 N. C. 250, 129 S. E. 577; Robinson Mfg. Co. v. Blaylock, 192 N. C. 407, 412, 135 S. E. 136.

Money Loaned to Contractors.—A bank loaning money to a contractor to build a public highway may not recover that money from the contractor if it be shown that the money was used for the payment of laborers and materialmen furnishing labor and materials upon which he worked, without having theretupon procured assignments to it of their claims, nothing appearing in the note given the bank by the contractor showing that the loan was for this purpose. Snelson v. Hill, 196 N. C. 494, 146 S. E. 135.

Money for Foremen.—If a money loaned by a bank to a contractor for bonds given to a State Highway Commission is used in building or repairing public roads, it is recoverable by the State Highway Commission against the contractor. Snelson v. Hill, 196 N. C. 494, 146 S. E. 135.

Extent of Surety's Liability.—The surety on the contract-
or's bond for the erection of a public building is only liable for the amount of the penalty of the bond. Robinson Mfg. Co. v. Blaylock, 192 N. C. 407, 135 S. E. 136.

Effect of Taking Nove of Contractor.—To determine the liability of the surety upon its bond given to a municipality for the contractor's performance of his contract to erect a public school building, the contract and the bond, together with the contract, shall be examined to effectuate its intent and purpose. Robinson Mfg. Co. v. Blaylock, 192 N. C. 407, 135 S. E. 136.

Sureties Right of Subrogation to Moneys Reserved by Municipality.—Where the municipality has in hand a penalty of the bond which the surety has paid into court entitled to the money thus reserved as against the laborers and materialmen, whose claims remain unpaid after the pro rata distribution of the money to the extent of the penalty of the bond is made, the surety is subrogated to the rights under this section since the amendment of 1923 is liable to those doing labor thereon or furnishing material therefor, whether such condition is written into the obligation of the bond itself or otherwise. Standard Elect. Time Co. v. Fidelity, etc., Co., 191 N. C. 653, 135 S. E. 688.

Sureties Right of Subrogation to Moneys Reserved by Municipality.—Where the contractor's bond for the erection of a municipal building is liable to those doing labor thereon or furnishing material therefor, whether such condition is written into the obligation of the bond itself or otherwise. Standard Elect. Time Co. v. Fidelity, etc., Co., 191 N. C. 653, 135 S. E. 688.

Liability of Bond to Materialmen, etc., Conclusive Regarding Its Express Conditions.—A surety bond given under this section since the amendment of 1923 is liable to those doing labor thereon or furnishing material therefor, whether such condition is written into the obligation of the bond itself or otherwise. Standard Elect. Time Co. v. Fidelity, etc., Co., 191 N. C. 653, 135 S. E. 688.

Liability of Bond to Materialmen, etc., Conclusive Regarding Its Express Conditions.—A surety bond given under this section since the amendment of 1923 is liable to those doing labor thereon or furnishing material therefor, whether such condition is written into the obligation of the bond itself or otherwise. Standard Elect. Time Co. v. Fidelity, etc., Co., 191 N. C. 653, 135 S. E. 688.

Conditions Taking Away Right of Indemnification Void as Against Public Policy.—The policy of law with respect to mechanics and laborers' liens, is that if the mortgage evidenced by this section is not expressed therein, or where rights of third parties, which the statute was intended to protect, are involved, the policy of law, and this section is not applicable. Hunt Mfg. Co. v. Bank of Ideal Brick Co. v. Gentry, 191 N. C. 653, 136 S. E. 800.

Liability of Bond to Materialmen, etc., Conclusive Regarding Its Express Conditions.—A surety bond given under this section since the amendment of 1923 is liable to those doing labor thereon or furnishing material therefor, whether such condition is written into the obligation of the bond itself or otherwise. Standard Elect. Time Co. v. Fidelity, etc., Co., 191 N. C. 653, 135 S. E. 688.

Application of Section to Existing Liens.—The provisions of this section that its requirements as to the liability of the contractor's bond for the construction of a county highway shall not affect existing suits, applies to the remedy, and does not relate to those who have furnished material for the construction of the highway before the enactment of the statute but have no action pending at that time. Chap- bell v. National Surety Co., 191 N. C. 703, 133 S. E. 21.

Effect of Taking Nove of Contractor.—The bond required by this section is not to cover the materialmen, even though he took the note of the contractor for the materials he furnished. Moore v. Builders Material Co., 192 N. C. 418, 135 S. E. 113; Standard Elect. Time Co. v. Fidelity, etc., Co., 191 N. C. 653, 135 S. E. 688.

Sureties Right of Subrogation to Moneys Reserved by Municipality.—Where the municipality has in hand a certain part of the cost of construction, and the surety bond, given in accordance with this section, is strung together with the contract, provides that the principal surety will be subrogated to the rights of the principal, the contractor, and all other sureties, to the extent of the penalty of the bond (under seal) is limited as to its commencement by the limitation of the power of action against the contractor, which does not apply. Chapbell v. National Surety Co., 191 N. C. 703, 133 S. E. 21.

Provision That Action Must Be within Reasonable Time.—Under this section the provision in a bond for public construction that action thereon should be brought within a reasonable time is valid. Horne-Wilson v. National Surety Co., 191 N. C. 656, 135 S. E. 136.

Feed for Teams as Materials Furnished.—Feed for teams working on a public highway come within the contemplation of this section as material furnished, making a surety upon the bond for the public highway liable. Chapbell v. National Surety Co., 191 N. C. 703, 133 S. E. 21.

Payments for Machinery Parts Used to Replace Borrowed Parts.—Where certain parts of a steam shovel used in construction of the county highway are replaced by other parts borrowed for the purpose, and are necessary in the construction, the surety on the contractor's bond is not liable under the statute for the payment of other like parts purchased to replace the borrowed parts which have thus been paid for. Nelsen v. Hill, 196 N. C. 494, 146 S. E. 135.

Misdemeanor Provision Still Applicable.—The provision of this section that any of the public agencies mentioned that fails to require the bond as fixed by the statute, is subject to a fine of $100 for each violation, and the same is still applicable. Cutt Real Estate Co. v. Fidelity, etc., Co., 191 N. C. 629, 135 S. E. 128.

Local Law Requiring Provision of Section Be Read in Bond.—Where the provision that the bond referred to shall be read in private construction bonds is invalid. Plott Co. v. Ferguson Co., 202 N. C. 445, 163 S. E. 488.

Not Applicable When Surety Takes over Contract.—A surety company on a contractor's bond for the erection of municipal buildings in taking over for its own protection the completion thereof, and dealing directly with those doing labor or others in loading or discharging the cargo of such vessel, and also for all labor done by any subcontractor or laborer employed in discharging or loading any such vessel, when such labor is done under contract with a contractor or stevedore who may be employed by the master, agent or owner of such vessel. (Rev., s. 2040; 1893, c. 357; 1909, c. 147; C. S. 2446.)

Engine as "Material Furnished."—Under this section, which gives a lien on a vessel for all debts contracted for work done on the same or material furnished, one who furnished an engine to be installed in a gas boat, relying on the credit of the vessel, is entitled to a lien therefor as "material," on compliance with the statute as to recording the nature of the engine and the vessel is immaterial that by the contract is reserved title to the engine until paid for. The Pearl, 189 Fed. 540.

§ 44-16. For labor in loading and unloading.—Every vessel, her tackle, equipment, and furniture, is subject to a lien for documents, or others in loading or discharging the cargo of such vessel, and also for all labor done by any subcontractor or laborer employed in discharging or loading any such vessel, when such labor is done under contract with a contractor or stevedore who may be employed by the master, agent or owner of such vessel. (Rev., s. 2041; Code, s. 1804; 1881, c. 356, s. 1; C. S. 2447.)

§ 44-17. Filing lien; laborer's notice to master.—The liens provided for in the preceding sections shall be filed as is provided for other liens.
The subcontractor or laborer may give notice to the master, agent or owner of such vessel, that the contractor or stevedore is or will become indebted to him. It shall then be the duty of such master, agent or owner of such vessel to retain out of the amount due to such contractor or stevedore under his contract as much as is due or claimed by the person giving the notice, and after such notice is given no payment to the contractor or stevedore shall be a credit on or a discharge of the lien herein provided. (Rev., s. 2042; Code, s. 1805; 1881, c. 356, s. 2; C. S. 2448.)

§ 44-18. Enforcement of lien. — The enforcement of such lien shall be by summons against the contractor or stevedore, and also against the master, agent or owner of such vessel, who made the contract with such contractor or stevedore, if over two hundred dollars, to be issued by the clerk of the superior court, and if under two hundred dollars, by a justice of the peace. (Rev., s. 2043; Code, s. 1806; 1881, c. 356, s. 3; C. S. 2449.)

Enforcement of Lien in Court of Admiralty. — A lien given by a state statute for materials or supplies furnished to a vessel in her home port in the state is enforceable by suit in rem in a court of admiralty. The Pearl, 189 Fed. 540.

§ 44-19. Judgment against contractor binds master and vessel. — The judgment against the contractor or stevedore shall also be a judgment against the master, agent or owner of such vessel, and also against such vessel itself, her tackle, apparel and furniture, which shall be seized, held and sold under execution for the satisfaction of such judgment. (Rev., s. 2044; Code, s. 1807; 1881, c. 356, s. 4; C. S. 2450.)

§ 44-20. Liens not to exceed amount due contractor. — The sum total of all the liens due to different subcontractors and laborers, performed for any contractor or stevedore under any contract with any master, agent or owner of any vessel, shall not exceed the amount due to the contractor or stevedore at the time of notice given to the owner, agent or master, or the amount due to the contractor or stevedore at the time of the service of summons upon the master, agent or owner, when no notice has been given. (Rev., s. 2045; Code, s. 1808; 1881, c. 356, s. 5; C. S. 2451.)

§ 44-21. Owner to see laborers paid. — In all cases where steamships or vessels of any kind are loaded or unloaded or where any work is done in or about the same by the contractors to do the same known as stevedores or "boss stevedores," who in doing the same employ laborers to assist or do the work by the hour, day, week or month, it is the duty of the owner or agent of the vessel to see that the laborers employed in or about the same by the stevedore, contractor or "boss stevedore" are fully paid the wages that may be due such laborer before he makes final settlement with the contractor, stevedore or "boss stevedore." (Rev., s. 2046; 1887, c. 145, s. 1; C. S. 2452.)

§ 44-22. Owner may refuse to settle with contractor till laborers paid. — Any owner or agent referred to in the preceding section may refuse final settlement with the "boss stevedore" or contractor until he or they satisfy the said owner or agent, by written oath if necessary, that the same has been done. (Rev., s. 2047; 1887, c. 143, s. 2; C. S. 2453.)

§ 44-23. Owner may pay orders for wages. — It is lawful for the owner or agent of such vessel to pay off from time to time such orders for wages as may be due and given therefor in favor of the laborers by the contractor or stevedore, which on final settlement may be deducted from the contract price. (Rev., s. 2048; 1887, c. 145, s. 3; C. S. 2454.)

§ 44-24. Laborer's right of action against owner. — Any owner or agent of such vessel who neglects or refuses to comply with the preceding provisions is liable to such laborer in a civil action for the amount of the wages so due him by the contractor, stevedore or "boss stevedore." (Rev., s. 2049; 1887, c. 145, s. 4; C. S. 2455.)

§ 44-25. Stevedore's false oath punishable as perjury. — If any contractor, stevedore or boss stevedore shall make any false oath or false representation with intent to wrong, cheat or defraud any laborer in violation of the four preceding sections, he shall be guilty of a felony and on conviction thereof shall be punished as is now prescribed by law for perjury. (Rev., s. 3613; 1887, c. 145, s. 5; 1913, c. 542; C. S. 2456.)

Cross Reference.—As to punishment for perjury, see § 14-2047.

Editor's Note.—The 1943 amendment substituted the word "felony" for the word "misdemeanor" in line five.

§ 44-26. Stevedores to be licensed; omission misdemeanor. — No person shall engage in the business of loading or unloading vessels upon contract, nor shall any person solicit or make contract for himself or for any other person to load or unload any vessel either by day's work or by the job, without having previously obtained a license therefor, in the manner provided by law for other licenses for trades and occupations. Any person violating the provisions of this section shall be guilty of a misdemeanor and shall be fined or imprisoned, or both, at the discretion of the court. (Rev., ss. 2050, 3791; 1891, c. 450; 1899, c. 595; C. S. 2457.)

§ 44-27. Tax and bond on procuring license. — Before the sheriff shall issue the said license the applicant shall pay to the sheriff an annual tax of fifty dollars, and shall execute a bond with two or more approved sureties in the sum of two thousand dollars, payable to the state of North Carolina, and conditioned for the faithful performance of his duties and the due and lawful payment of all sums due to laborers assisting in the work of loading or unloading any vessels upon which the applicant may be engaged. And every bond so taken shall be renewed annually, and shall be filed with and preserved by the register of deeds in trust for every person that shall be injured by the breach of his contracts, who may severally bring suit thereon for the damages by each one sustained. (Rev., s. 2051; 1891, c. 450; C. S. 2458.)

Art. 4. Warehouse Storage Liens.

§ 44-28. Liens on goods stored for charges. — Every person, firm or corporation who furnishes storage room for furniture, tobacco, goods, wares or merchandise and makes a charge for storing
the same, has the right to retain possession of and a lien upon all furniture, tobacco, goods, wares or merchandise until such storage charges are paid. (1913, c. 192, s. 1; 1915, c. 190, s. 2; C. S. 2459.)

Cross Reference.—As to effective period for lien on leaf tobacco, see § 44-64.

Application of Section.—This section applies to such persons, firms or corporations as operate warehouses as a business for compensation, and not to an isolated instance in which goods or chattels are left in a store or building of the claimant. Champion Shoe Machinery Co. v. Sellers, 197 N. C. 30, 147 S. E. 674.

§ 44-29. Enforcement by public sale.—If such charges are not paid within ten days after they become due, then such person, firm or corporation is authorized to sell said furniture, tobacco, goods, wares or merchandise at the courthouse door, or in some public places in the county, or in some newspaper published in the county where the goods or tobacco are stored, and out of the proceeds of such sale to pay the costs and expenses of sale and all costs and charges due for storage, and the surplus, if any, to the owner of such furniture, tobacco, goods, wares or merchandise.

(1913, c. 192, s. 2; 1915, c. 190, s. 2; C. S. 2460.)

Cross Reference.—As to requirement that the commissioner of revenue be given thirty days' notice of sale of a motor vehicle under a mechanic's or storage lien, see §§ 20-77, subsec. (c) and 20-114, subsec. (c).

Cited in Champion Shoe Machinery Co. v. Sellers, 197 N. C. 30, 32, 147 S. E. 674.

Art. 5. Liens of Hotel, Boarding and Lodging-House Keeper.

§ 44-30. Lien on baggage.—Every hotel, boarding-house keeper and lodging-house keeper who furnishes board, bed or room to any person has the right to retain possession of and a lien upon all baggage or other property of such person that may have been brought to such hotel, boarding-house or lodging-house, until all reasonable charges for such room, bed and board are paid. (Rev., s. 2037; 1899, c. 615, s. 1; 1917, c. 26, s. 1; C. S. 2461.)

Cross Reference.—As to hotels, inns, etc., generally, see §§ 22-1 et seq.

Upon Property of a Third Party Stranger.—An innkeeper has a lien even upon the goods of a third person held by the guest and brought to the inn, with the qualification however, that if he knew that they belonged to such third person he has no lien upon them. Covington v. Newberger, 99 N. C. 523, 6 S. E. 295.

A hotel keeper's lien for charges, under this section, will not attach to a chattel belonging to a third person which is brought to the hotel by the guest under given circumstances. Pate Hotel Co. v. Blair, 207 N. C. 464, 177 S. E. 330.

Occasional Entertainment of Strangers Not Inkeeping.—One who entertains strangers only occasionally, although he receives compensation for it, is not an innkeeper. State v. Mathews, 19 N. C. 424.

The principles of the law of bailment, as they apply to an action for negligent breach of duty arising under the implied contract of bailment, are not affected by the statutory lien given by this section. Wells v. West, 212 N. C. 656, 194 S. E. 313.

A proprietor of a lodging house is not a bailee of personal property left in the room rented by the owner of the property, even though the proprietor has access to the room for janitor and maid service, there being no such delivery of possession of the personality necessary to establish the relationship, and this result is not affected by the statutory lien given by this section. Id.

§ 44-31. Baggage may be sold.—If such charges are not paid within ten days after they become due, then the hotel, boarding-house or lodging-house keeper is authorized to sell said baggage or other property at the courthouse door, or in front of any public building in the town in which the lien attaches, after first advertising such sale for ten days at said courthouse door and three other public places in the county, and out of the proceeds of sale to pay the costs and expenses of sale and all costs and charges due for said board, bed or room, and the surplus, if any, to the owner of said baggage or other property. (Rev., s. 2038: 1899, c. 615, s. 2; 1917, c. 26, s. 2; 1935, c. 364; C. S. 2462.)

Editor's Note.—The amendment of 1935 adds the provision permitting sale in the front of any public building.

§ 44-32. Notice of sale.—Written notice of such sale shall be served on the owner of such baggage or other property ten days before such sale, if he is a resident of the state; but if he is a nonresident of the state, or if his residence is unknown, the publication of such notice for ten days at the courthouse door and three other public places in the county shall be sufficient service of the same. (Rev., s. 2039; 1887, c. 645, s. 3; C. S. 2463.)

Art. 6. Liens of Livery-Stable Keepers.

§ 44-33. Lien for ninety days keep on animals in possession.—Every keeper of livery, sale, or boarding stables has a lien upon and the right to retain the possession of every horse, mule, or other animal belonging to the owner or person contracting for the board and keep of any horse, mule, or other animal, for any and all unpaid amounts due for board of any horse, mule, or other animal. This lien shall not attach for amounts accruing for a longer period than ninety days from the reception of such property or from the last full settlement; nor does this lien apply if the property is removed from the possession of said keeper of said livery, sale, or boarding stable (1911, c. 141, s. 1; C. S. 2464.)

§ 44-34. Enforcement by public sale.—If such charges are not paid within fifteen days after they become due and demand is made for the same, then the keeper of such livery, sale or boarding stable is authorized to sell the property at the county courthouse door, after first advertising said sale for ten days at the county courthouse door and three other public places in said county, and out of the proceeds of such sale to pay the costs and charges due for the board and keep of said horse, mule, or other animal, including the charges for keeping said animal until said sale, and the surplus, if any, to the owner of said animal. (1911, c. 141, s. 2; C. S. 2465.)

§ 44-35. Notice of sale to owner.—Written notice of such sale shall be served on the owner of such horse, mule, or other animal ten days before such sale, if he is a resident of the state; but if he be a nonresident of the state, or if his residence is unknown, the publication of such notice for ten days at the county courthouse door and three other public places in the county shall be sufficient service of the same. (1911, c. 141, s. 3; C. S. 2466.)

Art. 7. Liens on Colts, Calves and Pigs.

§ 44-36. Season of sire a lien.—In all cases where the owner, or any agent for or employee of
§ 44-37. Colts, etc., not exempt from execution for season price.—The colt, calf, or pigs shall not be exempt from execution for the payment of said season price by reason of the operation of the personal property exemption: Provided, the person claiming such lien institutes action to enforce the same within twelve months from the foaling of the colt, dropping the calf, or farrowing of the pigs. (Rev. s. 2024; Code, s. 1797; 1885, c. 72; 1872-3, c. 94, s. 8; 1879, c. 47; 1915, c. 18; 1917, c. 229; C. S. 2467.)

Cross Reference.—As to personal property exemption, appraisal, see § 1-378.

Art. 8. Perfecting, Enforcing and Discharging Liens.

§ 44-38. Claim of lien to be filed; place of filing.—All claims against personal property, of two hundred dollars and under, may be filed in the office of the nearest justice of the peace; over two hundred dollars or against any real estate or interest therein, in the office of the superior court clerk in any county where the labor has been performed or the materials furnished; but all claims shall be filed in detail, specifying the materials furnished or labor performed, and the time thereof. If the parties interested make a special contract for such labor performed, or if such material and labor are specified in writing, in such cases it shall be decided agreeably to the terms of the contract, provided the terms of such contract do not affect the lien for such labor performed or materials furnished. (Rev., s. 2026; Code, s. 1784; 1869-70, c. 206, s. 4; 1876-7, c. 53, s. 1; C. S. 2467.)

Cross Reference.—As to duty of clerk to keep a lien docket, see § 2-43, paragraph 23.

As to when statement constitutes a lien without filing, see § 44-10. See note under § 44-1.

The purpose of filing mechanics', etc., claims for liens, under this section, is to give public notice of the claims, the amount, the material supplied or the labor done, and when done, on what property, specified with such details as will give reasonable notice to all persons of the character of the "claim," and the property to which it is attached. Where to Be Filed.—The notice of a lien required to be filed under this section, is to be filed in the office of the clerk of the superior court, although the evidence is conflicting the question is for the jury to decide agreeably to the terms of the statute. Where to BeFiled.—The notice of a lien required to be filed, since the Act of 1878, c. 206, sec. 4, should be filed in the office of the clerk of the superior court, although the materials began to be used before that Act went into effect when the law of 1868-69 was in force. Chadborn v. Williams, 71 N. C. 444, 446.

Same.—Prior to the Act of 1889-90, the notice required by this section was to be filed with the register of deeds. Chadborn v. Williams, 71 N. C. 444, 446.

Purpose of Claim Filed.—A claim of lien, filed under the provisions of the section must comply with the requirements of the statute. Therefore, when the plaintiff's claim is made after the labor is performed or the time when the material was furnished and the labor performed, it was irregular and void. Wray v. Harris, 77 N. C. 77.

The purpose of this requirement is to give public notice, in the offices designated, of the plaintiff's "claim," his debt, the amount of it, the materials supplied or the labor done, and when done, on what property, what farm or crop, and when, specified with such detail and certainty as will give reasonable notice to all persons of the character of the "claim," and the property to which it is attached, the same, attaches, and of the lien thereby established. It is to give the laborer an important advantage as to his debt due on account of his labor done on the property to which the lien attaches over the ordinary creditor, but to obtain that advantage, he must comply strictly, certainly substantially, in all material respects, with the requirements of the statute, and it is but reasonable and just that he should do so. Cook v. Cobb, 101 N. C. 68, 70, 7 S. E. 700.

While a substantial compliance with this section is necessary to the validity of a lien filed for material, etc., furnished in the construction of a building, and where the claimant file his itemized statement of the material used in a building which he had contracted to complete for the owner for one sum; but the time of the completion of the work must be stated. Jefferson & Bros. v. Bryant, 101 N. C. 404, 77 S. E. 341.

Where suit is brought by a contractor to enforce a lien on a building which was to have been paid for in a single sum, and when the claim as filed is defective, as filed with the clerk, in not stating the time the house was completed, as required by this section, it cannot be cured by amendment allowed in the superior court at the trial. Jefferson & Bros. v. Bryant, 101 N. C. 404, 77 S. E. 341.

Same.—Instances of Sufficiency.—When a lienor's schedule or material fur- nishes a full itemized statement in detail of the material furnished, and the clerk notes the names of the lienor and lien, the amount claimed by each lienor, a description of the property by materials and labor performed, and the dates letters bills of sale were furnished, referring to the schedule of prices and materials attached to the notice, asking that it "be taken as a part of the notice of lien," it is a sufficient compliance with this section. Fulp v. Kernersville Light, etc., Co., 157 N. C. 157, 72 S. E. 867.

Under this section requiring the claim for a laborer's lien to be filed in detail specifying the labor performed and the time thereof, the plaintiff filed his claim as follows before a justice of the peace: "J. S. C., owner and possessor, to D. A. C., 22 October, 1894. To 1235 days of labor as sawman at his sawmill on Jumping Run Creek, from 1 October, 1893, to 31 August, 1894, $127.24. (Signed) D. A. C., claimant," which was sworn to; it was held that the claim as filed was a reasonable and substantial compliance with the statute. Gaine v. Gainey, 203 N. C. 190, 165 S. E. 547.

In this case, claim, or notice of lien, was not made out in sufficient detail, "specifying the . . . labor performed, and the time thereof," the wages he was to receive, how and when to be paid, and furthermore, it was not made out in sufficient detail, and it appeared that purported notice of claim was filed "in the office of the nearest justice of peace" as required by this section. Gaine v. Gainey, 203 N. C. 190, 165 S. E. 547.

§ 44-39. Time of filing notice.—Notice of lien shall be filed as hereinbefore provided, except in those cases where a shorter time is prescribed, at any time within six months after the completion of the labor or the final furnishing of the materials, or the gathering of the crops. (Rev., s. 2028; Code, s. 1780; 1868-9, c. 117, s. 4; 1876-7, c. 53, s. 2; 1881, c. 65; 1883, c. 101; 1909, c. 32; 1913, c. 150, s. 7; C. S. 2470.)

Lien Relates Back.—When the notice is filed the lien is at once established, and relates back to the time when the work was commenced, or the materials were furnished. Lookout Lumber Co. v. Mansion Hotel, etc., R. Co., 109 N. C. 658, 661, 14 S. E. 35. Where the notice of claim under this section, the lien building against the owner relates back to the time the delivery was completed, and action must be commenced within six months after the time of the delivery of the work or materials furnished, the lien is preserved from the furnishing of the material and is superior to a deed of trust registered since that time, see note under § 44-1. The evidence is confusing in that the jury did not act under the instructions of the court. Atlas Supply Co. v. McCurry, 199 N. C. 799, 156 S. E. 91. See also note under § 44-1.
Same—Otherwise Statutes Would Be Defeated.—It must be clear that unless the claim when filed has relation back to the commencement of the furnishing of the materials, the obligation of the vendee of the materials by selling or mortgaging his estate, the act would be idle and ineffectual against the very mischief it was intended to cause (prevent). By allowing such lien to be perfected after the work has been started and then surveyed, it has put on a purchaser while the delivery is in progress the duty of informing himself whether the materials have been delivered or not, and under what sort of contract. Chadbourn v. Williams, 71 N. C. 444. The certain purpose is to protect the subcontractor or laborer against his claim against the owner of the property and all liens of whatever character that may attach to the property subsequently, and is not simply to the filing of the notice of claim in the office of the superior court. While the lien filed after the work was completed or the materials were furnished, Lookout Lumber Co. v. Mansion Hotel, etc., R. Co., 109 N. C. 658, 661, 14 S. E. 35, it is so, although the subsequent incumbent had no notice of the lien thus relating back. McNeal Pipe, etc., Co. v. Howland, etc., Co., 111 N. C. 615, 618, 16 S. E. 891. Where the claim is filed within the time and in the manner prescribed the lien relates back to the time of the beginning of the work or furnishing of the materials, and is effective against any subsequent encumbrance or purchase. Bankers’ Trust Co. v. Gillespie Co., 181 Fed. 448. 

Filing in Six Months after Moneys Are Due.—In Porter v. Case, 187 N. C. 629, 123 S. E. 463, it was held that the lien for work done within the six months was valid. McNeal Pipe v. Rockfish Trading Co. 163 N. C. 314, 79 N. C. 62. The “shorter time” herein referred to evidently refers to the notice required to be given by section 44-13, was intended to provide for a longer time within which to give notice, that is, six months, where the transaction has been completed by the final furnishing of the materials. Atlas Powder Co. v. Denton, 176 N. C. 426, 431, 97 S. E. 372.

Filing of Claim against Railroad Company.—Under this section in the event a contractor or subcontractor furnished material for the construction of a railroad, is entitled to file a lien on the property of the company within one year, (now six months) from the time of doing such work for furnishing such material and, when filed, has precedence over a mortgage registered after the work has been commenced. Dunavant v. Caldwell, etc., R. Co., 111 N. C. 615, 618, 16 S. E. 891.

Validity of Section.—In McNeal Pipe, etc., Co. v. Howland, etc., Co., 111 N. C. 615, 623, 16 S. E. 897, this section was held to be valid. State v. Howley, 220 N. C. 113, 16 S. E. 2d (24). 705.

 § 44-40. Date of filing—fixes priority.—The liens created and established by this chapter shall be paid and settled according to the priority of the notice of the lien filed with the justice of the peace or clerk. (Rev., s. 2035; Code, s. 1792; 1868-9, c. 117, s. 11; C. S. 2471.)

In General.—Liens of materialmen and laborers are statutory, and by the clear provisions of this section and § 44-42 the liens of parties furnishing labor and material under subcontract contracts with the owner or lessee in accordance with the time of filing prior to any lien for the work or furnishing of material, and, when filed, the lien has priority over any other lien or encumbrance which attached to the property subsequent to the time at which the work was commenced. (Rev., s. 2093; Code, s. 1782; 1869-70, c. 206, s. 6; C. S. 2472.)

Cross Reference.—As to landlord’s lien on crops for rent advances, etc., see § 42-15 et seq.

Lien Prior to Other Subsequent Lien.—The lien created by this section is preferred to every other lien or encumbrance which attached to the property subsequent to the time at which the work was commenced, or the materials were furnished. Lookout Lumber Co. v. Mansion Hotel, etc., R. Co., 109 N. C. 658, 660, 14 S. E. 35.

Breach of Contract—Lien for Claim.—The lien provided for by this section arises out of the simple relation of debtor and creditor for labor done or materials furnished, and when there is no other security than the personal obligor the lien is good in accordance with law, but also with justice and equity, for when persons have put their money and labor in a building, and the balance due is insufficient to pay all, it is not right for one to have the whole fund, in the absence of a lien, because he gets to the clerk’s office first. Morgan Mfg., etc., Co. v. Andrews, 165 N. C. 285, 295, 81 S. E. 418. See also White v. Riddle, 198 N. C. 511, 514, 152 S. E. 501.

Duly filed claims of prior creditors not affected.—Nothing in this chapter shall be construed to affect the rights of any person to whom any debt may be due for any work done for which prior claim is filed with the proper officer. (Rev., s. 2035; Code, ss. 1782; 1869-70, c. 206, s. 6; C. S. 2473.)

Cross Reference.—As to priority of claims for labor over mortgages of a corporation, see §§ 55-41.

§ 44-43. Action to enforce lien.—Action to enforce the lien created must be commenced in the court of a justice of the peace, and in the superior court, according to the jurisdiction thereof, within six months from the date of filing the notice of the lien. But if the debt is not due within six months, but becomes due within twelve months, suit may be brought or other proceedings instituted to enforce the lien in thirty days after it is due. (Rev., s. 2027; Code, ss. 1785, 1790; 1869-9, c. 117, s. 7; 1869-70, c. 206, s. 5; 1876-7, c. 250; C. S. 2474.)

When Section Not Applicable.—This section cannot have been intended to apply in cases in which the lien should be unnecessary, and a complete and efficient measure of relief is committed to and may be obtained by the parties’ own act. McNeal Pipe v. Rockfish Trading Co. 163 N. C. 314, 79 N. C. 62.

Juristication of Circuit Court of U. S.—While this section gives a right of action at law, for the enforcement of a mechanic’s lien, a circuit court of the United States sitting in equity has jurisdiction to entertain a bill for that purpose,
§ 44-44

when attachment available to plaintiff.

In all cases where the owner or employer attempts to remove the crop, houses or appurtenances from the premises, without the permission, or with the intent to deprive the lienor of his lien, the claimant may have a remedy by attachment (Rev., s. 2031; Code, s. 1785; 1869-70, c. 117, s. 14; C. S. 2475.)

§ 44-45. Sufficiency of Affidavit for Attachment.—Under this section, giving a remedy by attachment to enforce a laborer's lien, an affidavit that the defendant has removed and is removing and disposing of the cotton crop, or with the intent to deprive the lienor of his lien, the claimant may have a remedy by attachment (Rev., s. 2031; Code, s. 1785; 1869-70, c. 117, s. 14; C. S. 2475.)

§ 44-46. Discharge of lien.—All liens created by this chapter may be discharged as follows:

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1. By filing with the justice or clerk a receipt or acknowledgment, signed by the claimant, that the lien has been paid or discharged.

2. By depositing with the justice or clerk money equal to the amount of the claim, which money shall be held by said officer for the benefit of the claimant.

3. By an entry in the lien docket the action on the part of the claimant to enforce the lien has been dismissed, or a judgment rendered against the claimant in such action.

4. By a failure of the claimant to commence an action for the enforcement of the lien within six months from the notice of lien filed. (Rev., s. 2033; Code, s. 1793; 1868-9, c. 117, s. 12; C. S. 2179.)

Failure to Enforce as Discharge.—Failure of claimant to enforce his lien within six months as prescribed by section 44-43 operates as a discharge of the lien. Norfleet v. Tarboro Cotton Factory, 172 N. C. 833, 89 S. E. 785.

Art. 9. Liens upon Recoveries for Personal Injuries to Secure Sums Due for Medical Attention, etc.

§ 44-49. Lien created; applicable to persons non sui juris.—From and after March 26, 1935, there is hereby created a lien upon any sums recovered as damages for personal injury in any civil action in this State, the said lien in favor of any person or corporation of the person so recovering, or the person in whose behalf the recovery has been made, may be indebted for drugs, medical supplies, and medical services rendered by any physician, dentist, trained nurse, or hospitalization, or hospital attention and/or services rendered in connection with the injury in compensation for which the said damages have been recovered. Where damages are recovered for and in behalf of minors or persons non compos mentis, such liens shall attach to the sums recovered as fully and effectively as if the said person were sui juris. (1935, c. 121, s. 1.)

§ 44-50. Receiving person charged with duty of retaining funds for purpose stated; evidence; attorney's fees; charges.—A like lien shall attach to all funds paid to any person in compensation for or settlement of the said injuries, whether in litigation or otherwise; and it shall be the duty of any person receiving the same before disbursement thereof to retain out of any recovery or any compensation so received a sufficient amount to pay the just and bona fide claims for such drugs, medical supplies, and medical attention and/or hospital service, after having received and accepted notice thereof: Provided, that evidence as to the amount of such charges shall be competent in the trial of any such action: Provided further, that nothing herein contained shall be construed so as to interfere with any amount due for attorney's services: Provided, further, that the lien hereinbefore provided for shall in no case, exclusive of attorneys' fees, exceed fifty per cent of the amount of damages recovered. (1935, c. 121, s. 2.)

§ 44-51. Disputed claims to be settled before payments.—Whenever the sum or amount or amounts demanded for medical services or hospital fees shall be in dispute, nothing in this article shall have any effect of compelling payment thereof until the claim is fully established and determined, in the manner provided by law: Provided, however, that when any such sums are in dispute the amount of the lien shall in no case exceed the amount of the bills in dispute. (1935, c. 121, s. 3; 1943, c. 543.)

Editor's Note.—The 1943 amendment rewrote the proviso.

Art. 10. Agricultural Liens for Advances.

§ 44-52. Lien on crops for advances.—If any person makes any advance either in money or supplies to any person who is engaged in or about to engage in the cultivation of the soil, the person making the advances is entitled to a lien on the crops made within one year from the date of the agreement in writing herein required upon the land in the cultivation of which the advance has been expended, in preference to all other liens, except laborer's and landlord's liens, to the extent of such advances. Before any advance is made an agreement in writing for the advance shall be entered into, specifying the amount to be advanced, or fixing a limit beyond which the advance, if made from time to time during the year, shall not go; and said agreement shall be registered in the office of the register of the county or counties where the land is situated on which the crops of the person advanced are to be grown. Provided, that where a county line divides a farm the crop lien may be recorded in the county where the owner of said farm resides; Provided, he resides on said farm; Provided, that the lien shall continue to be good and effective as to any crop or crops which may be harvested after the end of the said year, and referred to in the said lien. (Rev., s. 2052; Code, s. 1799; 1893, c. 9; 1866-7, c. 1, s. 1; 1822-3, c. 133, s. 1; 1925, c. 303, s. 1; 1927, c. 22; 1935, c. 205; C. S. 2480.)


I. In General.

II. Priority of Liens.

III. The Written Agreement.

A. Form and Execution.

B. Registration.

IV. Description of Land.

V. Evidence.

Cross References.

As to landlord's lien on crops for rents, advances, etc., see § 42-15.

As to laborer's lien, see § 44-1 et seq. and § 44-41. As to effective periods for lien on leaf tobacco sold in auction warehouse, see § 44-49.

I. IN GENERAL.

Editor's Note.—This section was amended in 1925, where-
upon which the lien of this section becomes effective are the previous reduction of the contract for it to writing, setting out its terms, and registration; these provisions are manifestly for the security of creditors and others who may have dealings with the debtor and otherwise might not know of the encumbrances upon the crop. And so it has been held that registration is not essential to the validity of the statute dealing with chattel mortgages. Clark v. Farrar, 74 N. C. 686, 690, in Nash, 78 N. C. 100; Reese & Co. v. Cole, 93 N. C. 87, 89.

Compliance with Requirements Prerequisite. — The lien can only be enforced by compliance with its requirements. Where the section has not been followed, to sustain the agreement as an agricultural lien would utterly defeat the letter and the public policy enunciated by the statute dealing with chattel mortgages. Nash, 78 N. C. 100; Reese & Co. v. Cole, 93 N. C. 87, 89.

Strict Construction—Lienor Not Bound to See Materials Are Used on the Land.—This section was not intended simply to give to a lienor a lien upon a crop for advances; but also to give such a lien a preference to all other liens existing or otherwise to the extent of such advance. Therefore, it should be strictly construed when the rights of other creditors intervene. Where such claims do exist, it has been held that the lienor must determine his own needs in conducting his farm, and that his acceptance must be deemed conclusive between the parties, and not less so upon the claim of a subsequently derived title, and where the section has not been followed, to sustain the agreement as an agricultural lien in respect to crops are confined to crops after such advances are made, stands in no better plight, and is likewise bound by such admission. Womble v. Leach, 83 N. C. 84; Nichols & Bros. v. Speller, 102, 150 S. E. 706.

Not Retroactive.—This section has no retroactive effect so as to impair laborers' liens under section 44-41. Warren v. Woodard, 70 N. C. 382.

Articles to Be Considered 'Supplies.'—One who gives a lien on a crop to obtain supplies, under the provisions of this section, is estopped from asserting that articles which he received as a compliance with the contract, and a second mortgagee, who acquires an interest in the crop after such advances are made, stands in no better plight, and is likewise bound by such admission. Womble v. Leach, 83 N. C. 84; Nichols & Bros. v. Speller, 102, 150 S. E. 706.

Power of Sale Upon Default.—An instrument giving a lien on a crop for supplies to be furnished in making a crop and also conveys personal property as additional security, with the ordinary powers of sale, is valid both as a chattel mortgage and an agricultural lien. Nash, 78 N. C. 75, 78, 26 S. E. 632; Collins v. Bass, 106 N. C. 99, 102, 130 S. E. 706. In an instrument which gives a lien on a crop for supplies to be furnished in making a crop under this section, as a chattel mortgage and an agricultural lien, it is a lien that is secondary to that of the landlord's for rent, and a paperwriting of the agreement is required. If the requisites prescribed by the provisions of this section both as to context and registration are not material which precedes in actual time, for in contemplation of law the lien is prior to the execution, has no rights as an agricultural lienor by virtue of this section. Crinkley v. Egerton, 113 N. C. 127, 18 S. E. 341.

Mortgage on Crops as Agricultural Lien.—A mortgage, under a mortgage on a crop not expressed to be for advances to be made and not recorded after its execution, has no mortgage of prior date and registration upon the "crops" therein subjected to the extent of the advances made. Wooten v. Hill, 98 N. C. 48, 3 S. E. 846. Killbrew v. Hines, 104 N. C. 232, 131 S. E. 515, 516.

B. Registration.

Registration Not Necessary Inter Partes.—A crop lien to secure agricultural advances executed under this section is valid inter partes, although not registered within thirty days after the execution, has no rights as an agricultural lienor by virtue of this section. Crinkley v. Egerton, 113 N. C. 127, 18 S. E. 341.

Time of Registration Subsequent to Amendment.—Effect.—In N. C. § 44-52, it is provided that "a lienor fails to require registration within any specified time before the harvesting of the crop. What would be the effect of two persons making advances on the same crop, when the lienor for the second advance registered his lien on the 20th of September? It has been held that a mortgage on a crop, not expressed to be for advances, and not registered within 30 days after execution, has no rights as an agricultural lienor by virtue of this section. Crinkley v. Egerton, 113 N. C. 127, 18 S. E. 341.

Same.—It is Immaterial Which Act is Done First.—The agreement is a single transaction between the parties, executed by one in making the advances, and by the other in providing the statutory security for their payment. In such a case it is indifferent which act is first done, if both are done at the same time and in execution of their contract and understanding. The purpose is to enable the former to obtain the means of making his crop by creating a lien upon it when made, and the requirement for registration is for the use of the latter, who may deal with them. Reese & Co. v. Cole, 93 N. C. 87, 90.

B. Registration.

Registration Not Necessary Inte}
IV. DESCRIPTION OF LAND.
Identification of the Land by Sufficient Description.—The land on which the crops are to be grown must be sufficiently identified at the time the lien is executed. Within this ruling land is sufficiently identified when described as "a field or farm in possession of the mortgagor or seller." Well v. Flowers, 109 N. C. 212, 13 S. E. 761; Gwathney v. Etheridge, 59 N. C. 571, 6 S. E. 411.
An instrument giving a lien upon crops raised "upon Opossum Quarter tract of land in Warren County, known as the tract M. W. is buying from Egerton, or any other lands he may cultivate during the present year," sufficiently described the lands upon which the crops were to be raised, and was effective as to the crops raised on the land described, but void as to those raised on "any other lands." Crinkley v. Egerton, 113 N. C. 142, 18 S. E. 341.

V. EVIDENCE.
Extraneous Evidence to Show Time of Furnishing Materials.—Where an instrument intended to operate as an agricultural lien contains, on its face, the statutory requisites, except that it does not show that the money or supplies were furnished after the agreement, it is competent to show, dehors such instrument, that the supplies were furnished after the making of the agreement. Meekins v. Walker, 119 N. C. 46, 25 S. E. 760. Such evidence would not contradict the written instrument. Id.

§ 44-53. Contract for advances to mortgagor in possession. — The preceding section shall apply to all contracts made for the advancement of money and supplies, or either, for the purposes herein specified by mortgagors or trustees, their tenants, lessees or croppers, who may be in possession of the lands mortgaged or conveyed in trust at the time of the making of the contract for such advancement of money or supplies, either in case the debts secured in said mortgage or deed of trust be due or not. (Rev., s. 2053; 1889, c. 2483.)

§ 44-54. Price to be charged for articles advanced limited. — In order to be entitled to the benefits of the lien on crops in favor of landlords and other persons advancing supplies under the article, Agricultural Tenancies, of the chapter, Landlord and Tenant, and under the present article, or on a chattel mortgage on crops, such landlord or person shall charge for such supplies a price not price of not more than ten per cent over the average retail cash price of the same article or articles upon which such overcharge is made. At the time of each sale there shall be delivered to the purchaser a memorandum showing the cash prices of the articles advanced. (1917, c. 134, s. 1; 1921, c. 89; C. S. 2482.)

Local Modification.—Columbus and Scotland: 1931, c. 95; Greene: 1941, c. 210; Lenoir: 1929, c. 362; Robeson: 1929, c. 20.

Editor's Note.—The proviso to the first sentence of this section was added by the amendment of 1921.

§ 44-55. "Cash prices" defined and determined. — In the case of retail merchants, the retail cash price or prices shall be the average retail cash price or prices charged by the same merchant to cash customers for the same article or articles in like quantities at the same time. In the case of advances of supplies by landlords or other persons not engaged in business as retail merchants, or by retail merchants who have no regular cash prices, if the prices charged are called into question by the purchaser the retail cash price or prices of the supplies advanced may be determined by taking the average between the cash price or prices for the same class or classes of goods of two neighboring merchants, one selected by the landlord or other person making the advance and the other by the one to whom the advance is made. (1917, c. 134, s. 2; C. S. 2483.)

Local Modification.—Columbus and Scotland: 1931, c. 95; Greene: 1941, c. 210; Lenoir: 1929, c. 362; Robeson: 1929, c. 20.

§ 44-56. Person advanced not estopped by agreement. — No agreement or understanding between the parties as to the price or prices to be charged shall work an estoppel against the person to whom supplies have been advanced from showing that the price or prices charged were in fact more than ten per cent over the average retail cash price or prices in that locality at the time the advance or advances were made. If the price or prices charged by the merchants or landlord were in fact more than ten per cent, then the lien shall be null and void as to the article or articles upon which such overcharge is made. (1917, c. 134, s. 2; C. S. 2484.)

Local Modification.—Columbus and Scotland: 1931, c. 95; Greene: 1941, c. 210; Lenoir: 1929, c. 362; Robeson: 1929, c. 20.

§ 44-57. Commission in lieu of interest, where advance in money. — Any person, firm, or corporation, including any bank or credit union, making any advancement in money to any person for the purpose of enabling such person to cultivate a crop, and taking as sole security for the advance so made a lien or mortgage on the crops to be cultivated and the personal property of the person to whom the advances are made, may charge, in lieu of interest, a commission of not more than ten per cent of the amount of money actually advanced: Provided, that money
advanced under the provisions of this section shall be advanced in installments agreed upon at the time of the contract, and the ten per cent commission herein allowed shall not be deducted, but shall be added to the amount of money agreed to be advanced. (1917, c. 134, s. 3; C. S. 2486.)

Local Modification.—Lenoir: 1929, c. 262; Robeson: 1929, c. 20.


§ 44-58. Disposition of commission, where advanced by credit union.—In case the money is advanced by a credit union, the funds derived from the ten per cent commission allowed in the preceding section shall be used to pay such interest as the union may pay for the money borrowed by it for the benefit of its members, and to cover losses sustained by the union on account of loans made to members, and to further cover any reasonable expenses incurred by the union in connection with the loans made to members, and the balance of said fund shall be returned to the borrowers at the end of each year. (1917, c. 134, s. 4; C. S. 2486.)

Local Modification.—Lenoir: 1929, c. 262; Robeson: 1929, c. 20.

§ 44-59. Purchasers for value protected.—All liens or mortgages made under the provisions of this article shall be valid for their face value in the hands of purchasers for value and before maturity, even though the charges made are in excess of those allowed herein; but in such case the party to whom the advances are made has the right to recover from the party making the advances any sum he may be compelled to pay a third party in excess of the charges allowed by this article. (1917, c. 134, ss. 5, 8; C. S. 2487.)

Local Modification.—Lenoir: 1929, c. 262; Robeson: 1929, c. 20.

§ 44-60. Crop seized and sold to preserve lien.—If the person making such advances makes an affidavit before the clerk of the superior court of the county in which such crops are, that the amount secured by said lien for such advances, or any part thereof, is due and unpaid, that the person to whom such advances have been made, or any other person having the said crop in his possession, is about to sell or dispose of his crop, or in any other way is about to defeat the lien hereinafter provided for, accompanied with a statement of the amount then due, it is lawful for him to issue his warrant, directed to any of the sheriffs of the state, requiring them to seize the said crop, and, after due notice, sell the same for cash and pay over the net proceeds thereof, or so much thereof as may be necessary in the extinguishment of the amount then due. This proceeding shall not affect the rights of landlords or laborers. (Rev., s. 2054; Code, s. 1800; 1893, c. 9; 1866-7, c. 1, s. 2; 1873-4, c. 133, s. 4, c. 2; 1883, c. 58; C. S. 2488.)

Purpose of Section—Remedy of Cultivator.—The purpose of this section is to give a summary remedy to the party to whose advantage it is lawful for him to issue his warrant, directed to any of the sheriffs of the state, requiring them to seize the said crop, and, after due notice, sell the same for cash and pay over the net proceeds thereof, or so much thereof as may be necessary in the extinguishment of the amount then due. This proceeding shall not affect the rights of landlords or laborers. (Rev., s. 2054; Code, s. 1800; 1866-7, c. 1, s. 2; 1873-4, c. 133, s. 2; 1883, c. 58; C. S. 2488.)

§ 44-61. Lienor's claim disputed; proceeds of sale held; issue made for trial.—If the person to whom the advances have been made, who claims an interest in the crops, within thirty days after such sale has been made, gives notice in writing to the sheriff, accompanied with an affidavit, to the effect that the amount claimed is not justly due, it is the duty of the sheriff to hold the proceeds of such sale subject to the decision of the court upon an issue which shall be made and set for trial at the next succeeding term of the court upon an issue which shall be made and set for trial at the next succeeding term of the court. If the defendant's affidavit denying the indebtedness is false or in any other way is about to defeat the lien hereinafter provided for, accompanied with an affidavit denying the indebtedness is false, the sheriff may issue a warrant which he may have imprudently issued under this section. Cottingham & Bro. v. McKay, 86 N. C. 241, 243.

Revocation of Warrant by Clerk.—There can be no question of the reserved power in the clerk to revoke and supersede a warrant which he may have improvidently issued under this section. Cottingham & Bro. v. McKay, 86 N. C. 241, 243.


§ 44-63. Lienor's claim disputed; proceedings of sale held; issue made for trial. —If the person to whom the advances have been made, who claims an interest in the crops, within thirty days after such sale has been made, gives notice in writing to the sheriff, accompanied with an affidavit, to the effect that the amount claimed is not justly due, it is the duty of the sheriff to hold the proceeds of such sale subject to the decision of the court upon an issue which shall be made and set for trial at the next succeeding term of the court. If the defendant's affidavit denying the indebtedness is false or in any other way is about to defeat the lien hereinafter provided for, accompanied with an affidavit denying the indebtedness is false, the sheriff may issue a warrant which he may have improvidently issued under this section. Cottingham & Bro. v. McKay, 86 N. C. 241, 243.

§ 44-64. Lienor's claim disputed; proceedings of sale held; issue made for trial. —If the person to whom the advances have been made, who claims an interest in the crops, within thirty days after such sale has been made, gives notice in writing to the sheriff, accompanied with an affidavit, to the effect that the amount claimed is not justly due, it is the duty of the sheriff to hold the proceeds of such sale subject to the decision of the court upon an issue which shall be made and set for trial at the next succeeding term of the court. If the defendant's affidavit denying the indebtedness is false or in any other way is about to defeat the lien hereinafter provided for, accompanied with an affidavit denying the indebtedness is false, the sheriff may issue a warrant which he may have improvidently issued under this section. Cottingham & Bro. v. McKay, 86 N. C. 241, 243.

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Revocation of Warrant by Clerk.—There can be no question of the reserved power in the clerk to revoke and supersede a warrant which he may have improvidently issued under this section. Cottingham & Bro. v. McKay, 86 N. C. 241, 243.

§ 44-66. Local: Short form of liens.—For the purpose of creating a valid agricultural lien under the preceding sections for supplies to be advanced, a lien for an advanced chattel mortgage as additional security therefor, and to secure a pre-existing debt, the following or a substantially similar form shall be deemed sufficient, and for those purposes legally effective, in the counties of Alamance, Alleghany, Anson,
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CH. 44. LIENS—INTERNAL REVENUE


Whereas, ... ha ... agreed to make advances to ... for the purpose of enabling said ... to cultivate the lands hereinafter described during the year 19... the amount of said advances not to exceed ... dollars; and,

Whereas, said ... is indebted to said ... in the further sum of ... dollars now due; now, therefore, in order to secure the payment of the same the said ... do ... hereby convey to ... therefore, in order to secure the payment of the ... Code or otherwise, § 44-60 of the North Carolina Code may be raised during the year 19..., on the following lands in ... County, North Carolina, Township, adjoining the lands of  ... and also the following other property, viz:...

And if by the ... day of ..., 19..., said ... fail ... to pay said indebtedness, then said ... may foreclose this lien as provided in § 44-60 of the North Carolina Code or otherwise, and may sell said crops and other property after ten days' notice posted at the courthouse door and three other public places in said county, and apply the proceeds to the payment of said indebtedness and all costs and expenses of executing this conveyance, and pay the surplus to said ..., and the said ... hereby represents that said crops and other property are the absolute property of ... and free from encumbrance ....

Witness ... hand ... and seal, this the ... day of ..., 19...

Witness: ...

... owner of the lands described in the foregoing instrument, in consideration of the advances to be made, as therein provided, do ... hereby agree to waive and release my lien as landlord upon said crops to the extent of said advances made to said ...

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

Witness: ...

North Carolina, County. (Seal.)

The due execution of the foregoing instrument was this day proven before me by the oath and examination of ..., the subscribing witness thereto.

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

Witness: ...

North Carolina, County. (Seal.)

The foregoing certificate of ... a ... of ... County, is adjudged to be correct. Let the instrument with the certificate be registered. This the ... day of ..., 19...

... Clerk Superior Court.

(Rev., s. 2053; 1899, cc. 17, 247; 1901, cc. 329, 704; 1903, c. 489; 1905, cc. 226, 319; 1907, c. 843; 1909, c. 532; P. L. 1913, c. 49; 1923, c. 985, s. 1; 1931, c. 196; 1933, c. 101, s. 6; C. S. 2490.)

Local Modification.—Beaufort: 1933, c. 101; Johnston: 1943, 615.

Editor's Note.—By the amendments of 1925 and 1931 Randolph and Franklin Counties were brought within the scope of this section.

No Particular Form Required.—This section requires no particular form for the written instrument creating a valid agricultural lien but that it be substantially according to that therein prescribed, and the courts in construing it will look to the substance rather than the form and regard the entire writing with the view of ascertaining and effectuating the intention of the parties; and an instrument expressing itself to be an agricultural lien, and given in consideration of money or goods to be advanced for the purpose of making crops on certain land for the current year, with certain other property pledged as additional security, is sufficient without further designation, it appearing that the parties intended it to be one. Jones-Phillips Co. v. McCormick, 174 N. C. 82, 93 S. E. 449.

§ 44-63. Local: Rights on liens' failure to cultivate. — If any person in the counties mentioned in the preceding section, after executing a lien as aforesaid for advances, fails to cultivate the lands described therein, or does any other act calculated to impair the security therein given, then the person to whom the lien was executed is relieved from any further obligation to furnish supplies, and the debts and advances theretofore made become due and collectible at once, and the person to whom the instrument was executed may proceed to take possession of, cultivate and harvest said crops, and to sell the other property described therein. It is not necessary to incorporate such power in the instrument, but this section is sufficient authority for the same. The sale of any property described in any instrument executed under the provisions of this chapter may be made at any place in the county where such property is situated after ten days notice published at the courthouse door and three other public places in said county. (Rev., s. 2056; 1899, c. 17, s. 3; 1901, c. 329, s. 3; C. S. 2491.)

§ 44-64. Local: Commissioners to furnish blank records.—The board of commissioners of the said counties shall have record books made with the aforesaid forms printed therein, and the cost of said books and of the printing of said forms, and of such other said books as may be hereafter required, shall be paid by the respective counties, and furnished to the register of deeds. (Rev., s. 2057; 1899, c. 17, s. 4; 1901, c. 329, s. 4; C. S. 2492.)

Art. 11. Liens for Internal Revenue.

§ 44-65. Filing notice of lien.—Notices of liens for internal revenue taxes payable to the United States of America and certificates discharging such liens may be filed in the office of the register of deeds of the county or counties within which the property subject to such lien is situated. (Ex. Sess. 1924, c. 44, s. 1.)

§ 44-66. Duty of register of deeds.—When a notice of such tax lien is filed, the register of deeds shall forthwith enter the same in alphabetical Federal lien tax index to be provided by the board of county commissioners, showing on one line the name and residence of the taxpayer named in such notice, the collector's serial number of such notice, the date and hour of filing, and the amount of tax and penalty assessed. He shall file and keep all original notices so filed in numer-
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45-41. Recorded deed of release of mortgagee's representative.


§ 45-1. Form of chattel mortgage.—Any person indebted to another in a sum to be secured may execute a chattel mortgage in form substantially as follows:

I, .................................., of the county of .................................., in the state of North Carolina, am indebted to .................................., of .................. county, in said state, in the sum of .......... dollars, for which he holds my note to be due the .... of ............. A. D. 19 ......., and to secure the payment of the debt hereby incurred by him to me articles of personal property to wit: ..................................

but on this special trust, that if I fail to pay said debt and interest on or before the .... day of ............. A. D. 19 ......., then he may sell said property, or so much thereof as may be necessary, by public auction for cash, first giving twenty days notice at three public places, and apply the proceeds of such sale to the discharge of said debt and interest on the same, and pay any surplus to me.

Given under my hand and seal this .... day of ............. A. D. 19 .......

(Seal.)

(R. e. 1911, c. 95, p. 1; c. S. 2375.)

Essential Elements.—No particular form is essential to the validity of a chattel mortgage; mere informality will not vitiate it. No seal is necessary. It is sufficient if the words employed express in terms or by just implication the purpose of the parties to transfer the property to the mortgagee, to be reasserted in the mortgagee upon the performance of the condition agreed upon, however informally expressed. A power of sale is not essential. Comron v. Standel, 103 N. C. 207, 9 S. E. 808.

§ 45-2. Registration. — Chattel mortgages substantially in the form provided in § 45-1 are good to all intents and purposes when the same are duly registered according to law. (Rev. s. 1040; Code, ss. 1273; 1870-1, c. 277; ss. 1, 2; C. S. 2375.)

Cross References.—As to place of registration, see § 47-20. As to fee to register of deeds for registering chattel mortgage, etc., see §§ 101-30. As to offense of disposing of personal property, etc., see § 39-14. As to encumbered property and punishment therefor, see § 14-114.

In General.—The lien of the chattel mortgage is created by registering the original instrument, and such registration is conclusive evidence of the existence of the lien. It is not material to the public whether the debt and property were transferred by the mortgagee. The purpose of the Legislature in passing the statute in reference to registration was to prevent the creation of secret liens which embarrass trade and tend to encourage fraud. Hodges v. Wilkinson, 111 N. C. 55, 65, 15 S. E. 941.

Sec. 45-42. Release of corporate mortgages by corporate officers.

Art. 5. Real Estate Mortgage Loans.

45-43. Real estate mortgage loans; commissions.

Necessity of Registration Between the Parties.—Registration is not essential between the parties to the mortgage. Thomas v. Cooksey, 139 N. C. 148, 151, 41 S. E. 2; William v. Jones, 93 N. C. 384, 54 S. E. 954.

Registration Prior Assignment Gives Priority.—The registration of a mortgage prior to attachments issued by creditor makes it superior to the creditor's lien, but only on property situated in the county where the mortgage was registered. Williamson v. Biting, 159 N. C. 321, 74 S. E. 838.

No Special Statutory Mode of Registration.—There is no special statutory mode presented for the registration of a chattel mortgage. If it is actually registered and indexed, that is sufficient. This section does not determine the mode. Williamson v. Biting, 159 N. C. 321, 322, 74 S. E. 838.

Assignment of Mortgage Not Required to Be Registered.—There is no provision which requires assignments of chattel mortgages or the debts secured by them to be proven or registered; nor is there any good reason for enacting such a law, though it has been done in other states. The mortgage is declared "good to all intents and purposes" when registered according to law. No matter how often it be assigned, it is still good to protect the interest of the holder of the debt. Hodges v. Atkinson, 111 N. C. 56, 65, 15 S. E. 941.

Delivery to Register in His Office Necessary.—It is required for a valid filing of a mortgage that it be delivered at the office of the register of deeds, and until then it can acquire no priority over one theretofore executed; and where two mortgages given to different persons on the same subject-matter are delivered to the register of deeds out of his official office, carried by him to that place and marked by him filed at the same time, the filing and registration are required to be simultaneously, and the mortgage first executed will have priority of lien. McHan v. Dorsev, 173 N. C. 92; 92 S. E. 350.

Registry after Death of Mortgagor.—A mortgage both of land and personal property may be registered after the death of the mortgagor. William v. Jones, 95 N. C. 594.

§ 45-3. Mortgage of household and kitchen furniture. — A conveyance of household and kitchen furniture by a married man, to secure the payment of money or other things of value, are void, unless the wife joins therein and her privy examination is taken in the manner prescribed by law in conveyances of real estate, except when said mortgage or conveyance is executed for the purchase money thereof. (Rev., s. 1911; 1911, c. 91; 1931, c. 211; C. S. 2377.)

Cross References.—As to conveyance of home site, see § 30-3. As to forms of acknowledgment, see §§ 47-38, 47-39, 54-50.

Editor's Note.—The Act of 1931 added the exception as to purchase money mortgage. The amendment does not contravene the policy of the law designed for the protection of the wife as pointed out by Justice Lenoir in Thomas v. Sanderlin, 173 N. C. 329, 91 S. E. 1028. It is also consistent with the law which permits the husband to execute a mortgage or deed of trust on his real estate that will be valid as against his wife without her joinder in the instrument. See § 39-13. 9 N. C. Law Rev.

Provisions within Police Power of State.—The provisions of the section are in exercise of the police power of a State and promotive of its economic welfare and public convention and comfort, and designed for the protection of the home, and marital and personal and domestic settlement. Thomas v. Sanderlin, 173 N. C. 329, 91 S. E. 1028.

Doctrine of Section Public Policy.—The requirements that the wife must join in the conveyance of the husband's realty, in the conveyance of his allotted homestead, and in a mortgage of his household and kitchen furniture, and that the husband must give his written assent to the conveyance by the wife of her realty, are all of a piece as a declaration of public policy. Thomas v. Sanderlin, 173 N. C. 339, 336, 91 S. E. 1028.
Distinguished from § 30-8—Constitutionality.—A distinction between this section and § 30-8 should be noted. In this section the conveyance without the joinder of the wife of the husband of the personal property is invalid, so that, as the conveyance is declared to be invalid only for certain purposes. The owner of household and kitchen furniture is deprived absolutely of the right to convey said property by mortgage, without the consent of his wife, whereas the owner of a home site is deprived of such right only to a limited extent. If the former statute is constitutional, as held by the Constitution recognizes such a requirement. Thomas v. Sanderlin, 173 N. C. 329, 337, 91 S. E. 1028.

Whether the provisions of the act could be made to apply in the case of a chattel mortgage, or a chattel mortgage, or in any other way by which a lien could be fixed thereon, of the property named, as by deed of trust or conditional sale, without giving her assent thereto, is within the power of the General Assembly and is in line with the same requirement in the Constitution, as to the joinder of the wife in the convenience of the alloted homestead—the only instance in which the Constitution recognizes such a requirement. Thomas v. Sanderlin, 173 N. C. 329, 337, 91 S. E. 1028.

Liberal Construction—Goods for Sale in Shop Not Covered.—The words "household and kitchen furniture" may be construed to mean that species of property which is in actual use, but also that which is on sale in shops, yet no one will contend that this statute should be construed so literally as to embrace articles of this kind of the latter class.

Kelly v. Fleming, 113 N. C. 133, 139, 18 S. E. 81.

§ 45-6. Renunciation by representative; clerk or collector; before sale.—The executor or administrator of any deceased mortgagee or trustee where the heirs of the mortgagee were duly made parties and regular and orderly decrees of foreclosure entered by the court and sale had by a commissioner appointed by the court for that purpose and deed made after confirmation, the title so conveyed to purchaser at such judicial sale shall be deemed and held to be vested in such purchaser, whether the heir of such deceased mortgagee or trustee was a party to such foreclosure proceeding or not, and such heir of any deceased mortgagee is estopped to bring or prosecute any further action against such purchaser for the recovery of such property or foreclosure of such mortgage or deed in trust. (Rev., s. 1032; 1905, c. 425, s. 2; C. S. 2579.)

Editor's Note.—Public Laws of 1933, c. 199, inserted the words "or collector" following the words "executor or administrator."
§ 45-7

Agent to sell under power may be appointed by parol.—All sales of property, real or personal, under a power of sale contained in any mortgage or deed of trust to secure the payment of money, by any mortgagee or trustee, through an agent or attorney for that purpose, appointed orally or in writing by such mortgagee or trustee, whether such writing has been or shall be registered or not, shall be valid, whether or not such mortgagee or trustee was or shall be present at such sale. (Rev., s. 1035; 1895, c. 117; C. S. 2581.)

Recitals in Deed Prima Facie Correct.—Recitals in a trustee's deed that the trustee made the sale in pursuance of the power contained in the deed of trust are taken as prima facie correct. Hayes v. Ferguson, 206 N. C. 414, 174 S. E. 121.

§ 45-8. Survivorship among donees of power of sale.—In all mortgages and deeds of trust wherein two or more persons, as trustees or otherwise, are given power to sell the property therein conveyed or embraced, and one or more of such persons dies, any one of the persons surviving having such power may make sale of such property in the manner directed in such deed, and execute such assurances of title as are proper and lawful under the power so given; and the act of such person, in pursuance of said power, shall be as valid and binding as if the same had been done by all the persons on whom the power was conferred. (Rev., s. 1033; 1885, c. 327, s. 2; C. S. 2582.)

Editor's Note.—See 13 N. C. Law Rev. 93.

Execution of Power by Survivor Trustee in Mortgage.—Where one of two trustees in a power of sale mortgage dies, the survivor may execute the trust, this being a trust vested in the original trustee and the survivor to executed the trust according to its true intent and meaning, and as fully as if originally appointed: Provided, that in all actions or proceedings brought prior to January first, one thousand nine hundred, before the clerks of the superior court in which any trustee was appointed to execute a deed of trust where any trustee of a deed of trust has died, removed from the county where the deed was executed and from the state, or in any way become incompetent to execute the said trust, whether such appointment of such trustee by order or decree, or otherwise, was made upon the application or petition of any person or persons ex parte, or whether made in proceedings where all the proper parties were made, as well as all deeds made valid so far as regards the parties to said actions and proceedings to the same extent as if all proper parties had originally been made in such actions or proceedings. (Rev., s. 1037; Code, s. 1276; 1896-97, c. 188; 1873-4, c. 126; 1901, c. 576; 1933, c. 493; C. S. 2583.)

Bond for Substituted Trustee Unnecessary.—It is not necessary in substituting one trustee for another in pursuance of this section, to require a bond of the substituted trustee. State v. Green, 14 N. C. 498, 51 S. E. 341.

All Persons Interested Must Be Made Parties.—The appointment of a trustee in cases where the former trustee has died, removed from the county in which the trust is situated, or otherwise, was made upon the application of the court, under this section, of a trustee in place of the executor is void and clothes the appointee with no authority under the will and testament of the deceased testator, and hence an appointment by the clerk of the court is not valid to the extent of appointing a substitute trustee. State v. Green, 14 N. C. 498, 51 S. E. 341.

Personal Powers of Old Trustee Cannot Be Transferred upon the New.—Where the powers to be exercised by the original trustee are of a personal nature depending upon his discretion, such powers cannot be conferred upon the appointed trustee. See Young v. Young, 127 N. C. 494, 47 S. E. 511.

Administrative C. T. A. Taking Place of Executor Trustee.—Where an executor named in a will is thereby also appointed a trustee and renounces or dies, the administrator cum testamento annexo appointed in his stead succeeds as trustee, and the personal representative of the estate, the substituted trustee, and his successors in office, are in all respects the same as the original trustee, so far as it is competent for the court to confer them. McAfee v. Green, 14 N. C. 498, 51 S. E. 341.
§ 45-10. Substitution of trustees in mortgages and deeds of trust.—In addition to the rights and remedies now provided by law, the holders or owners of a majority in amount of the indebtedness, notes, bonds, or other instruments evidencing a promise or promises to pay money and secured by mortgages, deeds of trust, or other instruments conveying real or personal property, or creating a lien thereon, may substitute a trustee whether the trustee then named in the instrument is the original or a substituted trustee, by the execution of a paper writing whenever it appears:

(1) In the case of individual trustees: That the trustee then named in such mortgage, deed of trust, or other instrument securing the payment of money, has died, or has removed from the state, or is not a resident of this state or cannot be found in this state, or has disappeared from the community of his residence so that his whereabouts remains unknown in such community for a period of three months or more; or that he has become incompetent to act mentally or physically, or has been committed to any institution, private or public, on account of inebriacy or conviction of a criminal offense; or that he has refused to accept such appointment as trustee or refuses to act or has been declared a bankrupt; or that a petition in involuntary bankruptcy has been filed against him, or that a suit has been instituted in any court of this state asking relief against him on account of insolvency; or that a cause of action has been asserted against him on account of fraud against his creditors.

(2) In the case of corporate trustees: That the trustee is a foreign corporation or has ceased to do business, or has ceased to perform the duties of said trust, or other instrument creating the lien to the purchaser at the foreclosure sale. Bateman v. Sterrett, 201 N. C. 59, 159 S. E. 14.

A substituted trustee succeeds to all the rights, titles and duties of the original trustee, and has the power to authorize the execution of the instrument according to its terms upon default. Pearce v. Watkins, 219 N. C. 636, 14 S. E. (2d) 653.

A sale of the property by the substituted trustee in accordance with the terms of the instrument is valid, the appointment of a substitute trustee not being a conveyance of any interest in land. North Carolina Mtg. Corp. v. Morgan, 208 N. C. 743, 182 S. E. 450.

§ 45-11. Appointment of substitute trustee upon application of subsequent or prior lienholders; effect of substitution.—When any person, firm, corporation, county, city or town holding a lien on real or personal property upon which there is a subsequent or prior lien created by a mortgage, deed of trust or other instrument, the mortgagor or trustor therein named being dead or having otherwise become incompetent to act, files a written application with the clerk of the superior court of the county where such defendant resides, setting forth the facts showing that said mortgagee or trustee is then dead or has become incompetent to act, the said clerk of the superior court, upon a proper finding of fact that said mortgagee or trustee is dead or has become incompetent to act, shall enter an order appointing some suitable and competent person, firm or corporation as substitute trustee upon whom service of process may be made, and said substitute trustee shall thereupon be vested with full power and authority to defend any action instituted to foreclose said property as fully as if he had been the original mortgagee or trustee named; and the said substitute trustee shall have no power to cancel said mortgage or deed of trust without the joiner of the holder of the notes secured thereby. Said application shall not be made prior to the expiration of thirty days from the date the original mortgagee or trustee becomes incompetent to act. (1941, c. 115, s. 1.)

Editor's Note.—For comment on the 1941 enactment, see 19 N. C. Law Rev. 597.

§ 45-12. Certificate by clerk of superior court.—Whenever the powers set out in § 45-10 shall be exercised the clerk of the superior court shall certify that the instrument has been executed by the owner or owners of a majority in amount of the indebtedness, notes, bonds or other instruments secured therein, have executed the same, and that it has been made to appear to him that the cause of substitution as set forth therein is true and that the substituted trustee is a fit and proper person or corporation to perform the duties of said trust, and unless such certificate is attached to said instrument before registration and registered therewith the same shall be invalid and of no effect. (1931, c. 76, s. 3.)

§ 45-13. Right of appeal by any person interested; judge to review findings of clerk de novo.—Whenever the power contained in § 45-10 or in § 45-11 is exercised in respect to any deed of trust, mortgage or other instrument creating the lien which was executed prior to March 4,
§ 45-14. Acts of trustee prior to removal not invalidated. — If any such trustee who has been substituted as provided in § 45-10 or in § 45-11 shall have performed any functions as such trustee and shall thereafter be removed as provided in §§ 45-10 to 45-17, such removal shall not invalidate or affect the validity of such acts in so far as any purchaser or third person shall be affected or interested, and any conveyances made by such trustee before removal if otherwise valid, shall be and remain valid and effectual to all intents and purposes, but if any trustee upon such bearing is declared to have been wrongfully removed, he shall have his right of action against the substituted trustee for any compensation that he would have received in case he had not been wrongfully removed from such trust. (1931, c. 78, s. 5; 1941, c. 115, s. 3.)

Editor's Note.—The 1941 amendment inserted the reference to § 45-11.

§ 45-15. Registration of substitution constructive notice. — The registration of such paper writing designating a new trustee under § 45-10 or under § 45-11 shall be from and after registration, constructive notice to all persons, and no appeal or other proceedings shall be instituted to contest the same after one year from and after such registration. (1931, c. 78, s. 6; 1941, c. 115, s. 4.)

Editor's Note.—The 1941 amendment inserted the reference to § 45-11.

§ 45-16. Register of deeds to make marginal entry of substituted trustee. — Whenever any such substituted trustee shall be appointed as provided in §§ 45-10 to 45-17 and such designation of such substituted trustee shall have been registered, together with the certificates required in §§ 45-10 to 45-17, then it shall be the duty of the register of deeds to make an appropriate notation on the margin of the registration of the said mortgage, deed of trust, or other instrument securing the payment of money, indicating the place of registration of such appointment of a substituted trustee, and this shall be done as many times as the right to make such substitute may be substituted as provided for in §§ 45-10 to 45-17. It shall be competent for the holder of such deed of trust, or deeds of trust, mortgage or mortgages, wherein the same trustee is named, to execute one instrument applying to all such deeds of trust or mortgages, in the substitution of a trustee for any of the causes set forth in § 45-10, and in said instrument to recite and name the mortgages and/or deeds of trust affected by giving the names of the grantors, the trustee and, if registered, the book and page of such registration. This may be done as many times as a trustee may be substituted as provided for in §§ 45-10 to 45-17, and in which cases the register of deeds or the court may, as to each described instrument, mortgage or deed of trust, the notation provided for in this section. (1931, c. 78, s. 7.)

§ 45-17. Substitution made as often as justifiable. — The powers set out in § 45-10 and in § 45-11 may be exercised as often and as many times as the right to make such substitution may arise under the terms of such section, and all the privileges and requirements and rights to contest the same as set out in §§ 45-10 to 45-17 shall apply to each deed of trust or mortgage and to each substitution. (1931, c. 78, s. 8; 1941, c. 115, s. 5.)

Editor's Note.—The 1941 amendment inserted the reference to § 45-11.

§ 45-18. Validation of certain acts of substituted trustees. — Whenever before February 3, 1939, a trustee has been substituted in a deed of trust in the manner provided by §§ 45-10 to 45-17, but the instrument executed by the holder and/or owners of all or a majority in amount of the indebtedness, notes, bonds, or other instruments secured by said deed of trust, and the certificate of the clerk of the superior court executed in connection therewith under the provisions of § 45-12, all have not been registered as provided by said sections until after the substituted trustee has exercised some or all of the powers conferred by said deed of trust upon the trustee therein, including the advertising of the property conveyed by said deed of trust for sale, the sale thereof, and the execution of a deed by such substituted trustee to the purchaser at such sale, all such acts of said substituted trustee shall be deemed valid and effective in the same manner and to the same extent as if said instrument substituting said trustee, and the clerk’s certificate thereon had been registered prior to the performance by said substituted trustee of any one or more of said acts, or other acts authorized by such deed of trust. (1939, c. 127.)

Pending Litigation Not Affected. — The powers set out in §§ 45-10 to 45-17 shall not be construed to affect any litigation pending February 3, 1939, nor to divest vested rights. Public Laws, 1939, c. 13, s. 2.

§ 45-19. Mortgage to guardian; powers pass to succeeding guardian. — When a guardian to whom a mortgage has been executed dies or is removed or resigns before the payment of the debt secured in such mortgage, all the rights, powers and duties of such mortgagee shall devolve upon the
§ 45-20. Sales by mortgagees and trustees confirmed.—All sales of real property made prior to February tenth, nineteen hundred and forty, by any trustee in the exercise of the power of sale vested in him under any deed, deed of trust, mortgage, will, or other instrument in which the trustee has been conveyed to affix his seal after his signature, shall be good and valid; provided, however, that this section shall not apply to actions instituted and pending prior to the fifteenth day of May, one thousand nine hundred and forty-three. (1943, c. 171.)

§ 45-21. Validation of appointment of and conveyances to corporations as trustees.—In all deeds of trust made prior to March 15, 1941, wherein property has been conveyed to corporations as trustees to secure indebtedness, the appointment of said corporations as trustees, the conveyances to said corporate trustees, and the action taken under the powers of such deeds of trust by said corporate trustees are hereby confirmed and validated to the same extent as if such corporate trustees had been individual trustees. (1941, c. 245, s. 1.)

Editor's Note.—This section, which became effective March 15, 1941, did not apply to or affect pending litigation. For comment on this enactment, see 19 N. C. Law Rev. 507.

Art. 3. Mortgage Sales.

§ 45-22. Limitation of time for attacking certain foreclosures on ground trustee was agent, etc., of owner of debt.—1. No action or proceeding shall be brought or defense or counterclaim pleaded later than one year after March 15, 1941, in which a foreclosure sale which occurred prior to January 1, 1941, under a deed of trust conveying real estate as security for a debt is attacked or otherwise questioned upon the ground that the trustee was an officer, director, attorney, agent or employee of the owner of the whole or any part of the debt secured thereby, or upon the ground that the trustee and the owner of the debt or any part thereof have common officers, directors, attorneys, agents or employees.

2. This section shall not be construed to give or create any cause of action where none existed before March 14, 1941, nor shall the limitation provided in subsection one hereof have the effect of barring any cause of action based upon grounds other than those mentioned in said section, unless the grounds set out in subsection one are an essential part thereof.

3. This section shall not be construed to enlarge the time in which to bring any action or proceeding or to plead any defense or counterclaim; and the limitation hereby created is in addition to all other limitations now existing. (1941, c. 202.)

§ 45-23. Personal property; notice and place of sale. — All personal property sold under the terms of any mortgage or other contract, expressed or implied, whether advertised in some newspaper or otherwise, shall be advertised by posting a notice at some conspicuous place at the courthouse door in the county where the property is situated, such notice to be posted for at least twenty days before the sale, unless a shorter time be expressed in the contract. (Rev., s. 1042; 1889, c. 70; 1909, c. 49, s. 1; C. S. 2585.)

Cross Reference.—As to advertisement for sale under execution of personal property, see § 1-336.

Strict Compliance with Statute.—In foreclosure proceedings under a power of sale contained in a mortgage, the requirements of the statute and the contract stipulations of the instrument, not inconsistent with the statute in respect to notice and other terms on which the power may be exercised, shall be strictly complied with; and when such has not been done, no title can pass under the sale in respect to the immediate parties thereto. Ferebee v. Sawyer, 167 N. C. 199, 83 S. E. 127.

§ 45-24. Foreclosure of conditional sales.—In all sales of personal property wherein the title is retained by the seller to secure the purchase money, or any part thereof, and no power of sale is conferred, and default is made in the payment of said obligation by the purchaser, then in all such cases it is lawful for the owner of such debt thereby secured, without an order of court, to sell such property, or so much thereof as may be necessary to pay off said indebtedness, at public auction for cash, after first giving twenty days notice at three or more public places in the county wherein the sale is to be made, and apply the proceeds of such sale to the discharge of said debt, interest on the same, and costs of foreclosure, and pay any sum to the person legally entitled thereto. Before making any such sale under the power of sale of a conditional advertisement above required, the owner of said debt shall, at least ten days before the day of sale, mail a copy of the notice of sale to the last known postoffice address of the original purchaser or his assigns. (1913, c. 60, s. 1; C. S. 2587.)

Cross References.—As to registration of conditional sales
§ 45-25. Real property; notice of sale must describe premises.—In sales of real estate under deeds of trust or mortgages it is the duty of the trustee or mortgagee making such sale to fully describe the premises in the notice required by law substantially as the same is described in the deed of authority under which said trustee or mortgagee makes such sale. (Rev., s. 1043; 1895, c. 294; C. S. 2588.)

Cross Reference.—As to requirements for advertisement in execution and judicial sales, see § 1-525 et seq.

§ 45-26. Real property; power of sale barred when foreclosure barred.—The power of sale of real property contained in any mortgage or deed of trust for the benefit of creditors shall become inoperative, and no person shall execute any power in a deed of trust for the benefit of creditors would be barred by the statute of limitations, and the power of sale contained in the mortgage or deed of trust, as if the provision for the acceleration of the payment and the entirety of the power of sale had not been incorporated in the mortgage.

And where more than ten years had elapsed since the maturity of some of the notes recovery therein was barred. Ownbey v. Parkway Properties, 222 N. C. 35, 21 S. E. (2d) 990.

Where notes secured by a mortgage are barred by the statute of limitations, and the power of sale contained in the mortgage or deed of trust after the last payment on the same "where the mortgagor or grantor has been in possession of the property." Ownbey v. Parkway Properties, 222 N. C. 55, 21 S. E. (2d) 990.

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Where notes secured by a mortgage are barred by the statute of limitations, and the power of sale contained in the mortgage or deed of trust after the last payment on the same "where the mortgagor or grantor has been in possession of the property." Ownbey v. Parkway Properties, 222 N. C. 55, 21 S. E. (2d) 990.
§ 45-26.1. Real property; validation of deeds made after expiration of statute of limitations where sales made prior thereto.—In all cases where sales of real property have been made under powers of sales contained in mortgages or deeds of trust and such sales have been made within the times which would have been allowed by the statute of limitations for the commencement of actions to foreclose such mortgages or deeds of trust as a result of the filing of raised or increased bids, such deeds in the exercise of the power of sale are hereby validated and are declared to have the same effect as if they had been executed and delivered within the period allowed by the statute of limitations for the commencement of actions to foreclose such mortgages or deeds of trust. (1943, c. 16, s. 2.)

§ 45-27. Land lying in two or more counties; place of sale.—When a mortgage or deed in trust conveying lands lying partly in two or more counties confers upon the mortgagee or mortgagees, trustee or trustees, therein named, any power for the sale of such lands, without naming the place of sale, or where mortgagor has not named any mortgagee, trustee or trustees, the right to select the same, in the exercise of such power, any sale thereunder may be made at the courthouse door of any one of the counties in which such lands are situate, and at no other place except as hereinafter provided; but when such lands consist of two or more detached parcels, lying wholly within the limits of different counties, the sale of each and every one of such parcels shall be made at the courthouse door of the county in which the same is situate. (1911, c. 185, s. 1; C. S. 2390.)

§ 45-28. Reopening judicial sales, etc., on advance bid.—In the foreclosure of mortgages or deeds of trust on real estate, or by order of court in foreclosure proceedings either in the superior court or in actions at law, or in the case of the public sale of real estate by an executor, administrator, or administrator with the will annexed, or by any person by virtue of the power contained in a will or sale under execution duly issued, the sale shall not be deemed to be closed under ten days. A report of such sale shall be filed in the office of the clerk of the superior court within five days from the date thereof: Provided, that failure to file such report prescribed shall not invalidate said sale. If in ten days from the date of the sale, the sale price is increased ten per cent where the price does not exceed five hundred dollars, and five per cent where the price exceeds five hundred dollars, and the same is paid to the clerk of the superior court, the mortgagee, trustee, executor, or person offering the real estate for sale shall reopen the sale of said property and advertise the same in the same manner as in the instance. It shall only be necessary to give fifteen days' notice of a resale. The clerk may, in his discretion, require the person making such advance bid to execute a good and sufficient bond in a sufficient amount to guarantee compliance with the terms of sale should the person offering the advance bid be declared the purchaser at the resale. Where the bid or offer is raised as prescribed herein, and the amount paid to the clerk, he shall issue an order to the mortgagee or other person and require him to advertise and resell said real estate. Resales may be had as often as the bid may be raised in compliance with this section. Upon the final sale of the real estate, the clerk shall issue his order to the mortgagee or other person, and require him to make title to the purchaser. If upon any resale the person making an advance bid or his agent shall become the last and highest bidder at such resale and upon confirmation of his bid shall fail to comply therewith within ten days, the clerk shall order a resale of the property; and in such event the deposit made with the clerk of said court shall be forfeited as damages for failure to comply with the bid at such resale and shall be applied, under order of the clerk, first to the payment of all costs and expenses in advertising and conducting the resale, and the balance of said deposit, if any, shall be applied as a credit on the indebtedness on account of which the sale was authorized: Provided, however, that no such forfeiture shall be allowed if, at the resale ordered because of such failure to comply, the property shall sell for an amount equal to or more than said advance bid so offered but not complied with, plus the costs of such resale and the deposit; or the court shall make all such orders as may be just and necessary to safeguard the interest of all parties, and he shall keep a record which will show in detail the amount of each bid, the purchase price, and the final settlement between parties. This section shall not apply to the foreclosure of mortgages or deeds of trust executed prior to April first, nine-
the distinction between actions at law and suits in equity is
made under § 45-28.

execution sales. See Weir v. Weir, 196 N. C. 268, 145 S. E.
2d.

mailed, the offer would still be sufficient to send a cashier's check by mail
a proceeding for foreclosure must be in the Superior
Court." The 1931 amendment repeals the former and inserts
the words "or by order of court in foreclosure proceedings
in the Superior Court." While under the provisions of this section, the clerk of the court has no
power and authority to order a resale of lands foreclosed under
the power of sale contained in mortgages and deeds of trust not to be raised in the amount and time prescribed by law. In re
affirmation of title acquired by the purchaser as
grantee in the deed of the trustee void, solely, for that rea-

Confirmation of Sale Not Subject to Collateral Attack.—
Under the provisions of this section, the clerk of the court has no
power to make an allowance to the mortgagee or trustee for his services in
making the sale, to be retained by him from the proceeds of the sale. From an order making such allowance, a party
interested in the land or in the proceeds of the sale, may appeal to the judge, who, upon such appeal, may affirm, reverse or modify the order of the clerk; in the absence of such appeal, the order of the clerk is final and conclusive.

suits in equity are authorized under § 45-28.

On the other hand, a material loss has been sustained by destruction of a house
on the lands, within the stated period. In re Sermon's Land, 182 N. C. 122, 108 S. E. 497.

Where the mortgaged premises has been materially diminished in value by the loss by fire of a house thereon, which has extinguished the equity of redemption, the holder of a mortgage, who is the highest bidder at such sale, having no title or right of possession, or control over the property for its preservation or protection, within ten days provided by this section, the loss occasioned by the fire in increasing the funds at issue on the lands sold under power of sale, the highest bidder is not chargeable therewith, or required by law to take the property at the price he had bid therefor. In re Sermon's Land, 182 N. C. 122, 108 S. E. 497.

Same.—When Supervisory Power Begins.—The clerk of the court acquires supervisory power of the sale of land under power contained in a mortgage or deed of trust, or of the proceeds of the sale, when such sale is made under a power of sale granted under the provisions of this section, which continues until after the final sale under foreclosure. Lawrence v. Beck, 185 N. C. 914, 118 S. E. 482.

Same.—Order Accepting Mortgagor's Deed.—Where a resale of land under mortgage has been made under the provisions of this section, the clerk may enter an order accepting the mortgagor's deed nunc pro tunc as to the time it should have been tendered, when otherwise the observance of the statute had been made. Briggs v. Asheville Developers, 191 N. C. 784, 133 S. E. 3.

Section Incorporated in Mortgages and Deeds of Trust.—The provisions of this section, concerning the sale of land under a power thereof contained in a mortgage or deed of trust, or of the proceeds of the sale, when such sale is made under a power of sale granted under the provisions of this section, which continues until after the final sale under foreclosure. In re Sermon's Land, 182 N. C. 122, 108 S. E. 497.

Status Under Section of Mortgage and Deeds of Trust Sales.—Under this section a sale of land under the power in a mortgage, when the sale is made under a decree or judgment of court. Pringle v. Building, etc., Ass'n, 182 N. C. 316, 108 S. E. 914.

Irregularity in Conveyance—Time to Keep Sale Open.—Where a trust deed to secure money loaned on lands has been foreclosed, this section requires the sale to be kept open for ten days for the tender of increased bids, etc., but where it appears that an irregularity in conveying the land before the sale was committed by the persons who have adjudged any of the parties, they are concluded by the judgment upholding the validity of the transaction. Wise v. Sermon's Land, 182 N. C. 184, 108 S. E. 491.

No Specific Performance When Sale Reopened.—The principle upon which specific performance of a binding contract to convey lands is enforceable, has no application to the successful bidder at a sale under the power contained in a mortgage or deed of trust of lands, during the ten days allowed by this section, for, within that time, there is no binding contract of purchase, and the bargain is incomplete. In re Sermon's Land, 182 N. C. 122, 108 S. E. 497.

Title of the Bidder.—Under the provisions of this section, the bidder at the sale during the period of ten days acquires no title, mortgage, or power of sale, but only a position similar to a bidder at a judicial sale, before confirmation. He is only considered as a preferred bidder, his right depending upon whether there is an increased bid at a subsequent sale, and the provisions of the statute. In re Sermon's Land, 182 N. C. 122, 108 S. E. 497. See Richmond County v. Simmons, 209 N. C. 250, 153 S. E. 257.

When in special proceeding to sell real property to create assets with which to pay debts of a decedent an order for the proceeds for an order of resale under § 28-93, it clearly appears that a private sale is open to either course for ten days from the date and report of the sale, after he has acquired the interest of possession or title. He is merely a preferred bidder. Howard v. Ray, 222 N. C. 710, 24 S. E. (2d) 599.

No Bid Required until Expiration of Ten Days.—A last and highest bidder at a foreclosure sale is but a proposed purchaser or preferred bidder during the ten days allowed by statute for an increase in the bid, and the sale cannot be consummated until ten days after the public auction. Shelby Bldg., etc., Ass'n v. Black, 215 N. C. 400, 2 S. E. (2d) 6.

Rights of Highest Bidder—Payment of Mortgage within Ten Days Period.—The last highest bidder at a foreclosure sale of a mortgage on lands is but a proposed purchaser under this section acquiring no right until the statutory period of ten days has expired. In order that the mortgage indebtedness to the mortgagee within that time cancels the instrument and all rights arising thereunder. A last and highest bidder at the foreclosure of a mortgage or deed of trust on lands is but a proposed purchaser within the ten days before confirmation, and where the mortgagee has become such purchaser and within ten days and by an increasing third person pays the mortgage debt and has the notes and mortgage assigned to him, such person has the right of lien and foreclosure under the terms of the mortgage securing the note. Davis v. Central Life Ins. Co., 197 N. C. 637, 197 S. E. 120.

Same.—Resale of Mortgaged Land.—When in a special proceeding to sell real property to create assets with which to pay debts of a decedent an order for the proceeds for an increase in the bid, usu-
§ 45-29. Surplus after sale to be paid to clerk, in certain cases.—It is competent for any trustee or mortgagee who sells any real, personal or mixed property under the power of sale contained in any deed of trust or mortgage of any kind and who has in his hands any surplus money, after paying the debt or debts secured by such deed of trust or mortgage and costs and expenses of such sale, to pay into the office of the clerk of the superior court for the county where the sale was had, any surplus moneys in his hands as aforesaid, and the clerk may order the said trustee or mortgagee to execute a deed to the purchaser, was signed and docketed on the first or third Monday of a month, such judgment of confirmation shall be and is hereby declared to have the same force and effect as if the same were executed and delivered pursuant to a judgment of confirmation properly signed and docketed by the clerk of the superior court on a first or third Monday of the month. (1923, c. 59, s. 1; C. S. 2593(a).)

§ 45-30. Orders signed on days other than first and third Mondays validated; force and effect of deeds.—In all actions for the foreclosure of any mortgage or deed of trust which has heretofore been instituted and prosecuted before the clerk of the superior court of any county in North Carolina, wherein the judgment confirming the sale made by any commissioner appointed in said action, and ordering the same to be executed, the said commissioner is required to execute a deed to the purchaser, was signed by such clerk on a day other than the first or third Monday of a month, such judgment of confirmation shall be and is hereby declared to be valid and of the same force and effect as though signed and docketed on the first or third Monday of any month, and any deed made by any commissioner or commissioners in any such action where the confirmation of sale was made on a day other than the first or third Monday of the month shall be and is hereby declared to have the same force and effect as if the same were executed and delivered pursuant to a judgment of confirmation properly signed and docketed by the clerk of the superior court on a first or third Monday of the month. (1923, c. 53, s. 1; C. S. 2593.)

§ 45-32. Injunction of mortgage sales on equitable grounds.—Any owner of real estate, or other person, firm or corporation having a legal or equitable interest therein, may apply to a judge of the superior court, prior to the confirmation of any sale of such real estate by a mortgagee, trustee, commissioner or other person authorized
to sell the same, to enjoin such sale or the confirmation thereof, upon the ground that the amount bid or price offered therefor is inadequate and inequitable and will result in irreparable damage to the owner or other interested person, or upon any other legal or equitable ground upon which it is claimed there is want of due process of law; nor does it confer upon the mortgagor or grantor in deeds of trust any exclusive equitable power, the provisions of this section being constitutional and valid. Whitaker v. Chase, 206 N.C. 726, 182 S.E. 491.

This section is remedial only, and is valid for that purpose. Stated in Richmond Mtg., etc., Corp. v. Wachovia Bank, etc., Co., 209 N.C. 732, 175 S.E. 133. See annotations under § 45-32.

§ 45-34. Ordering resales before confirmation; receivers for property; tax payments.—The court or judge granting such order or injunction, or before whom the same is returnable, shall have the right before, but not after, any sale is confirmed to order a resale by the mortgagee, trustee, commissioner, or other person authorized to make the sale in such manner and upon such terms as may be just and equitable: Provided, that the rights of all parties in interest, or who may be affected thereby, shall be protected by bond or indemnity in such form and amount as the court may require, and the court or judge may also appoint a receiver of the property or the rents and proceeds thereof, pending any sale or resale, and may make such order for the payment of taxes or other prior lien as may be necessary, subject to the right of appeal to the supreme court in all cases. (1933, c. 275, s. 2.)

When Foreclosure May Not Be Reinstated.—An executor or administrator of the estate of the deceased mortgagee gave notice in apt time that he would make application to the resident judge of the district out of term and out of the county for an order restraining the consummation of the sale made by him under the mortgage, alleging that the price bid at the sale was grossly inadequate, which allegation was denied in the answer, and it was error for the court to grant defendants' motion to dismiss, plaintiffs being entitled to a hearing and a determination of the issue under the provisions of this section. Smith v. Bryant, 209 N.C. 213, 183 S.E. 276. See annotations under § 45-32.

Where It Is Error for Court to Grant Motion to Nonsuit.—Where plaintiffs, trustees in a deed of trust, seek to enjoin the consummation of a foreclosure sale had under the provisions of this section, and alleged that the price bid at the sale was grossly inadequate, which allegation is denied in the answer, it is error for the court to grant defendants' motion to dismiss, plaintiffs being entitled to a hearing and a determination of the issue under the provisions of this section. Smith v. Bryant, 209 N.C. 726, 182 S.E. 491.

Where Court Determines Whether Bid Was Grossly Inadequate.—Where, in a suit to enjoin the consummation of a foreclosure sale the issue of whether the bid at the sale was grossly inadequate, and the parties are not entitled as a matter of law to have the issue determined by a jury, but the court may hear evidence and determine the issue, and should dismiss the action if it finds that the amount of the bid is the fair value of the land, or should enjoin the consummation of the sale if it finds that the bid is grossly inadequate. Smith v. Bryant, 209 N.C. 732, 175 S.E. 133. See annotations under § 45-32.


Cited in Richmond Mtg., etc., Corp. v. Wachovia Bank, etc., Co., 210 N.C. 29, 183 S.E. 482.

§ 45-33. Ordering resales before confirmation; receivers for property; tax payments.—The court or judge granting such order or injunction, or before whom the same is returnable, shall have the right before, but not after, any sale is confirmed to order a resale by the mortgagee, trustee, commissioner, or other person authorized to make the sale in such manner and upon such terms as may be just and equitable: Provided, that the rights of all parties in interest, or who may be affected thereby, shall be protected by bond or indemnity in such form and amount as the court may require, and the court or judge may also appoint a receiver of the property or the rents and proceeds thereof, pending any sale or resale, and may make such order for the payment of taxes or other prior lien as may be necessary, subject to the right of appeal to the supreme court in all cases. (1933, c. 275, s. 2.) See annotations under § 45-32.


Cited in Richmond Mtg., etc., Corp. v. Wachovia Bank, etc., Co., 210 N.C. 29, 183 S.E. 482.

§ 45-34. Right of mortgagee to prove in deficiency suit reasonable value of property by way of defense. When any sale of real estate or personal property has been made by a mortgagee, trustee, or other person authorized to make the same, at which the mortgagee, payee or other holder of the obligation thereby secured becomes the purchaser and takes title either directly or indirectly, and thereafter such mortgagee, payee or other holder of the secured obligation, as afore-
said, shall sue for and undertake to recover a deficiency judgment against the mortgagor, trustee or other holder of such obligation whose property has been so purchased, it shall be competent and lawful for the defendant against whom such deficiency judgment is sought to allege and show as matter of defense and offset, but not by way of counter-claim, that the property sold was fairly worth the amount of the debt secured by it at the time and place of sale or that the amount bid was substantially less than its true value, and, upon such showing, to defeat or offset any deficiency judgment against him, either in whole or in part: Provided, this section shall not affect the rights of purchasers of such deficiency judgments or of innocent third parties, nor shall it be held to affect or defeat the negotiation of any note, bond or other obligation secured by such mortgage, deed of trust or other instrument: Provided, further, this section shall not apply to foreclosure sales made pursuant to an order or decree of court nor to any judgment sought or rendered in any foreclosure suit nor to any sale made and confirmed prior to April 18, 1933. (1933, c. 875, s. 3.)

Editor's Note.—See 12 N. C. Law Rev. 366, for note on "Recent During the Depression."

This section is of general and valid. Richmond Mtg., etc., Corp. v. Wachovia Bank, etc., Co., 210 N. C. 29, 185 S. E. 482. This section has merely restricted the exercise of the contractual remedy to provide a procedure which, to some extent, renders the remedy by a trustee's sale consistent with that in equity. This does not impair the obligation of the contract. Richmond Mtg., etc., Corp. v. Wachovia Bank, etc., Co., 210 N. C. 34, 185 S. E. 482. Richmond Mtg., etc., Corp. v. Wachovia Bank, etc., Co., 201 N. C. 29, 185 S. E. 482. See also, Richmond Mtg., etc., Corp. v. Wachovia Bank, etc., Co., 300 U. S. 124, 137, 57 S. Ct. 338, 81 L. Ed. 552, 108 A. L. R. 886.

It applies only to foreclosure under powers of sale and not to judicial sales, only to instances where the creditor bids in the property, directly or indirectly, and not to instances where the property is bid in by independent third persons. Richmond Mtg., etc., Corp. v. Wachovia Bank, etc., Co., 210 N. C. 29, 185 S. E. 482. See also, Richmond Mtg., etc., Corp. v. Wachovia Bank, etc., Co., 300 U. S. 124, 137, 57 S. Ct. 338, 81 L. Ed. 552, 108 A. L. R. 886.

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It is not "emergency legislation," nor is its purpose to provide a "moratorium" for debtors during a temporary period of depression. Richmond Mtg., etc., Corp. v. Wachovia Bank, etc., Co., 210 N. C. 29, 34, 185 S. E. 482.

Amount Bid Is Not Conclusive as to Value.—The amount bid by the creditor at the sale, and applied by him as a payment on the debt, is not conclusive as to the value of the property. Richmond Mtg., etc., Corp. v. Wachovia Bank, etc., Co., 210 N. C. 34, 185 S. E. 482.

This section recognizes the obligation of a debtor who has secured the payment of his debt by a mortgagee or deed of trust to pay his debt in accordance with his contract, and does not impair such obligation. Richmond Mtg., etc., Corp. v. Wachovia Bank, etc., Co., 210 N. C. 29, 34, 185 S. E. 482.

And it recognizes the validity of powers of sale contained in purchase-money mortgages, or deeds of trust, and thereby provides protection of equity. It provides for judicial supervision of sales made and conducted by creditors whose debts are secured by mortgages or deeds of trust, and thereby provides protection for debtors whose property has been sold and purchased by their creditors for a sum which was not a fair value of the property at the time of the sale. Richmond Mtg., etc., Corp. v. Wachovia Bank, etc., Co., 210 N. C. 29, 35, 185 S. E. 483.

It is Not Applicable to Sales under Order of Court.—Where the maker of a note assigned a judgment in its favor to the payee as security and the judgment was sold under order of court and purchased by the payee who thereafter realized upon the judgment an amount in excess of the sale price, it was held that the note was properly credited with the sale price and not the amount realized by the sale. Where, subsequent to the judgment sale, the holder of the judgment sold the property at a price which was equal to the amount of the judgment, the holder of the judgment was not entitled to any deficiency judgment. Biggs v. Lasiter, 220 N. C. 761, 18 S. E. (2d) 419.


§ 45-35. Sections 45-32 to 45-35 not applicable to tax suits.—All laws and clauses of laws in conflict with §§ 45-32 to 45-35, to the extent of such conflict only, are hereby repealed, but said sections shall not apply to tax foreclosure suits or tax sales. (1933, c. 875, s. 4.)


§ 45-36. Deficiency judgments abolished where mortgage represents part of purchase price.—In all sales of real property by mortgagees and/or trustees under powers of sale contained in any mortgage or deed of trust executed after February 6, 1933, or where judgment or decree is given for the foreclosure of any mortgage executed after February 6, 1933, to secure payment of the balance of the purchase price of real property, the mortgagee or trustee or holder of the notes secured by such mortgage or deed of trust shall not be entitled to a deficiency judgment on account of such mortgage, deed of trust or obligation secured by the same: Provided, said evidence of indebtedness shows upon the face that it is for balance of purchase money for real estate: Provided, further, that when said note or notes are prepared under the direction and supervision of the seller or sellers, he, it, or they shall cause a provision to be inserted in said note disclosing that it is for purchase money of real estate; in default of which the seller or sellers shall be liable to purchaser for any loss which he might sustain by reason of the failure to insert said provision as herein set out. (1933, c. 36.)

Cross Reference.—As to provision that wife need not join in purchase-money mortgage, see § 39-13.

Editor's Note.—The effect of this section is to limit the creditor to the property conveyed, when the mortgage is for the purchase money, changing in that respect section 1-123. See 11 N. C. Law Rev. 219.

Foreign Executed Mortgage on Foreign Realty.—This section operates to deprive our courts of jurisdiction to enter the deficiency judgments proscribed, and the section applies to all such deficiency judgments, including those predicated upon notes secured by mortgages or deeds of trust executed in another state upon realty lying therein. Bul-lington v. Angel, 220 N. C. 18, 16 S. E. (2d) 411, 136 A. L. R. 1054.

Foreclosure under First Mortgage.—This section is not available as a defense to a action on a purchase-money note secured when the mortgage has been sold under the first mortgage for a sum sufficient to pay only the notes secured by said mortgage, unless the mortgage is held for a payment of said mortgage as a part of the purchase price. Brown v. Kirkpatrick, 217 N. C. 486, 8 S. E. (2d) 601.


Art. 4. Discharge and Release.

§ 45-37. Discharge of record of mortgages and deeds of trust.—Any deed of trust or mortgage [264]
registered as required by law may be discharged and released in the following manner.

1. The trustee or mortgagee or his or her legal representative, or the duly authorized agent or attorney of such trustee, mortgagee or legal representative, may, in the presence of the register of deeds or his deputy, acknowledge the satisfaction of the provisions of such deed of trust or mortgage, whereupon the register or his deputy shall forthwith make upon the margin of the record of such deed of trust or mortgage an entry of such acknowledgment of satisfaction, which shall be signed by the trustee, mortgagee, legal representative or attorney, and witnessed by the register or his deputy, who shall also affix his name thereto.

2. Upon the exhibition of any mortgage, deed of trust or other instrument intended to secure the payment of money, accompanied with the bond or note, to the register of deeds or his deputy, where the same is registered, with the endorsement of payment and satisfaction appearing thereon by the payee, mortgagee, trustee, or assignee of the same, or by any chartered active banking institution in the state of North Carolina, when so endorsed in the name of the bank by an officer thereof, the register or his deputy shall cancel the mortgage or other instrument by entry of "satisfaction" on the margin of the record; and the person so claiming to have satisfied the debt may retain possession of the bond or mortgage or other instrument: Provided, that if such mortgage or deed of trust provides in itself for the payment of money and does not call for or recite any note secured by it, then the exhibition of such mortgage or deed of trust alone shall be signed by the trustee, mortgagee, or his or her legal representative, and witnessed, shall operate and have the same effect to release and discharge all the interest of such trustee, mortgagee or representative in such deed or mortgage as if a deed of release or reconveyance thereof had been duly executed and recorded. (Rev., s. 1046; Code, s. 1237; 1870-1, c. 217; 1891, c. 180; 1893, c. 36; 1901, c. 46; 1917, c. 49, s. 1; 1917, c. 50, s. 1; 1923, c. 192, s. 1; 1923, c. 193; 1935, c. 47; C. S. 3294.)

3. Upon the exhibition of any mortgage, deed of trust, or other instrument intended to secure the payment of money by the grantor or mortgagee, his agent or attorney, together with the notes or bonds secured thereby, to the register of deeds or his deputy of the county where the same is registered, the deed of trust, mortgage, notes or bonds being at the time of such exhibition more than ten years old, counting from the date of maturity of the last note or bond, the register or his deputy shall make proper entry of cancellation and satisfaction of such instrument on the margin of the record where the same is recorded, whether there be any such entries on the original papers or not.

4. Upon the presentation of any deed of trust given to secure the bearer or holder of any negotiable instruments transferable by delivery, together with all the evidences of indebtedness secured thereby, marked paid and satisfied in full and signed by the bearer or holder thereof, to the register of deeds or his deputy of the county in which same is recorded, the said register or his deputy shall cancel such deed of trust by entry of satisfaction upon the record and such entry of satisfaction shall be valid and binding upon all persons: Provided that prior to such presentation and cancellation, any person rightfully entitled to any such deed of trust, or evidences of indebtedness, which have been lost or stolen, may notify the register of deeds, or his deputy, in writing of such loss or theft, and said register, or his deputy, shall make a marginal entry in writing thereof, together with the date such notice is given, upon the record of the deed of trust concerned, and thereafter same shall not be canceled unless the same shall have been lawfully determined: Provided that nothing herein shall be construed so as to impair the negotiability of any instrument otherwise properly negotiable, nor to impair the rights of any innocent purchaser for value thereof.

5. The conditions of every mortgage, deed of trust, or other instrument securing the payment of money shall be conclusively presumed to have been complied with or the debts secured thereby paid as against creditors or purchasers for a valuable consideration from the trustor, mortgageor, or grantor, from and after the expiration of fifteen years from the date when the conditions of such instrument or the terms thereof are due to have been complied with, or the last installment of debt or interest secured thereby, unless the holder of the indebtedness secured by such instrument or party secured by any provision thereof shall file an affidavit with the register of deeds of the county where such instrument is registered, in which shall be specifically stated the amount of debt unpaid, which is secured by said instrument, or in what respect any other condition thereof shall not have been complied with, whereupon the register of deeds shall record such affidavit and refer on the margin of the record of the instrument referred to therein the fact of the filing of such affidavit, and a reference to the book and page where it is recorded. Or in lieu of such affidavit the holder may enter on the margin of the record any payments that have been made on the indebtedness secured by such instrument, and shall in such entry state the amount still due thereunder. This entry must be signed by the holder and witnessed by the register of deeds. Provided, however, that this subsection shall not apply to any deed, mortgage, deed of trust or other instrument made or given by any railroad company, or to any agreement of conditional sale, equipment trust agreement, lease, chattel mortgage or other instrument relating to the sale, purchase or lease of railroad equipment on rolling stock, or of other personal property.

Every such entry thus made by the register of deeds or his deputy, and every such entry thus acknowledged and witnessed, shall operate and have the same effect to release and discharge all the interest of such trustee, mortgagee or representative in such deed or mortgage as if a deed of release or reconveyance thereof had been duly executed and recorded. (Rev., s. 1046; Code, s. 1237; 1870-1, c. 217; 1891, c. 180; 1893, c. 36; 1901, c. 46; 1917, c. 49, s. 1; 1917, c. 50, s. 1; 1923, c. 192, s. 1; 1923, c. 193; 1935, c. 47; C. S. 3294.)

Cross Reference.—As to requirement of registration for mortgages and deeds of trust, see § 47-20.

Editor's Note.—The proviso contained in the second clause of this section, and the entire fifth clause were added by the amendments of 1923.

Subsection 4 was added by the amendment of 1935.

Modes of Release.—A mortgage can only be released so as to affect purchasers at a sale under the mortgage by a
cancellation on the margin of the registration thereof under this section, or by a reconveyance of the mortgaged property duly recorded. Barber v. Wadsworth, 115 N. C. 29, 32, 20 S. E. 178.

Construction of the words "mortgaged person."—This section will be construed to effectuate the legislative intent as gathered from its language, and by harmonizing its various parts when this can reasonably be done. Richmond Guano Co. v. Walston, 157 N. C. 571, 122 S. E. 733.

Not Retroactive.—This section has no application to a mortgage given prior to the passage of the section nor does it apply in an action by a subsequent mortgagee. Roberson v. 20532, 5208S..." 178:

"...mortgagee acknowledges the satisfaction and discharge of the cancellation on the margin of the registration thereof un-..." 125:

...der this section, or by a reconveyance of the mortgaged..." 178:

...entered satisfaction on the margin of the record of the..." 178:

...of securing a loan of money. Richmond Guano Co. v. Walston, 187 N. C. 667, 122 S. E. 663. It was contended in this..." 178:

...payment" in the clause quoted above to the words of the first..." 178:

...＂satisfaction" of a deed of trust, and thereupon..." 178:

...the provisions of a deed of trust, but only with the surrender..." 178:

...title to the lands remains in the mortgagee, who alone is au-..." 178:

...mortgagee, and thereby to cancel the mortgage. First Nat. Bank v. Sauls, 183 N. C. 165, 110 S. E. 865.

Under this section, subsection 2, there is no authority given to the register of deeds to enter cancellation of record upon the mortgage. Faircloth v. Johnson, 198 N. C. 429, 127 S. E. 346.

Authority of Trustee.—Possession of the papers by the trustee raises a presumption of his authority to cancel. Williams v. Williams, 220 N. C. 806, 18 S. E. (2d) 364.

Effect of Forged Cancellation.—When the attorney for the owner of the land is in charge of the instrument of trust, and after fraudulently and surreptitiously forgery the signature..." 178:

...the wrongfull cancellation by a forged entry on the margin..." 178:

...of the margin of the record of the instrument, under this..." 178:

...the real estate in the presence of the register of deeds, and..." 178:

...the provisions of this section, subsection 2, and relying..." 178:

...the supposed cancellation of the old mortgage was made, and..." 178:

...the supposed cancellation declared void. Union Central Life Ins. Co. v. Cates, 193 N. C. 456, 145 S. E. 577.

Same.—Upon Rights of Third Mortgagee.—As against the mortgagee of a third mortgage given on the same lands, the wrongful cancellation by a forged entry on the margin of the registration thereof nullity, and the lien continues until the payment of the debt it secures, as prior to that of the third mortgage, when the second mortgage lien has lawfully been foreclosed of record. Swindell v. Stephens, 193 N. C. 474, 137 S. E. 430.

Effect of Prior Fraud.—Where the register of deeds has entered "satisfaction" of a deed of trust, and therefore..." 178:

...the provisions of this section do not exclude from the intent and mean-..." 178:


Authority of Trustee to Release Part of Property without Satisfactory Cancellation only empowers the trustee to "acknowledge satisfaction of the provisions of such trust, etc.," the entry operating as a reconveyance. As was said in Browne v. Davis, 109 N. C. 23, 13 S. E. 701: "...was never recorded, so that the supposed prior fraud or cancellation..." 178:

...the supposed cancellation, and thereafter applied, the supposed..." 178:

...the creditor to know that the supposed cancellation or reconveyance..." 178:

...the mortgagee cancels the instrument in person, under..." 178:

...cancellation, and hypothecates the note of the second mort-..." 178:

...to the creditor's consent and authority properly shown. Woodcock v. Merrimon, 122 N. C. 731, 736, 30 S. E. 321.

Even if an attempted release is under seal it is ineffectual, as the statute authorizing such mode of release confers no power upon a trustee to release specific parts of property in the absence of authority of the owner. Brown v. Davis, 109 N. C. 23, 13 S. E. 703.

Effect of Cancellation by First Mortgagee.—The legal title to the mortgaged lands is conveyed by the instrument to the mortgagee, and remains in him until transferred or assigned, for the purpose of the security or the cancellation of the instrument, under this section and where the mortgagee has transferred the fee-simple title to another, and receives a mortgage back to secure a note for the balance of the purchase price of which the mortgagee, as collateral to his own, the lender for the purposes of the security, acting in good faith, has a prior lien on the lands. First Nat. Bank v. Sauls, 183 N. C. 165, 110 S. E. 865.

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§ 45-38. Entry of foreclosure.—In case of foreclosure of any deed of trust, or mortgage, the trustee or mortgagee shall enter upon the margin of the record thereof the fact of such foreclosure and the date when, and the person to whom, a conveyance was made by reason thereof. (1923, c. 192, s. 2; C. S. 2594(a).)

Failure of Trustee to Comply Does Not Affect Purchaser.—The purchaser of lands at a foreclosure sale made in conformity with a deed of trust upon lands is not affected with constructive notice of fraud by the omission of the trustee to comply with the provisions of this or the following sections, if the instrument of which satisfaction has been acknowledged and recorded as is now prescribed by law. (1923, c. 192, s. 2; C. S. 2594(a).)

Cancellation without Knowledge of Cestui.—Where the trustee paid the trustee the amount of the mortgage debt and the trustee entered a cancellation of the deed of trust on the records under this section, without the knowledge and without assent of the cestui que vanti, the cancellation shall be void. Parham v. Hinnant, 206 N. C. 200, 173 S. E. 198.


§ 45-39. Trustees or mortgagees making sales to file accounts.—It shall be the duty of any trustee or mortgagee making sale under the provisions of any power to file an account with the clerk of the superior court in the county where the land lies as is required by commissioners making sales for partition, and for the auditing and recording of said account the clerk shall be allowed the same fees as are provided for auditing accounts of such commissioners. (1923, c. 192, s. 3; C. S. 2594(b).)

Cross References.—As to procedure for filing, auditing and recording accounts of commissioners making sales for partition, see § 45-26. As to fixing the number of clerks and recording accounts of commissioners making sales for partition, see § 2-26, herein is set forth fees of clerks for auditing and recording the final account of commissioners appointed to sell real estate.

§ 45-40. Register to enter satisfaction on index.—When satisfaction of the provisions of any deed of trust or mortgage is acknowledged and entry of such acknowledgment of satisfaction is made upon the margin of the record of said deed of trust or mortgage, or when the register of deeds or his deputy shall cancel the mortgage or other instrument by entry of satisfaction, the register of deeds or his deputy shall enter upon the margin of the record of said deed of trust, or mortgage, or when the instrument of which satisfaction has been acknowledged or entered is a deed of trust. (1909, c. 638, s. 1; C. S. 2595.)

§ 45-41. Recorded deed of release of mortgagee's representative.—The personal representative of any mortgagee or trustee in any mortgage or deed of trust which has heretofore or which may hereafter be registered in the manner required by the laws of this state may discharge and release the same and all property thereby conveyed by deed of quit claim, release or conveyance executed, acknowledged and recorded as is now prescribed by law for the execution, acknowledgment and registration of deeds and mortgages in this state. (1909, c. 283, s. 1; C. S. 2596.)

Cross Reference.—As to provisions regarding probate and registration of deeds and mortgages, etc., see § 47-1 et seq.

§ 45-42. Release of corporate mortgagees by corporate officers.—All mortgagees or holders of deeds in trust executed to a corporation may be satisfied and so marked of record, as by law provided for the satisfaction of mortgages and deeds in trust, by the president, any vice-president, cashier, assistant cashier, secretary, assistant secretary, treasurer, assistant treasurer, trust officer and assistant trust officer of such corporation signing the name of such corporation by him as such officer. Where mortgagees or deeds in trust were marked "satisfied" on the records before the twenty-third day of February, nineteen hundred and nine, by any president, secretary, treasurer or cashier of any corporation by such officer writing his own name and affixing thereto the title of his office in such corporation, such satisfaction is validated, and is as effective to all intents and purposes as if a deed of release duly executed by such corporation had been made, acknowledged and recorded. (1909, c. 283, ss. 2, 3; 1935, c. 251; C. S. 2597.)

Editor's Note.—By the amendment of 1935, vice-president, assistant cashier, assistant secretary, assistant treasurer, trust officer and assistant trust officer, were added to the list of officers enumerated in the first sentence of the section.

Art. 5. Real Estate Mortgage Loans.

§ 45-43. Real estate mortgage loans; commissions.—Any individual or corporation authorized by law to do a real estate mortgage loan business may make or negotiate loans of money on notes secured by mortgages or deeds of trust on real estate bearing legal interest payable semi-annually at maturity or otherwise, and in addition thereto, may charge, collect and receive such commission or fee as may be agreed upon for making or negotiating any such loan, not exceeding, however, an amount equal to one and one-half per cent of the principal amount of the loan for each year over which the repayment of the said loan is extended: Provided, however, the repayment of such loan shall not be extended, in any instance, for a period of not less than three nor more than fifteen years, and that no annual installment, other than the last, shall exceed thirty-three and one-third per cent of the principal amount of loans which are payable in installments extending over a period of as much as three years and less than four years, twenty-five per cent of the principal amount of
loans which are payable in installments extending over a period of not less than four years nor more than five years, and fifteen per cent of the principal amount of loans which are payable in installments extending over a period of more than five years and not more than fifteen years. This section shall only apply to the counties of Ashe, Buncombe, Caldwell, Forsyth, Gaston, Henderson, McDowell, Madison, Rutherford, Watauga, and Yancey. (Ex. Sess. 1924, c. 36; 1925, cc. 88, 209; Pub. Loc. 1925, c. 592; modified by 1927, c. 5; Pub. Loc. 1927, c. 187.)

Chapter 46. Partition.

Art. 1. Partition of Real Property.

§ 46-1. Partition is a special proceeding.

§ 46-2. Venue in partition.

§ 46-3. Petition by cotenant.

§ 46-4. Surface and minerals in separate owners; partitions distinct.

§ 46-5. Petition by judgment creditor of cotenant; assignment of homestead.

§ 46-6. Unknown parties; summons and representation.

§ 46-7. Commissioners appointed.

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Art. 2. Partition Sales of Real Property.

§ 46-10. Commissioners to meet and make partition; oath of commissioners.

§ 46-11. Owelty to bear interest.

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§ 46-13. Partition where shareowners unknown or title disputed.


§ 46-15. Dower claims settled on partition; dower valued.

§ 46-16. Partial partition; balance sold or left in common.

§ 46-17. Report of commissioners; contents; filing.


§ 46-20. Report and confirmation enrolled and registered; effect.

§ 46-21. Clerk to docket owelty charges; no release of land and no lien.


§ 46-23. Remainder or reversion sold for partition; outstanding life estate.

§ 46-24. Life tenant as party; valuation of life estate.


§ 46-27. Sale of land required for public use on cotenant's petition.


§ 46-29. Notice of partition sale.

§ 46-30. Title made to purchaser; effect of deed.

§ 46-31. Who appointed to sell.

§ 46-32. Report of sale; filing; confirmation and impeachment.

§ 46-33. Shares in proceeds to cotenants secured.

§ 46-34. Shares to persons unknown or not sui juris secured.

Art. 3. Partition of Lands in Two States.

§ 46-35 to 46-41. [Repealed.]

Art. 4. Partition of Personal Property.

§ 46-42. Personal property may be partitioned; commissioners appointed.


§ 46-44. Sale of personal property on partition; report of officer.

§ 46-45. Confirmation and impeachment of reports of commissioners or officer.

§ 46-46. Notice of sale of personal property.

When the proceeding for partition becomes adverse to the plaintiff is not allowed to take a voluntary nonsuit. Hadlock v. Stocks, 167 N. C. 70, 83 S. E. 9.


§ 46-2. Venue in partition.—The proceeding for partition, actual or by sale, must be instituted in the county where the land or some part thereof lies. If the land to be partitioned consists of one tract lying in more than one county, or consists of several tracts lying in different counties, proceedings may be instituted in either of the counties in which a part of the land is situated, and the court of such county wherein the proceedings for partition are first brought shall have jurisdiction to proceed to a final disposition of said proceedings, to the same extent as if all of said land was situate in the county where the proceedings were instituted. (Rev., s. 2488; Code, s. 1898; 1868-9, c. 122, s. 7; Ex. Sess. 1924, c. 63, s. 1; C. S. 3214.)

Editor's Note.—The latter part of the section, stating the
extent of the jurisdiction of the court, and the provision for partition of several estates, were added by the Public Laws of 1924, Extra Session.

Waiver of Venue.—Construing secs. 1-82, 1-83 and this section, in pari materia, venue cannot be jurisdictional, and it may never be waived. Pleading to the merits waives de

fective venue. Venue is a matter not to be determined by the common law, but by legislative regulation. Clark v. Caroline Savings, 189 N. C. 701, 128 S. E. 20, 23. For distinctions between venue and jurisdiction, see the Editor's Note to sec. 1-75.

§ 48-3. Petition by cotenant. — One or more persons claiming real estate as joint tenants or tenants in common may have partition by petition to the superior court. (Rev., s. 2487; Code, s. 1592; 1886-9, c. 122, s. 1; C. S. 3215.)

I. In General.

II. Parties.

III. Plea of Sole Seizin.

Cross Reference.

As to procedure for sale or mortgage of property where there is a vested interest and a contingent remainder to uncertain persons, see § 41-11.

I. IN GENERAL.

Jurisdiction of Superior Court.—The superior court acquires jurisdiction of proceedings to partition lands upon their being transferred by the clerk thereto, in term, and may proceed therewith and fully determine all matters in controversy. In such case it is immaterial whether it was properly instituted before the clerk. Baggett v. Jackson, 106 N. C. 26, 76 S. E. 86.


Tenants in common may make a valid agreement, either at the time of the creation of the tenancy or afterwards, whereby the right to partition is modified or limited, provided the waiver of the right to partition is not for an unreasonable length of time. Chadwick v. Blades, 210 N. C. 115, 185 S. E. 158. See also, 15 N. C. Law Rev. 279.

The Petition—Omission of Term of Court.—A petition entitled in the original cause, but addressed to the clerk, in special proceedings for partition is not demurrable because it does not give the term of court or any court in the caption. Hartsfield v. Bryan, 177 N. C. 166, 98 S. E. 379.

Same—Possession.—If the petition alleges that the petitioners are tenants in common in fee, it will not be dismissed for failure to allege that they are entitled to immediate possession. Epley v. Epley, 111 N. C. 505, 16 S. E. 321; Alexander v. Gibson, 118 N. C. 796, 24 S. E. 748, 58 Am. St. Rep. 757.

Same—Leave to Amend.—On petition before the clerk for partition, permission to amend the petition is purely within the discretion of the clerk. Simmons v. Jones, 118 N. C. 472, 24 S. E. 114.

Lands Not Included in Petition.—The petitioners are not entitled as a matter of right to have a part only of the lands divided, and the defendants may have other land held in common included. Luther v. Luther, 157 N. C. 499, 73 S. E. 102. But see section 46-16 and note thereto as to partial partition.

Not Proper Remedy for Ouster.—Where a tenant in common has been actually ousted by his cotenant, his remedy is by ejectment, and not partition. Thomas v. Garvin, 15 N. C. 223, 25 Am. Dec. 708, cited in note in 20 L. R. A. 637.

Divorced Couple Entitled to Partition.—When marriage is dissolved by divorce, the husband and wife become tenants in common of property formerly held by the entirety, such as land, and the right of partition vests in them in the same manner as if they were tenants by the entirety. Vaughn v. Vaughn, 167 N. C. 411, 83 S. E. 559, L. R. A. 1915C, 396.

Partition as to Churches.—Churches belonging to an association controlling a school are not entitled to partition. Church v. Thornton, 158 N. C. 119, 73 S. E. 810.

Question of Fact for Court.—Whether or not, in a proceeding instituted under this section, for partition of land, held by a cotenant and claimed for separate use of one or more of such persons, there shall be an actual partition, or a sale for partition, as authorized by statute, involves a question of fact to be determined by the court. Talley v. Talley, 119 N. C. 706, 193 S. E. 146.


II. PARTIES.

In General.—Parties claiming to hold in common may properly be brought in as defendants. McKeel v. Holloman, 163 N. C. 332, 79 S. E. 445. Partition can be made only by persons who are seized of the freehold, and not by those in remainder or reversion. Partition lies only in favor of one who has a seizin and right of immediate possession. Osborne v. Mull, 91 N. C. 203.

Plea of Right.—In an action for partition of an intestate's lands, the administrator is not a party. Kellum v. Henderson, 89 N. C. 630, 73 S. E. 332. For a full treatment of the interests mentioned in the catch-line, see section 48-23 and the notes thereto.


Partition by Infant and Another.—Where partition was brought by a minor and another, the latter was bound by the judgment, although it was not approved by the judge of the court. Lindsay v. Beaman, 128 N. C. 189, 38 S. E. 81.

Claimant of Paramount Title.—In an action for partition of lands, it is proper to allow another party claiming a paramount title to the land to intervene and assert his rights. Roughton v. Duncan, 178 N. C. 5, 100 S. E. 78. But such a claimant may be estopped by his laches, as in the case of adverse possession. Thomas v. Garvin, 15 N. C. 223, 25 Am. Dec. 703.

Administrator Not a Party.—In an action by the heirs at law for partition of an intestate's lands, the administrator or personal representative may be made a party defendant if the judgment creditors of the individual tenants, and their mortgagees, are proper parties to the proceedings; and where such lienors have been made parties thereto, it is proper to allow another to dismiss the action as to them. Holley v. White, 172 N. C. 77, 85 S. E. 1061.

The mortgagee of one tenant in common is not a necessary party to special proceedings to partition the land. Rostan v. McGuigan, 216 N. C. 386, 5 S. E. (2d) 126, 126 A. L. R. 410.

Making Additional Party for Purpose of Setting Aside Sale.—An application to be made a party defendant in partition proceedings after confirmation of sale was properly denied, where it was based on deeds from persons who never had claimed any title and accompanied by a motion to set aside the sale to permit his principals to make a bid. Thompson v. Rospigliosi, 162 N. C. 145, 77 S. E. 113.

Presence of Unnecessary Party.—The presence of an unnecessary party, in proceedings for partition of lands, will be regarded as constituting an improper venue. Baggett v. Jackson, 106 N. C. 26, 76 S. E. 86.

Unknown Parties.—See section 46-6 and notes thereto.

III. PLEA OF SOLE SEIZIN.

Effect of Plea.—Where the pleas of sole seizin is set up, the effect is to bar the party to contestation of ejectment. When it is not set up, the parties are taken to be tenants in common, and the only inquiry is as to the interests owned. Haddock v. Stovall, 167 N. C. 70, 74, 83 S. E. 91; Graves v. Barrett, 126 N. C. 267, 220, 35 S. E. 39. Where the plea is set up the proper course is for the court to try title to the land. Purvis v. Wilson, 50 N. C. 22, 69 Am. Dec. 777.

Plea Not Put in before Partition Ordered.—Where, in partition, a plea of sole seizin is not put in before the order of partition is made, it will be considered as waived. Wight v. Wight, 26 N. C. 689, 9 N. C. Rep. 550.

Burden of Proof.—Where the defendants plead sole seizin in proceedings to partition lands, the burden of proof is with the plaintiff, which will devolve upon the defendant to establish adverse possession, when relied upon for title, after a prima facie case of tenancy in common is made out. Lester v. Harvard, 272 N. C. 83, 91 S. E. 698.

Effect of Election of Partition When Defendant Waives Issue.—While proceedings for the partition of lands do not ordinarily place the title at issue, such may be done by the tenants in common, and the judgment thereunder will estop them. Beers v. Lee, 124 N. C. 468, 62 S. E. 126; J. C. Mohan- van v. Harrington, 152 N. C. 333, 67 S. E. 747, 136 Am. St. Rep. 638.


§ 48-4. Surface and minerals in separate owners; partitions distinct.—When the title to the
mineral interests in any land has become separated from the surface in ownership, the tenants in common or joint tenants of such mineral interests may have partition of the same, distinct from the surface, and without joining as parties the owner or owners of the surface; and the tenants in common or joint tenants of the surface may have partition of the same, in manner provided by law, distinct from the mineral interest the owner or owners of the mineral interest. In all instances where the mineral interests and surface interests have thus become separated in ownership, the owner or owners of the mineral interests shall not be compelled to join in a partition of the surface interests, nor shall the owner or owners of the surface interest be compelled to join in a partition of the mineral interest, nor shall the rights of either owner be prejudiced by a partition of the other interests. (Rev., s. 2488; 1905, c. 90; C. S. 3216.)

§ 46-5. Petition by judgment creditor of cotenant; assignment of homestead.—When any person owns a judgment duly docketed in the superior court of a county wherein the judgment debtor owns an undivided interest in fee in land as a tenant in common, or joint tenant, and the judgment creditor desires to lay off the homestead of the judgment debtor in the land and sell the excess, if any, to satisfy his judgment, the judgment creditor may institute before the clerk of the court of the county wherein the land lies a special proceeding for partition of the land between the tenants in common, making the judgment debtor, the other tenants in common and all other interested persons parties to the proceeding by summons. The proceeding shall then be in all other respects conducted as other special proceedings for the partition of land between tenants in common. Upon the actual partition of the land the judgment creditor may sue out execution on his judgment, as allowed by law, and have the homestead of the judgment debtor allotted to him and sell the excess, as in other cases where the homestead is allotted under execution. The remedy provided for in this section shall not deprive the judgment creditor of any other remedy in law or in equity which he may have for the enforcement of his judgement lien. (Rev., s. 2489; 1905, c. 499; C. S. 3217.)

Cross References.—As to homestead and exemptions in sale under execution, see § 1-369 et seq. As to execution, see § 1-302 et seq.


§ 46-6. Unknown parties; summons and representation.—If, upon the filing of a petition for partition, it be made to appear to the court by affidavit or otherwise that there are any persons interested in the premises whose names are unknown to and cannot after due diligence be ascertained by the petitioner, the court shall order notices to be served upon all such persons by a publication of the petition, or of the substance thereof, with the order of the court thereon, in one or more newspapers to be designated in the order. If after such general notice by publication any person interested in the premises and entitled to notice fails to appear, the court shall in its discretion appoint some disinterested person to represent the owner of any shares in the property to be divided, the ownership of which is unknown and unrepresented. (Rev., s. 2490; 1887, c. 284; C. S. 3218.)

Appointment Discretionary.—It is discretionary, by the express terms of the statute, with the trial judge as to whether he will appoint some disinterested person to represent the interest of unknown persons, etc., and this discretion is not reviewable. Lawrence v. Hardy, 151 N. C. 123, 61 S. E. 765.

Purchaser Acquires Good Title.—When the service of summons has been made by publication on parties unknown, as required by this section, the proceedings being regular in every respect, and the court having jurisdiction of the subject matter, a purchaser for full value without notice acquires title, free from claim or demand of such heir upon whom summons has been thus served. Lawrence v. Hardy, 19 N. C. 123, 65 S. E. 766.

Purchaser Cannot Resist Payment of Purchase Price.—Where the method prescribed by this section is followed, a purchaser may not successfully resist payment of the purchase price of the land on the ground of a defect in title for that the commissioner's deed would not preclude the claim of the missing heir. Bynum v. Bynum, 179 N. C. 14, 101 S. E. 527.

§ 46-7. Commissioners appointed. — The superior court shall appoint three disinterested commissioners to divide and apportion such real estate, or so much thereof as the court may deem best, among the several tenants in common, or joint tenants. Provided, in cases where the land is partitioned lies in more than one county, the court may appoint such additional commissioners as it may deem necessary from counties where the land lies other than the county where the proceedings are instituted. (Rev., s. 2487; Code, s. 1892; 1868-9, c. 122, s. 1; Ex. Sess. 1924, c. 62, s. 2; C. S. 3219.)

Editor's Note.—The provision of this section in regard to the appointment of additional commissioners when the land lies in more than one county was added to the original section by the amendment of 1924.

Confirmation and Approval by Two Appraisers Held Error.—Testator's children selected three appraisers in accordance with the will, but prior to final report one of the appraisers died, whereupon the court ordered the two surviving appraisers to complete the appraisal and file report, which report was later approved by the court. It was held that under the express terms of the will and under this section, it is necessary that three appraisers act in the matter, although two of them may file the report, § 46-17, and the superior court should have appointed a third appraiser and the confirmation and approval of the report based upon the findings of but two appraisers is reversible error. Sharpe v. Sharpe, 210 N. C. 92, 185 S. E. 634.

§ 46-8. Oath of commissioners.—The commissioners shall be sworn by a justice of the peace, or other person authorized to administer oaths, to do justice among the tenants in common, in respect to such partition, according to their best skill and ability. (Rev., s. 2492; Code, s. 1893; 1868-9, c. 122, s. 2; C. S. 3220.)

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

§ 46-9. Delay or neglect of commissioner penalized.—If, after accepting the trust, any of the commissioners unreasonably delay or neglect to execute the same, every such delinquent commissioner shall be liable for contempt and may be removed, and shall be further liable to a penalty of fifty dollars, to be recovered by the petitioner. (Rev., s. 2498; Code, s. 1901; 1868-9, s. 122, s. 10; C. S. 3221.)

§ 46-10. Commissioners to meet and make partition; equalizing shares. — The commissioners, who shall be summoned by the sheriff, or any constable, must meet on the premises and partition the same among the tenants in common, or joint
tenants, according to their respective rights and interests therein, by dividing the land into equal shares in point of value as nearly as possible, and for this purpose they are empowered to subdivide the more valuable tracts as they may deem best, and to charge the more valuable dividends with such sums of money as they may think necessary, to be paid to the dividends of inferior value, in order to make an equitable partition. (Rev., s. 2491; Code, s. 1894; 1887, c. 2, s. 1868-9, c. 125, s. 7; C. S. 3222.)

Promo Only to Compulsory Partition or Sale. — Where the parties have agreed to a compulsory partition or sale, a covenanter, by neglect to make a partition or sale in the manner provided between cotenants, this section is not applicable. Outlaw v. Outlaw, 184 N. C. 255, 238, 114 S. E. 4; Newsome v. Harrell, 168 N. C. 295, 84 S. E. 322.

Section of Two Commissioners Valid. — Where three commissioners are appointed to partition land the action of any two of them is valid. Thompson v. Shemwell, 93 N. C. 222. And this action may consist in filling the vacancy caused by the absence of the third commissioner, when done in the presence of the interested parties and without their objection. Simmons v. Foscoe, 81 N. C. 86. By the very terms of section 46-17, the signature of two of the commissioners on their report is sufficient. Thompson v. Shemwell, supra.

Existing Easement. — It would seem that existing easements are not destroyed by a division in partition. See Jones v. Swindell, 176 N. C. 34, 96 S. E. 663.

Improvements. — A tenant in common is entitled to recover against a co-tenant for betterments he has made upon the land. Daniel v. Dixon, 163 N. C. 137, 79 S. E. 425. Section 1-340 does not apply in this case to that section of the act the reference is to. Fisher v. Towsay Co., 171 N. C. 547, 88 S. E. 887.

But where in a partition an excessive portion is allotted to one, which is reduced on a re-allotment, he cannot be held by the partition of one of the others in his own folly to make them before obtaining a final decree. Hinnant v. Wilder, 122 N. C. 149, 150, 29 S. E. 221.

Owealty. — The right to owealty on an unequal partition is based on the implied warranty attaching to each share from all the others. Cheatham v. Crews, 88 N. C. 38; Nixon v. Lindsey, 53 N. C. 220.

Owealty to Mere Lien Debt. — The charge in partition upon the more valuable shares is not a mere lien debt secured by lien. The debtor is a tenant in common with the holder of the charge, the deed of partition is entered in the records, and the charge is upon the extent of the charge, until the same shall be satisfied. In re Walker, 107 N. C. 340, 12 S. E. 136.

Same. — Charge upon Land. — The sums charged upon "the more valuable dividends," in partitions of lands are charges, not upon the persons of the owners of such dividends, but upon the land alone. Young v. Trustees, 62 N. C. 261.

Owealty Follows Land. — Charges upon land for equality of partition follow the land into the hands of all persons to whom it may come; and they are held to be affected by constructive notice. Powell v. Weatherington, 124 N. C. 40, 12 S. E. 380; Dobbin v. Rev., 106 N. C. 444, 11 S. E. 360. As to the docketing of owealty charges, see section 46-21.

When Land Charged with Payment of Several Shares. — Payment under execution of the charge in favor of one share is not a charge upon the land in favor of non-shareholders. Meyer v. Rice, 107 N. C. 24, 12 S. E. 66.

Effect of Discharge in Bankruptcy on Owelty. — A discharge in bankruptcy does not discharge the charge of owealty of partition against the land of the bankrupt. In re Walker, 107 N. C. 340, 12 S. E. 136.

Discharge in Bankruptcy. — In proceedings for partition (including the expenses of the partition) are charges upon the several shares in proportion to their respective values. Hinnant v. Wilder, 122 N. C. 149, 150, 29 S. E. 221.


 `$46-11.

Owealty to bear interest. — The sums of money due from the more valuable dividends shall bear interest until paid. (Rev., s. 2496; Code, s. 1890; 1887-8, c. 125, s. 5; C. S. 3223.)

 `$46-12.

Owealty from infant's share due at majority. — When a minor to whom a more valuable dividend shall fall is charged with the payment of any sum, the money shall not be payable until such minor arrives at the age of twenty-one years, but the general guardian, if there be one, must pay such sum whenever assets shall come into his hands, and in case the general guardian has assets which he did not so apply, he shall pay out of his own proper estate any interest that may have accrued in consequence of such failure. (Rev., s. 2497; Code, s. 1900; 1887-8, c. 129, s. 9; C. S. 3224.)

Charged Land Inherited by Infants. — Owelty may be enforced against land inherited by infants from an adult who owned the land when the owealty was made a charge against it, though as to land partitioned to an infant cotenant owealty is not payable until he reaches his majority. Powell v. Weatherington, 124 N. C. 40, 12 S. E. 380.

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 `$46-13.

Partition where shareowners unknown or title disputed. — If there are any of the tenants in common, or joint tenants, whose names are not known or whose title is in dispute, the share or shares of such persons shall be set off together as one parcel. If, in any partition proceeding, two or more appear as defendants claiming the same share of the premises to be divided, or if any part of the share claimed by the petitioner is disputed by any defendant or defendants, it shall not be necessary to decide on their respective claims before the court shall order the partition or sale to be made, but the partition or sale shall be made, and the controversy between the contesting parties may be afterwards decided either in the same or an independent proceeding. If two or more tenants in common, or joint tenants, by petition or answer, request it, the commissioners may, in their discretion, order such sums of money as they may think necessary, to be paid whenever assets shall come into the hands of any minor, and in case the general guardian has assets which he did not so apply, he shall pay out of his own proper estate any interest that may have accrued in consequence of such failure.

Miscellaneous. — Where the partition of land is to be by auction, the sale was held to be valid. Hinnant v. Wilder, 122 N. C. 149, 150, 29 S. E. 221.


Charged land. — Where the owealty of partition should be enforced by proceedings in rem against the more valuable shares of the land divided, and not by personal judgments against the owners thereof. Young v. Young, 122 N. C. 24, 12 S. E. 66, 67.

Confirmation Necessary to Execution. — No execution can issue to recover a charge against land in partition proceedings until the commissioners' report has been confirmed. In re Ausborn, 122 N. C. 47, 29 S. E. 56.

Parties to Action to Recover Owelty of Partition. — The widow of a deceased tenant, on the death of whom a partition was made, is not a necessary party to an action brought to recover the sum charged. Ruffin v. Cox, 71 N. C. 253.

Counterclaim. — A cotenant, who is charged in the partition proceedings with owealty, may set up by way of counterclaim damages sustained by his eviction from part of the land awarded to him. Huntley v. Cline, 93 N. C. 458.


Editors' Note. — The 1937 amendment added the last sentence. While the primary purpose of the partition proceeding is to allot to each of the former cotenants his share of the property in severity, this amendment by no means militates
against such purpose but makes it possible for some of the former cotenants, who find it economically desirable, to have their several shares allotted to them as one parcel so that they may again hold as cotenants that parcel of land.

§ 46-14. Judgments in partition of remainders validated.—In all cases where land has been conveyed by deed, or by devise, upon contingent remainder, executory devise, or other limitation, where a judgment of partition has been rendered by the superior court authorizing a division of said lands upon the petition of the life tenant or tenants and all other persons then in being who would have taken such land if the contingency had then happened, and those unborn being duly represented by guardian ad litem, such judgment of partition authorizing a division of said lands among the respective life tenants and remaindermen, or executory devisees, shall be valid and binding upon the parties thereto and upon all other persons not then in being. (1933, c. 215, s. 1.)

§ 46-15. Dower claims settled on partition; dowry valued.—Where there is a dower or right of dower out of any land, petitioned to be sold or divided in severalty by actual partition, the woman entitled to dower or right of dower therein may join in the petition. The land to be divided in severalty shall be allotted to the tenants in common, or joint tenants, subject to the dower right or dower, and either may be asked and assigned at the same time that partition thereof is made and by same commissioners. On a decree of sale, the interest of one-third of the proceeds shall be secured and paid to her annually; or in lieu of such annual interest, the value of an annuity of six percent on such third, during her probable life, shall be ascertained and paid to her absolutely out of the proceeds. (Rev., s. 2517; Code, s. 1909; 1893, c. 341; 1868-9, c. 122, s. 18; C. S. 3226.)

§ 46-16. Partition; balance sold or left in common.—In all proceedings under this chapter actual partition may be made of a part of the land, sought to be partitioned and a sale of the remainder; or a part only of any land held by tenants in common, or joint tenants, may be partitioned and the remainder held in cotenancy. (Rev., s. 2506; 1887, c. 214, s. 1; C. S. 3227.)

§ 46-17. Report of commissioners; contents; filing.—The commissioners, within a reasonable time, not exceeding sixty days after the notification of their appointment, shall make a full and ample report of their proceedings, under the hands of any two of them, specifying therein the manner of executing their trust and describing particularly the land or parcels of land divided, and the share allotted to each tenant in severalty, with the sum or sums charged on the more valuable dividends to be paid to those of inferior value. The report shall be filed in the office of the superior court clerk. (Rev., s. 2194; Code, s. 1896; 1868-9, c. 122, s. 5; C. S. 3229.)

§ 46-18. Map embodying survey to accompany report.—The commissioners are authorized to employ the county surveyor or, in his absence or if he be connected with the parties, some other surveyor, who shall make the survey and the map therein showing the quantity, courses and distances of each share, which map shall accompany and form a part of the report of the commissioners. (Rev., s. 2493; Code, s. 1895; 1868-9, c. 122, s. 4; C. S. 3292.)

§ 46-19. Confirmation and impeachment of report.—If no exception to the report of the commissioners is filed within twenty days, the same shall be confirmed. Any party after confirmation may impeach the proceedings and decrees for mistake, fraud or collusion by petition in the cause: Provided, innocent purchasers for full value and without notice shall not be affected thereby. (Rev., s. 2494; Code, s. 1896; 1868-9, c. 122, s. 5; C. S. 3230.)

§ 46-20. Proceedings Interlocutory until Confirmation.—Until the decree of confirmation by the judge, for the partition of lands are not final, but interlocutory, and rest in his discretion. Taylor v. Cawos, 156 N. C. 6, 72 S. E. 76. Effect of Failure to Object.—Where no exceptions were filed and no objections made, plaintiff was entitled to confirmation as a matter of law. Roberts v. Roberts, 141 N. C. 309, 55 S. E. 721.

§ 46-21. Exceptions to the report of the commissioners appointed to make partition of land shall be filed within twenty days after the report is filed. Floyd v. Rock, 125 N. C. 10, 38 S. E. 33. As to objection to confirmation, see § 46-12 and notes thereto.

§ 46-22. Sufficiency of Exception.—Where within 20 days after filing the report the defendant notified the clerk that he desired to file exceptions, whereupon the clerk made a transcripand, the defendant had objected to the report, and later amended exceptions, setting out various grounds why the report should not be confirmed, were filed with the clerk without objection, it was held error to confirm the report on the ground that no exception had been filed within 20 days. McDevitt v. McDevitt, 159 N. C. 237, 64 S. E. 761.

Resale after Confirmation.—After confirmation a resale
may be ordered for sufficient cause shown; but should be upon such motion or notice to the purchaser, as has acquired equitable rights under the first confirmation, except White, 82 N. C. 378.

*Estoppel as to Lands Not Included in Petition.—When lands described in a petition for a partition proceeding with the knowledge and consent of the parties thereto, the administrator of one of the parties is estopped from denying that the land was not originally included in the petition for partition. Lindsay v. Beaman, 128 N. C. 189, 38 S. E. 811.*

**Appeals May Be to Different Judges.**—When appeals from the clerk in proceedings for partition are made successively to different judges before whom comes a latter appeal, the record may be set aside or amended before the entry of judgment, but it is not being required for that purpose that the same judge should have passed upon the former appeals. Taylor v. Cooper, 195 N. C. 711, 143 S. E. 469.

**Jurisdiction of Judge in Chambers.**—A judge in chambers has jurisdiction of appeals from the report of commissioners appointed in special proceedings to partition land. Mcmillan v. McMillan, 121 N. C. 577, 31 S. E. 729.

**Right of Clerk to Set Aside Former Order.**—Where it appears of record that the clerk in the court in proceedings to partition lands had rendered a judgment in the plaintiff's favor, and had set said judgment on the former order made before him seventeen months thereafter upon allegation of fraud in its procurement, and that the plaintiff had fraudulently obtained a judgment against defendant from appearing and defending, to which the plaintiff did not except, the plaintiff's motion in the superior court, in the cause transferred, for judgment in his favor upon the whole record cannot be allowed. Dexter v. Dexter was the exception to the rule herein cited of this section in setting aside his former order, in plaintiff's favor, on defendant's motion, at the time it was made before him. Turner v. Davis, 163 N. C. 38, 79 S. E. 257.

**Statute of Limitations.**—Where the commissioners appointed in special proceedings to partition lands among tenants in common, to divide lands held by tenants in common award owelty to one of them to equalize his share with the other, the ten-year statute of limitations begins to run from the confirmation of the report by the clerk, approved by the judge, and the fact that the clerk has not docketed the judgment in the event that the clerk was wrong in his report but correct in the proceedings, does not alone repel the statute of limitations since the record in the petition, or any part thereof. (Rev., s. 2512; Code, ss. 1904, 1921; 1868-9, c. 123, ss. 13, 31; C. S. 3233.)

**Effect of Failure to Docket.**—Failure of the clerk to docket the owelty of partition upon his judgment docket, within seven years after such date, does not affect the right of plaintiff to enforce payment of the owelty by executor. Cochran v. Colson, 122 N. C. 663, 135 S. E. 794.

### § 46-20. Report and confirmation enrolled and registered; effect.

Such report, when confirmed, together with the decree of confirmation, shall be enrolled and certified to the register of deeds and recorded in the office of the county wherein such real estate is situated, and shall be binding among and between the claimants, their heirs, and assigns. (Rev., s. 2492; Code, s. 1897; 1868-9, c. 122, s. 6; C. S. 3231.)

**Effect of Adjudication before Clerk.**—In proceedings to partition lands among tenants in common, the adjudication before the clerk operates as an estoppel as to them and to the claimants, their heirs and assigns, where the land is incapable of actual division without injury to some or all of the parties interested, and he has the power to order a sale for partition. Scale v. Scale, 120 N. C. 455, 27 S. E. 123, it is held: "The only controverted fact arising on the pleadings was as to the advisability of a sale for partition or an actual division. This was not an issue of fact but a question of fact for the decision of the trial court, and not an issue of fact for the jury." Vanderbilt v. Roberts, 162 N. C. 273, 78 S. E. 156.

**Admissibility of Record in Evidence.**—The record of the proceedings is admissible in evidence though not recorded as required by this section. Lindsay v. Beaman, 128 N. C. 189, 38 S. E. 811.

### § 46-21. Clerk to docket owelty charges; no release of land and no lien.

In case owelty of partition is charged in favor of certain parts of said land and against certain other parts, the clerk shall enter upon the judgment docket the said owelty charges in like manner as judgments are entered on said docket, persons to whose parts are allotted in favor of which owelty is charged being marked plaintiffs on the judgment docket, and persons to whom parts are allotted against which owelty is charged being marked defendants on said docket; said entry on said docket shall contain the title of the special proceeding in which N. C. 5. 322.5, 6; .C-. 5. 3231.)

**Sale of Lands by Tenant in Common.**—A tenant in common suing to partition the premises controlled by him as agent for the cotenants cannot, on being appointed commissioner to sell the premises, purchase them at the sale nor procure any one to do it for him, and he cannot speculate for his own benefit or do any act detrimental to the interest of his cotenants. Tuttle v. Tuttle, 146 N. C. 484, 59 S. E. 1008. See also Credle v. Baughm, 152 N. C. 18, 67 S. E. 46.

**Questions of Fact—Questions of Fact.**—In Ledbetter v. Piner, 120 N. C. 455, 27 S. E. 123, it is held: "That the controverted fact arising on the pleadings was as to the advisability of a sale for partition or an actual division. This was not an issue of fact but a question of fact for the decision of the clerk subject to review by the judge on appeal." Vanderbilt v. Roberts, 162 N. C. 273, 78 S. E. 156.

### § 46-22. Sale in lieu of partition.

Whenever it appears by satisfactory proof that an actual partition of the lands cannot be made without injury to some or all of the parties interested, the court shall order a sale of the property described in the petition, or any part thereof. (Rev., s. 2512; Code, ss. 1904, 1921; 1868-9, c. 123, ss. 13, 31; C. S. 3233.)

**Cross Reference.**—As to power of court to enter judgment for money due on judicial sales, see § 1-243.

**Tenanted to Actual Partition.**—Tenants in common are entitled to an actual partition, if it can be made without injury to any of the co-owners. Taylor v. Carrow, 156 N. C. 6, 72 S. E. 76; Gillespie v. Allison, 115 N. C. 542, 546, 20 S. E. 46.

**Tenant Entitled to Homestead.**—That a tenant in common is entitled to a homestead against the judgment cannot prevent a sale for partition. Holley v. White, 173 N. C. 559, 188 S. E. 94.

**Purchase of Lands by Tenant in Common.**—A tenant in common suing to partition the premises controlled by him as agent for the cotenants cannot, on being appointed commissioner to sell the premises, purchase them at the sale nor procure any one to do it for him, and he cannot speculate for his own benefit or do any act detrimental to the interest of his cotenants. Tuttle v. Tuttle, 146 N. C. 484, 59 S. E. 1008. See also Credle v. Baughm, 152 N. C. 18, 67 S. E. 46.
or finding facts to show the right to sell, the cause will be
Court must find that lands are subject to a deed of sale for
Effect of Interests of Others.—The owner of an undivided
interest or judgment thereon in favor of the defendant. The
undivided interest of the plaintiff in the undivided interest of the defendant was acquired by an undivided interest in a
partition action. The plaintiff must show that he has a
right to have a partition or sale in lieu of partition, because of
interests which defendants, other than his cotenants,
Effect of Trust Created by Another Co-Tenant. — The
right of a tenant in common to have the lands sold for a
division, under this section, cannot be defeated by a trust
creating an interest in the lands by another of the tenants.
Barber v. Barber, 195 N. C. 711, 143 S. E. 469.
Parties—Trustee and Beneficiaries. — The trust is created
for the benefit of the cotenants or joint tenants in common
in a tenant in common is proper parties to the proceedings
for a sale for division. Barber v. Barber, 195 N. C. 711, 143 S. E. 469.
Same.—Right of Wife of Co-Tenant to Resist Partition. —
The wife of a tenant in common has an interest in his portion
of the land on the proceeds of the sale thereof, for
division, contingent upon her surviving him, and is
a proper party to the proceedings for partition, under
this section or section 46-3, with the right to be heard when
the lands are sold for division in order to protect her
contingent interest in the proceeds of the sale. But she
cannot resist the plaintiff’s right to a partition nor challenge
the power of the court to order sale for partition. Barber
v. Barber, 195 N. C. 711, 143 S. E. 469.
Interest of Trust Beneficiaries Attaches to Proceeds. —
The interest of the beneficiaries under a deed of trust
upon the interest of a tenant in common in land will upon
its sale under this section attach to the proceeds and be
fully protected in the final judgment or order in the
Review of Decision.—The action of a judge of the superior
court in setting aside the report of partition commissioners,
advising actual partition, and ordering a sale, is not review-
able, unless an error of law was committed. Taylor v. Car-
row, 156 N. C. 6, 72 S. E. 76; Alhambra Steam Nav. Co. v.
Woods, 133 N. C. 93, 45 S. E. 466.
Since a tenant in common has the right to actual partition
unless it is made to appear by satisfactory proof that actual
partition cannot be made without injury to some
or all of the parties interested, an order for sale for partition affects a substantial right, and an appeal will lie to the
court supreme from such order entered by the judge on
appeal from the master. Hyman v. Edwards, 217 N. C. 342, 7
S. E. (2d) 700.
Applied in Talley v. Murchison, 212 N. C. 205, 193 S. E.
145.
§ 46-24. Life tenant as party; valuation of life estate. — In all proceedings for partition of land wherein there is a life estate, the life tenant may
join in the proceeding and on a sale the interest on
the value of the share of the life tenant shall be received and paid to such life tenant annually;
or in lieu of such annual interest, the value of
such share during the probable life of such life
tenant shall be ascertained and paid out of the
proceeds to such life tenant absolutely. (Rev., s.
2509; 1887, c. 214, s. 2; C. S. 3234.)
Cross References.—As to evaluation of life tenant’s inter-
est, see § 46-14. Life Tenants May Waive Rights.—Under a will providing that "home place shall remain a home for all the single
children of such child," the life tenant shall have the right to retain it as a home, since life tenants could waive the right
if they desired to enjoy their share in severalty. Sides v. Sides, 178 N. C. 554, 101 S. E. 100.
While the life tenant during the existence of her estate
can waive her rights and consent to the sale of her estate,
under this section, this may not be done, against her will,
§ 46-25. Sale of standing timber on partition; valuation of life estate.—When two or more persons own, as tenants in common, joint tenants, or copartners, a tract of land, either in possession, or in remainder or reversion, subject to a life estate, on which there may be standing timber trees, a sale of said timber trees, separate from the land, may be had upon the petition of one or more of said owners, or the life tenant, for partition among the owners thereof, including the life tenant, upon such terms as the court may order, and under like proceedings as are now prescribed by law for the sale of land for partition: Provided, that when the land is subject to a life estate, the life tenant shall be made a party to the proceedings, and shall be entitled to receive his portion of the net proceeds of sales, to be ascertained under the mortuary tables established by law. (Rev. s. 2510; 1895, c. 187; C. S. 3236.)

Cross Reference.—As to mortuary tables and present worth of annuities, see §§ 8-46, 8-47.

§ 46-26. Sale of mineral interests on partition.—In case of the partition of mineral interests, in all instances where it is made to appear to the court that it would be for the best interests of the tenants in common, or joint tenants, of such interests to have the same sold, or if actual partition of the same cannot be had without injury to some or all of such tenants (in common), then it is lawful for and the duty of the court to order a sale of such mineral interests and a division of the proceeds as the interests of the parties may appear. (Rev. s. 2507; 1905, c. 90, s. 2; C. S. 2537.)

The mere conclusion of the court that the mineral interest is incapable of actual division, unsupported by allegation, proof, or finding, will not support a decree of sale for partition. Carolina Mineral Co. v. Young, 220 N. C. 287, 17 N. C. L. 312, 23 S. E. 452.

§ 46-27. Sale of land required for public use on covenants' petition. —When the lands of joint tenants or tenants in common are required for public purposes, one or more of such tenants, or their guardian for them, may file a petition verified by oath, in the superior court of the county where the lands or any part of them lie, setting forth therein that the lands are required for public purposes, and that their interests would be promoted by a sale thereof. Whereupon the court, all proper parties being before it, and the facts alleged in the petition being ascertained to be true, shall order a sale of such lands, or so much thereof as may be necessary, in the manner and on the terms it deems expedient. The expenses, fees, and costs of the proceeding shall be paid in the discretion of the court. (Rev., s. 2518; Code, s. 1907; 1868-9, c. 122, s. 16; C. S. 3238.)

§ 46-28. Manner and terms of partition sale. —The sale shall be made by some person appointed by the court, on such terms as to size of lots, place or manner of sale, time of credit and security for payment of purchase money, as may be most advantageous to the parties concerned. (Rev., s. 2518; Code, ss. 1904, 1921; 1868-9, c. 122, ss. 13, 31; C. S. 3230.)

Private or Public Sale.—The superior court may, in the exercise of its discretion, order a sale of lands in proceedings for partitions, where minors are interested and represented by guardian ad litem, either to be publicly or privately made. Ryder v. Oates, 173 N. C. 569, 92 S. E. 505. And where no abuse of this discretion is shown on appeal, the action of the lower court will not be reviewed. Thompson v. Rospigliosi, 163 N. C. 145, 77 S. E. 113.

§ 46-29. Notice of partition sale. —The notice of sale, under this proceeding, shall be the same as required by law on sales of real estate by sheriff under execution: Provided, however, that in case a re-sale of such real property shall become necessary under such proceeding, that such real property shall then be re-sold only after notice of re-sale has been duly posted at the courthouse door in the county for fifteen days immediately preceding the re-sale and also published at any time during such fifteen day period once a week for two successive weeks of not less than eight days in some newspaper published in the county, if a newspaper is published in the county, but if there be no newspaper published in said county, notices for the re-sale shall be posted at the courthouse door and three other public places in the county for fifteen days immediately preceding the re-sale. (Rev., s. 2514; Code, s. 1905; 1868-9, c. 122, s. 14; 1933, c. 187; C. S. 3240.)

Cross Reference.—As to notice in execution and judicial sales, see § 1-325.

Editor's Note.—Public Laws 1933, c. 187, added the proviso at the end of this section relating to notices of resale.

§ 46-30. Title made to purchaser; effect of deed. —On the coming in of the report of sale, and confirmation thereof, and payment of the purchase money, the title shall be made to the purchaser or purchasers at such time and by such person as the court may direct, and in all cases where the persons in possession have been made parties to the proceedings, the court shall give such order for possession. And the deed of the officer or person designated to make such sale shall convey to the purchaser such title and estate in the property as the tenants in common, or joint tenants, had. (Rev., s. 2512; Code, ss. 1904, 1921; 1868-9, c. 122, ss. 13, 31; C. S. 3241.)

Sale an Official Act.—When an officer of the court, design-
nated either by his official or individual name in the order, is commissioned to make sale of real or personal estate, he acts in the name of and by the authority of the clerk, and his signature under the fidelitas of his conduct. Kerr v. Brandon, 84 N. C. 128, 131.

Enforcement.—Upon acceptance by the court's commissioner of a bid on a private sale, for land involved in partition proceedings, the court has jurisdiction over the purchaser to enforce the bid. Wooten v. Cunningham, 171 N. C. 577, 9 S. E. 513.

Sale.—Balance of Bid.—The purchaser of land at a judicial sale for a private sale, may be authorized to make a better bid at the next sale, for the balance of the amount of his bid which was not paid. Crocker v. Vann, 192 N. C. 422, 135 S. E. 127.

When Title Passes.—Where, under a petition of a tenant in common, lands are sold for division, under the provisions of this section title to the lands held in common will not pass to the purchaser until the purchase price has been paid, and a deed executed to the purchaser by the one appointed to sell under the order of the court. Crocker v. Vann, 192 N. C. 422, 135 S. E. 127.

Title of Intending Purchaser before Confirmation.—An intending purchaser at a partition sale is a mere preferred proposer, and not a purchaser, until after the sale has been confirmed. Patillo v. Lytle, 158 N. C. 92, 73 S. E. 200.

After Confirmation Purchaser Regarded Equitable Owner.—Under section 41-32 after confirmation by the court of a judicial sale of lands, the purchaser is regarded as equitably purchasing, under decree of court fails to pay the price, the title will not be set aside for "mistake, fraud, or collusion," established in partition proceedings, the court has jurisdiction over the intending purchaser at a partition sale is a mere preferred proposer, and not a purchaser, until after the sale has been confirmed. Crocker v. Vann, 192 N. C. 422, 135 S. E. 127.

When Purchaser Fails to Pay.—Where a purchaser of land under decree of court fails to pay the price, the title will not be set aside for "mistake, fraud, or collusion," established in partition proceedings and decrees for mistake, fraud or collusion are not made by party to the proceeding, except in cases where absent purchasers for full value and without notice shall not be affected thereby. (Rev., s. 2513; Code, s. 1906; 1899, c. 161; 1868-9, c. 122, s. 15; 1937, c. 71; C. S. 3243.)

Cross Reference.—As to confirmation of judicial sales in vacation, see § 1-218.

Editor's Note.—The 1937 amendments reduce the time for filing exceptions from twenty to ten days. The proceedings are held instead of 30 days as formerly required. 15 N. C. Law Rev. 281.

In General.—This section does not require formal exceptions; but because of the use of the word "shall" it is a prerequisite to the power of the court to order a resale that exceptions in a recognized legal way be made within the time prescribed. McCormick v. Patterson, 194 N. C. 216, 139 S. E. 225.

What Exceptions Contemplated.—In the contemplation of this section this is an objection to the regularity of the proceeding or sale or because of "inequitable adjustment." McCormick v. Patterson, 194 N. C. 216, 139 S. E. 225.

Section Relates Only to Public Sale.—This section relates only to public sales, and does not prevent confirmation of a private sale within 20 days. Thompson v. Rospigliosi, 162 N. C. 140, 145 S. E. 113.

Execution Sales.—This section is not applicable to execution sales. Weir v. Weir, 196 N. C. 268, 269, 145 S. E. 381.

Effect of Failure to File Report.—Upon the commissioner's failure to file a report and final account with the clerk, as provided by this section, the demand upon the commissioner or his administrator, for the disbursement of the funds, will be considered to have been made as a matter of law. Peal v. Martin, 207 N. C. 106, 176 S. E. 282.

Power of Superior Court to Confirm Sale.—The superior court in a partition action, having general jurisdiction in law and equity, has power to order and confirm a private as well as a public sale. Thompson v. Rospigliosi, 162 N. C. 145, 77 S. E. 113; McAfee v. Green, 143 N. C. 411, 415, 55 S. E. 229.

Power to Set Aside.—Where lands are ordered to be sold for a private sale by a court of equity, the authority of the court to set aside an inequitable sale and reopen the bidding proceedings as well as to award the same to parties adults as where some of them, or all, are infants. Ex parte Post, 56 N. C. 485.

Deed Erroneously Made to Husband and Wife.—Where the wife alone is entitled to a deed in the sevance of her interest as a tenant in common of lands sold for division, and a deed is made by the court that the deed be made to her and her husband by entities, the title will inure only to her under a resulting trust, and the husband cannot acquire by survivorship. Crocker v. Vann, 192 N. C. 422, 135 S. E. 127.

Who appointed to sell. — The court may authorize any officer thereof, or any other competent person, to be designated in the decree of sale, to sell the real estate under this proceeding; but no clerk of any court shall appoint himself or his deputy to make sale of real property or other property in any proceeding before him. (Rev., s. 2513; Code, s. 1906; 1899-9, c. 122, s. 15; 1899, c. 161; C. S. 3242.)
his reason therefor within the statutory time, his conduct may amount to an omission to conform to the agreement with the tenant, leaving the matter within the power of the court to order a resale. McCormick v. Patterson, 194 N. C. 216, 139 S. E. 865.

§ 46-33. Shares in proceeds to cotenants secured.—Upon confirmation of the report, the court shall secure to each tenant in common, or joint tenant, his ratable share in severalty of the proceeds of sale. (Rev., s. 2513; Code, s. 1921; 1868-9, c. 122, s. 31; C. S. 3244.)

§ 46-34. Shares to persons unknown or not sui juris secured.—When a sale is made under this chapter, and any party to the proceedings be an infant, non compos mentis, imprisoned, or beyond the limits of the state, or when the name of any tenant in common is not known, it is the duty of the court to decree the share of such party, in the proceeds of sale, to be so invested or settled that the same may be secured to such party or his real representative. (Rev., s. 2516; Code, s. 1908; 1887, c. 284, s. 3; 1868-9, c. 122, s. 17; C. S. 3245.)

Effect on Title.—This section in nowise interferes with power to free the title and make a valid conveyance of the same. Bynum v. Bynum, 179 N. C. 14, 17, 101 S. E. 525; 116 N. C. 521, 188 S. E. 198.

Consent of Court Necessary to Agreement.—Parties cannot stipulate as to the distribution of the proceeds of a judicial sale without the knowledge of the court, especially where there are infants in the case whose rights are not prejudiced by a preexisting agreement. Lyman v. Southern Coal Co., 183 N. C. 581, 112 S. E. 242.

Infant's Share of Proceeds Remains Realty.—The proceeds of land, sold for partition, to which an infant is entitled, remain real estate until such infant comes of age and elects to take them as money. Bateman v. Latham, 56 N. C. 35.

Payment to Guardian.—A payment made by purchaser of land sold for partition to the guardian of an infant which directed the proceeds to be paid over to the parties according to law, to the guardian of one of the tenants in common, is proper and in pursuance of the statute. Howard v. Stevens, 142 N. C. 12, 54 S. E. 782. As to sufficiency of payment to husband before the modern statute liberating married women from their legal disabilities, see Burgin v. Burgin, 83 N. C. 137.

Cited in McCormick v. Patterson, 194 N. C. 216, 139 S. E. 235.

Art. 3. Partition of Lands in Two States.

§§ 46-35 to 46-41: Repealed by Session Laws 1943, c. 543.

Art. 4. Partition of Personal Property.

§ 46-42. Personal property may be partitioned; commissioners appointed.—When any persons entitled as tenants in common, or joint tenants, of personal property desire to have a division of the same, they, or either of them, may file a petition in the superior court for that purpose; and the court, if it think the petitioners entitled to relief, shall appoint three disinterested commissioners, who, being first duly sworn, shall proceed within twenty days after notice of their appointment to divide such property as nearly equally as possible among the tenants in common, or joint tenants. (Rev., s. 2304; Code, s. 1917; 1868-9, c. 122, s. 27; C. S. 3253.)

Exclusiveness of Remedy.—A petition for the partition of personal property is the only remedy one tenant in common has against another for withholding possession. Grim v. Wicker, 59 N. C. 383; 61 N. C. 143; 72 N. C. 451, 12 S. E. 762.

Same.—No Right to Exclusive Possession.—One tenant in common or joint owner of personal property cannot maintain an action against the other tenant or owner to recover exclusive possession of the property. Lyman v. Southern Coal Co., 183 N. C. 581, 112 S. E. 242.

Cited in Buncombe County v. Arbogast, 205 N. C. 745, 746, 172 S. E. 364.

§ 46-33. CH. 46. PARTITION—PERSONAL PROPERTY § 46-45

§ 46-43. Report of commissioners.—The commissioners shall report their proceedings under the hands of any two of them, and shall file their report in the office of the clerk of the superior court within five days after the partition was made. (Rev., s. 2505; Code, s. 1918; 1868-9, c. 122, s. 28; C. S. 3254.)


§ 46-44. Sale of personal property on partition; report of officer.—If a division of personal property owned by any persons as tenants in common, or joint tenants, cannot be had without injury to some of the parties interested, and a sale thereof is deemed necessary, the court shall order a sale to be made by some officer of the court or other competent person, who shall file his report of sale in the office of the clerk of the court within ten days after sale. (Rev., s. 2519; Code, s. 1919; 1868-9, c. 122, s. 29; C. S. 3255.)


§ 46-45. Confirmation and impeachment of reports of commissioners or officer.—If no exception to the report of the commissioners making partition, or to the report of the officer making sale, as the case may be, is filed within ten days, the same shall be confirmed. Any party, after confirmation, shall be allowed to impeach the proceedings and decrees for mistake, fraud or collusion, by petition in the cause: Provided, inno-
Chapter 47. Probate and Registration.

Art. 1. Probate.

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Art. 2. Registration.

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Sec. 47-23. Conditional sales of personal property.
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Sec. 47-30. Plats and subdivisions.
Sec. 47-31. Certified copies may be registered; used as evidence.
Sec. 47-32. Photostatic copies of plats, etc.; fees of clerk.

§ 46-46. Notice of sale of personal property.—The sale shall be made after twenty days notice, by advertisement in three or more public places in the county, and shall be on such terms as the court may direct. (Rev., s. 2520; Code, s. 1920; 1868-9, c. 122, s. 30; C. S. 3257.)
Art. 1. Probate.

§ 47-1. Officials of state authorized to take probate.—The execution of all deeds of conveyance, contracts to buy, sell or convey lands, mortgages, deeds of trust, assignments, powers of attorney, covenants to stand seized to the use of another, leases for more than three years, releases and any and all instruments and writings of whatsoever nature and kind which are required or allowed by law to be registered in the office of the register of deeds or which may hereafter be required or allowed by law to be so registered, may be proved or acknowledged before any one of the following officials of this state: the several justices of the supreme court, the several judges of the superior court, commissioners of affidavits appointed by the governor of this state, the clerk of the supreme court, the several clerks of the superior court, the deputy clerks of the superior court, the several clerks of the criminal courts, notaries public, and the several justices of the peace. (Rev., s. 989; Code, s. 1246; 1895, c. 161, ss. 1, 3; 1897, c. 87; 1899, c. 235; C. S. 3293.)

Effect of Disqualification.—If the disqualification of either the probating or acknowledging officer appears upon the face of the record, the registration is a nullity as to subsequent purchasers and incumbrances. Quinmerry v. Quinmerry, 114 N. C. 145, 19 S. E. 99. But when the incapacity of the acknowledging or probating officer is latent, i. e., does not appear upon the record, one who takes under the
grantee in such instrument gets a good title, unless the party claiming the benefit of the defective acknowledgment or probate is cognizant of the facts. Richmond Co. v. Walston, 197 N. C. 67, 122 S. E. 663; County Sav. Bank v. Tolbert, 192 N. C. 726, 133 S. E. 551.

Woman Not Qualified to Act as Notary Public.—A woman is qualified to act as a notary public since the adoption of the amendment to the Constitution of this State, Art. VII, sec. 7; and also to pass upon the proper probate of deeds to lands, and make a valid certificate for its registration, when deputized by the clerk of the superior court under the provisions of our statutes. Preston v. Roberts, 183 N. C. 65, 110 S. E. 586.

Interest and Relationship.—As to disqualification on the ground of interest and relationship, see section 47-7.

Cited in McClure v. Crow, 196 N. C. 657, 146 S. E. 713.

§ 47-2. Officials of the United States, foreign countries, and sister states.—The execution of all such instruments and writings as are permitted or required by law to be registered may be proved or acknowledged before any one of the following officials of the United States, of the District of Columbia, of the several states and territories of the United States, of countries under the dominion of the United States and of foreign countries: Any judge of a court of record, any clerk of a court of record, any notary public, any commissioner of deeds, any mayor, any lieutenant governor, any governor, any major or chief magistrate of an incorporated town or city, any ambassador, minister, consul, vice-consul, consul general, vice-consul general, or commercial agent of the United States, any justice of the peace of any state or territory of the United States, any officer of the army of the United States or United States marine corps having the rank of captain or higher, any officer of the United States navy or coast guard having the rank of lieutenant, senior grade, or higher, or any officer of the United States merchant marine having the rank or lieutenancy, senior grade, or higher. No official seal shall be required of said military, naval or merchant marine official, but he shall sign his name, designate his rank, and give the name of his ship or military organization and the date, and for the purpose certifying said acknowledgment, he shall use a form in substance as follows:

On this the day of , the undersigned officer, personally appeared , known to me (or satisfactorily proven) to be serving in or with the armed forces of the United States and to be the person whose name is subscribed to the within instrument and acknowledged that , executed the same for the purposes therein contained. And the undersigned does further certify that he is at the date of this certificate a commissioner or qualified of our state, and is in the active service of the armed forces of the United States.

Signature of Officer

Rank of Officer and command to which attached.

If the proof or acknowledgment of the execution of an instrument is had before a justice of the peace of any state of the United States other than this state or of any territory of the United States, the certificate of such justice of the peace shall be accompanied by a certificate of the clerk of some court of record of the county in which such justice of the peace resides, which certificate of the clerk shall be under his hand and official seal, to the effect that such justice of the peace was at the time the certificate of such justice bears date an acting justice of the peace of such county and state or territory and that the genuine signature of such justice of the peace is set to such certificate. (Rev., § 990; 1899, c. 235, s. 5; 1905, c. 451; 1913, c. 39, s. 1; Ex. Sess. 1913, c. 72, s. 1; 1943, c. 150, s. 1; 1943, c. 471, s. 1; C. S. 2294.)

Cross References.—As to commissioner of affidavits and deeds appointed by the governor, see § 3-1 et seq. As to powers of clerks of courts of record of other states, see § 3-7. As to power of notaries public in and out of state, see § 10-4. As to form of certificate required upon acknowledgment by nonresident official, see §§ 47-44 and 47-45.

Editor's Note.—Both 1943 amendments inserted the words "any commissioner of oaths" in the first sentence. The first 1943 amendment also added to the first sentence the provisions relating to military, naval and merchant marine officials.

Compliance Essential.—This section prescribing how deeds may be proved and acknowledgment and privy examination taken in other states as well as in foreign countries, must be followed, and all prior probates and acknowledgments thereon will be ineffectual, was pending in 1913 when an act amended § 47-2 so as to allow probate and acknowledgment before a commissioner of deeds of another state. By the amendment to the act, all prior probates and acknowledgments before such commissioners of deeds, except those which affected pending litigation or vested rights, were validated.

Proof before Notary Public in Another State.—A deed regularly proved before a notary public in South Carolina by authority of this section, is effectual to pass title as against creditors. County Sav. Bank v. Tolbert, 192 N. C. 133, 133 S. E. 573.

Proof in This State by Notary of Another State.—The proof of a instrument taken in this State by a notary public of another state is defective. County Sav. Bank v. Tolbert, 192 N. C. 133, 133 S. E. 573.

Same.—Rights of Purchaser Where Record Is Clear.—While a probate of a mortgage taken in this State by a notary public of another state is defective, the purchaser at the mortgage sale will acquire his deed title as against an innocent purchaser, being a subsequent judgment creditor, when the probate appears on record, in the office of the registrar of deeds in the county wherein the land is situate here, to have been regularly taken in South Carolina, and there is no evidence that such purchaser had knowledge of the defect at or before the time he acquired his deed. County Sav. Bank v. Tolbert, 192 N. C. 133, 133 S. E. 573.

By Woman Notary Public.—The position cannot be maintained that the probate is fatally defective, being taken by a woman, for it will be assumed that the notary was rightfully appointed in the State in which the deed was probated, and her act will be recognized as valid here. Nicholson v. Eureka Lumber Co., 160 N. C. 33, 75 S. E. 720.

§ 47-3. Commissioner appointed by clerk for nonresident maker.—When it appears to the clerk of the superior court of any county that any person nonresident of this state desires to acknowledge a power of attorney, deed or other conveyance touching any real estate situated in the county of said clerk, he may issue a commission to a commissioner for receiving such acknowledgment, or taking such proof, and said commissioner may likewise take the acknowledgment and privy examination of a married woman separate and apart from her husband, touching her assent to any power of attorney, deeds or other conveyances, touching real estate in said county. The commissioner shall make certificate of the acknowledgments or proof and privy examination made by him, and shall return the same to the clerk of the superior court, whereupon he
shall adjudge that such conveyance, power of attorney or other instrument is duly acknowledged or proved, and that such examination is in due form, and shall order the same to be registered.

(N.C. Gen. Stat. s. 991; Code, s. 1258; 1809-70, c. 185; C. S. 3295.)

Cross Reference.—As to acknowledgments before officials of the United States, foreign countries, and sister states, see §§ 3-5, 10-4, 47-2, 47-6, 47-44, 47-45.

§ 47-4. By justice of peace of other than registering county. If the proof or acknowledgment of any instrument is had before a justice of the peace of any county other than the county in which such instrument is offered for registration, the certificate of proof or acknowledgment made by such justice of the peace shall be accompanied by the certificate of the clerk of the superior court of the county in which said justice of the peace resides, that such justice of the peace was at the time his certificate bears date an acting justice of the peace of such county, and that such justice's genuine signature is set to his certificate. The certificate of the clerk of the superior court herein provided for shall be under his hand and official seal. (Rev., s. 192; 1899, c. 235, s. 4; C. S. 3296.)

Cross Reference.—As to form of clerk's certificate, see § 47-44.

Omission to Register Seal Not Fatal.—The execution of a deed was proved before a justice of the peace in the County of Franklin, and the clerk of the superior court of that county certified the official character of the Justice of the peace under his official seal; the deed was thereupon registered in Granville County upon the face of the clerk of the superior court of the county, but the official seal of the clerk of Franklin superior court was not registered: It was his certificate. The certificate of the clerk of the superior court herein provided for shall be under his hand and official seal. (Rev., s. 192; 1899, c. 235, s. 4; C. S. 3296.)

Cross Reference.—As to acknowledgments before officials of other states, see §§ 3-5, 10-4, 47-2, 47-6, 47-44, 47-45.

§ 47-5. When seal of officer necessary to probate.—When proof or acknowledgment of the execution of any instrument by any maker of such instrument, whether a married woman or of any corporation, is had before any officer authorized by law to take such proof and acknowledgment, and such officer has an official seal, he shall set his official seal to his certificate. If the official before whom the instrument is proved or acknowledged has no official seal he shall certify under his hand, and his private seal shall not be essential. When the instrument is proved or acknowledged before the clerk or deputy clerk of the superior court of the county in which the instrument is to be registered, the official seal shall not be necessary. (Rev., s. 993; 1899, c. 235, s. 8; C. S. 3297.)

Cross References.—See also § 10-9. As to validation of certain acts, deeds, etc., and to any notary public where seal omitted, see §§ 47-52, 47-102. As to validation of certain acknowledgments before officers with seal omitted, see §§ 47-52, 47-102. As to validation of certain acknowledgments before officials, authorized by law to take probates, regardless of the county in which the subject-matter of the instrument may be situated and regardless of the domicile, residence or citizenship of the person who executes such instrument, or of the domicile, residence or citizenship of the person to whom or for whose benefit such instrument may be made. (Rev., s. 994; 1899, c. 235, s. 13; C. S. 3298.)

§ 47-7. Probate where clerk is a party.—All instruments required or permitted by law to be registered to which clerks of the superior court are parties, or in which such clerks are interested, may be proved or acknowledged and private examination of any married woman may be taken before any justice of the peace or notary public of the county of said clerk, which clerk may then under his hand and official seal certify to the genuineness thereof. Such proofs, acknowledgments and examinations may also be taken before any judge of the superior court or justice of the supreme court, and the instruments may be probated and ordered to be registered by such judge or justice, in like manner as is provided by law for probates by clerks of the superior court in other cases. Provided, that nothing contained herein shall prevent the clerk of the superior court who is a party to any instrument, or who is a stockholder or officer of any bank or other corporation which is a party to any instrument, from adjudicating and ordering such instruments for registration as have been acknowledged or proved before some justice of the peace or clerk of the superior court, or other papers by any corporation in which such clerk also is an officer or stockholder, are hereby validated and declared sufficient for all such purposes. (Rev., s. 993; 1891, c. 102; 1893, c. 3; 1913, c. 118, s. 1; 1921, c. 92; 1921, c. 106, s. 2; 1939, c. 210, s. 1; C. S. 3298.)

Cross Reference.—As to disqualification of clerk to act, see § 2-12. See also § 47-7.

Editor's Note.—The 1939 amendment in effect inserted the words "who is a party to any instrument or" in the proviso after the words "clerk of the superior court." Oficer Party Trustee or Cestui Que Trust.—An acknowledgment and privy examination before an officer who was a party, trustee or cestui que trust in the deed is invalid. King v. Johnson, 114 N. C. 504, 19 S. E. 161; McAllister v. Purcell, 124 N. C. 262, 262, 32 S. E. 715.

Relation to Parties Not a Disqualification.—Probate and private examination taken before an officer are not invalid simply because of the name assigned to the parties. McAllister v. Purcell, 124 N. C. 262, 262, 32 S. E. 715.

§ 47-8. Attorney in action not to probate papers therein.—No practicing attorney at law has power to administer any oaths to a person to any paper writing to be used in any legal proceedings [281]
§ 47-9. Probates before stockholders in building and loan associations.—No acknowledgment or proof of execution, including the privy examination of any married woman, of any mortgage or deed of trust executed to secure the payment of any indebtedness to any building and loan association shall hereafter be held invalid by reason of the fact that the officer taking such acknowledgment, proof or privy examination, is a stockholder in said building and loan association. This section does not authorize any officer or director of a building and loan association to take acknowledgments, proofs and privy examinations. The provisions of this section shall apply to federal savings and loan associations having their principal offices in this state. Acknowledgments and proofs of execution, including private examinations of any married women, of any mortgage or deed of trust executed before March 20, 1939 by an officer who is or was a stockholder in any federal savings and loan association, are hereby validated. (1913, c. 110, ss. 1, 2; 1939, c. 136; C. S. 3301.)

Editor's Note.—The 1939 amendment, which added the last sentence of this section, provides: "Acknowledgments and proofs of execution, including private examinations of any married woman heretofore taken by an officer who is or was a stockholder in any federal savings and loan association, are hereby validated. Provided the incorporated provisions of this Act shall not affect pending litigation." § 47-9. Probates before stockholders in building and loan associations.—No acknowledgment or proof of execution, including privy examination of married women, of any mortgage, or deed of trust executed to secure the payment of any indebtedness to any banking corporation, taken prior to the first day of January, one thousand nine hundred twenty-nine, shall be held invalid by reason of the fact that the officer taking such acknowledgment, proof or privy examination, was a stockholder or director in such banking corporation. (1939, c. 303, s. 1.)

Acknowledgment before Bank Official.—Under this section where a mortgage is executed on the equity in lands in order to secure endorsers on a note against loss and the note is discounted at a bank, the contract to secure the endorsers against loss is a collateral agreement between the makers and endorsers to which the bank is a party, and the acknowledgment to the mortgage taken by an officer of the bank is valid. Watkins v. Simonds, 202 N. C. 746, 164 S. E. 363.

§ 47-11. Subpoenas to maker and subscribing witnesses.—The grantee or other party to an instrument required or allowed by law to be registered may at his own expense obtain from the clerk of the superior court of the county in which the instrument is registered a subpoena for any or all of the makers or subscribing witnesses to an instrument, commanding such maker or subscribing witness to appear before such clerk at his office at a certain time to give evidence concerning the execution of the instrument. The subpoena shall be directed to the sheriff of the county in which the person upon whom it is to be served resides. If any person refuses to obey such subpoena he is liable to a fine of forty dollars or to be attached for contempt by the clerk, upon its being made to appear to the satisfaction of the clerk that such disobedience was intentional, under the same rules of law as are prescribed in the cases of other defaulting witnesses. (Rev., s. 996; Code, s. 1288; 1899, c. 235, s. 16; 1897, c. 28; C. S. 3302.)

Cross References.—As to powers of clerk, see § 2-16. As to power of clerk to punish for contempt, see § 5-6.

§ 47-12. Proof of attested writing.—If an instrument required or permitted by law to be registered has a subscribing witness and such witness is dead or out of the state, or of unsound mind, the execution of the same may be proved before any official authorized to take the proof and acknowledgment of such instrument by proof of the handwriting of such subscribing witness or of the handwriting of the maker, but this shall not be proof of the execution of instruments by married women. Provided, that no instrument required or permitted by law to be registered shall be proved, probated or ordered to be registered upon the oath and examination of a subscribing witness who is also the grantee named in said instrument, and the registration of any instrument which has been proven and admitted to probate upon the oath and examination of a subscribing witness who is the grantee in said instrument shall be void: Provided further, that nothing herein shall invalidate the registration of any instrument registered prior to the ninth day of April, A.D. one thousand nine hundred and thirty-five. (Rev., s. 997; 1899, c. 235, s. 12; 1935, c. 168; 1937, c. 7; C. S. 3303.)

Editor's Note.—The proofs added by the 1935 amendment were changed by the 1937 amendment. The 1937 amendment omitted the prohibition of registration of an instrument if the witness attesting its execution is the agent or servant of the grantee. This omission has been interpreted to mean that the witness would seem to be rather remote. It also omitted a former proviso applying the section to agricultural liens. This omission is quite logical since the statute is applicable to all instruments "required or permitted by law to be registered," and agricultural liens fall within such a category. 15 N. C. L. Rev. 337.

§ 47-13. Proof of unattested writing.—If an instrument required or permitted by law to be registered has no subscribing witness, the execution of the same may be proved before any official authorized to take the proof and acknowledgment of such instrument by proof of the handwriting of the maker, but this shall not apply to proof of execution of instruments by married women. (Rev., s. 998; 1899, c. 235, s. 11; C. S. 3304.)

Cross References.—As to proof by attesting witnesses of instruments not required to be attested, see § 8-38. As to proof of handwriting by comparison as evidence, see § 8-40.

Admission to Probate by Proof of Handwriting of the Maker.—A deed having no subscribing witness, may be admitted to probate and registration upon proof of the handwriting of the maker, but this shall not apply to proof of execution of instruments by married women. (Rev., s. 998; 1899, c. 235, s. 1; C. S. 3304.)

Proof of Writing of Nonresident by Resident Party. — Where the parties to an instrument requiring registration are nonresidents, except one, the instrument may be probated by proving the handwriting of the nonresident by the resident party. LeRoy v. Jacobosky, 136 N. C. 443, 48 S. E. 796.

§ 47-14. Clerk to pass on certificate and order registration.—When the proof or acknowledgment of the execution of any instrument, required or permitted by law to be registered, is had before any other official than the clerk or deputy clerk of the superior court of the county in which such instrument is offered for registration, the clerk or deputy clerk of the superior court of the county in which the instrument is offered for
§ 47-14

CH. 47. PROBATE

AND

registration shall, before the same is registered,
examine the certificate or certificates of proof or
acknowledgment appearing upon the instrument,
and if it appears that the instrument has been
duly proved or acknowledged and the certificate
or certificates to that effect are in due form, he
shall so adjudge, and shall order the instrument
to be registered, together with the certificates.
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Cross Reference.—As to form of adjudication and order of
registration, see § 47-37.
Elements of Adjudication.—If the certificate is not found
in due form, the instrument is rejected. If the certificate
is adjudged in due form, then the clerk admits to probate,
i. €., probates it, passes upon the certificate as furnishing
proof of execution, adjudges as to the genuineness of the certificate, the authority of the officer, and whether the justice or officer certifying is such, and the sufficiency of proof
as certified. White v. Connelly, 105 N. C. 65, 66, 68, 11 S. E.

177.
Adjudication
by Clerk Mandatory.—This
section
requiring clerks of the superior court
to adjudicate
upon
the
probate to a deed for lands situated here is mandatory, and
its omission will invalidate the conveyance as against the
rights of purchasers and creditors. Champion Fibre Co. v.

Cozad, 183 N. C. 600, 112 S. E. 810.
The requirement
of this section that the clerk of the
court shall pass upon the sufficiency of the probate of a
deed is mandatory and not directory.
Woodlief v. Woodlief,
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In Champion Fibre Co. v. Cozad, 183 N. C. 600, 112 S.
FE. 810, two lines of decisions, one holding that this section is directory, the other holding that it is mandatory,
are reviewed and distinguished.
The first series, to which
belong Holmes v. Marshall, 72 N. C. 37; Young v. Jackson,
92 N. C. 144; Darden vy. Neuse, etc., Steamboat Co., 107
N.. GC. 437, 12'S. “RB. 46; and Heath v. Lane, 176 N. C. 119,
96 S. E. 889, hold that inasmuch as every clerk of the superior court in North Carolina has equal jurisdiction with
every other clerk in respect to probate matters, where the
clerk of the court of any county in the state takes the acknowledgment

of

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deed

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orders

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is not absolutely necessary that the certificate of this clerk
be passed upon by the clerk of the court of the county in
which

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situated.

In

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other

series

of

cases,

which’ includes Simmons v. Gholson, 50 N. C. 401; Evans
v. Etheridge, 99 N. C. 43, 5 S. E. 386; White v. Connelly,
105 N. C. 65, 11 S. E. 177; and Cozad v. McAden, 148 N.
C. 10, 61 S. E. 633, the section is held to be mandatory,
but

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ficer other than the clerk of court, judges of the superior
court,
or justices of the supreme
court.
In Darden
v.
Neuse,
etc., Steamboat
Co., supra,
the court
apparently
limits the doctrine that the statute is directory to cases
in which deeds have been acknowledged before other clerks,
judges, or justices of the supreme court.
Same—Qualification
of the Rule.—While
it is held that
such act of adjudication and order of registration are directory upon the clerk of the superior court of the county
wherein the land is situated, it is so only where the fiat
or order of registration has beén properly made by the
clerk of another county upon which such power has been
conferred by the statute, and in the absence of any proper
fiat or order for registration, the conveyance will be ineffectual against the rights of purchasers and creditors of the
grantor.
Champion Fibre Co. v. Cozad, 183 N. C. 600, 112
‘Son Be 810:
Same—Where Probate Taken by Foreign Commissioner of
Deeds.—The
probate to a mortgage
of lands
situated
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Carolina,

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tration by a clerk of the superior court within the State,
and clothed with authority to do so by our statute, is ineffectual as against purchasers or creditors to pass title to
the purchaser
at the foreclosure
sale, or those claiming
under him.
Champion Fibre Co. v. Cozad, 183 N. C. 600, 112

S.

E. 810.
Use of Words ‘In Due Form” Not Essential to Adjudication.—The adjudication by the clerk of the superior court that
“the foregoing instrument has been duly proved, as appears
from the foregoing seal and certificate,’ does not follow
the very words of the statute in that it does not adjudge
that said probate is “in due form.” But it is intelligible
and means substantially the same thing and “will be upheld without regard to mere form.’’ Devereux v. McMahon,

102 N.

C. 284, 9 S. E. 635.

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§ 47-14

REGISTRATION

fore an officer
in due form.

authorized to take it and probate was
The omission, therefore, of the clerk

in fact
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judge in just so many words that the probate was “in due
form” when in substance he did so adjudge, was not sufficient ground to exclude the deed. Deans v. Pate, 114 N. C.
194,

196,

19 S.

E.

146.

Adjudication
Exercise
of Judicial
Function.—When
the
clerk of the superior court, upon the certificate of the acknowledgment of a grantor in a conveyance, or of proof of
its execution, and privy ‘examination of a married woman
by a justice of the peace, adjudges such certificate to be
in due form, admits the instrument to probate, and orders
its registration, this is the exercise of a judicial function.
White v. Connelly, 105 N. C. 65, 11 S: EB. 177.
Substantial
Compliance
Sufficient—A
substantial
compliance with this section and section 47-37, is all that is necessary to be observed by the clerk of the superior court of
the county wherein the land lay, in passing upon the certificate to a deed thereto made and executed in another state;
and when objection to the validity of registration is made
on that ground, and it appears of record on appeal that the
certificate made
in such other state is in fact sufficient,
the validity of the registration will be declared and upheld
Certificate of ‘Probate or Acknowledgment Necessary Even
if Prebate Made before Clerk.—The statutes of North Carolina require, as the tnethod of authentication and warrant
to the register to record a deed, that a certificate complying substantially with the terms of the statute shall be attached to or indorsed upon the deed, even though probate
is had before the clerk of the superior court, and where no
sufficient certificate was attached to or indorsed upon an instrument, it could not be shown by parol that proper proof
was made before the clerk.
102, 103.
Registration No Evidence of Adjudication without Signed
Certificate of Clerk.—Where a justice of the peace has properly and in due form taken the acknowledgment of the grantor and his wife to a deed to lands, and the clerk of the
court has failed or omitted to sign his name to the cerficate for registration, the registration of the instrument is
no evidence that the clerk or his deputy has complied with
the provisions of this section requiring the clerk, etc., to
adjudicate the sufficiency of the certificate of the justice
of the peace, or permit a copy of such deed to be used in
evidence under the provisions of section 8-18.
The curative
statutes,
§§ 47-49, 47-86, 47-87, 47-88 and 47-89, have no
application.
Woodlief v. Woodlief, 192 N. C. 634, 135 S. E.
612.

No

Adjudication

When

Instrument

Proved

before

Clerk.—

It is only required for a valid probate that the clerk should
certify to the proof of a deed taken before him and it is
only when he passes upon a probate taken before some other
officer that he is required to certify to the correctness of
the probate and certificate, and order the instrument to be
registered. Table Rock Lumber Co. v. Branch, 158 N. C.
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Adjudication of Instrument Probated in Another State.—
When a deed in trust made and executed beyond the borders
of this State conveying lands herein has been there acknowledged and probated before a notary public, and (unnecessarily) the clerk of the Supreme Court in compliance with

a statute there, has certified the official character of the
notary and his authority as such, it is a sufficient compliance with this and section 47-37, for the clerk of the superior
court of the county wherein the land lay, to certify that “the
foregoing and annexed certificate of (naming the clerk), a
clerk of the Supreme
Court, etc., duly authenticated
by
his official seal, is adjudged to be correct, in due form and
according to law, and the foregoing and annexed deed of
trust is adjudged to be duly proved, etc.” Kleybolte &
Co. v. Black Mountain Timber Co., 151 N. C. 635, 66 S.

E. 663.

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Certificate of Clerk for Registration of Grant by State
Not Required.—The certificate of the clerk of the court, required as a prerequisite to the registration of instruments
of writing named therein, is not essential to the validity of
the registration of a grant; the great seal of the State being
sufficient authority for such registration.
Ray
v. Stewart,
105° N.C;

4725/11

See

182i

Presumption
of Regularity
from
Clerk’s
Certificate.—
Where it appears that the clerk appended to a lease offered
for registration his certificate, it will be presumed, nothing
to the contrary

appearing,

that

v. Neuse,

Steamboat

Co., 107 N. C. 437, 12 S. E. 46.

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Deed—Invalid

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shall be valid, and pass title and estates without other conveyances by corporations, see § 47-41. Deeds executed and registered according to law shall be as if signed, sealed, and acknowledged, or proven, as if signed, as if probated and registered, and when the property described in said contract or instrument so probated and registered is signed by any corporation in its corporate name by its president, and when such corporation has been in existence for more than ten years when the said contract or instrument is offered for probate and registration, and when the grantee and those claiming under any such grantee have been in the uninterrupted possession of the property described in said contract or instrument since the date of its execution; and said contract or instrument so probated and registered shall be as effective to all intents and purposes as if signed, sealed, and acknowledged, or proven, as provided under the existing laws of this state. (1911, c. 44, s. 1; C. S. 3307.)

Cross Reference.—As to forms of probate for deeds and other conveyances by corporations, see § 47-41.

Art. 2. Registration.

§ 47-17. Probate and registration sufficient without livery.—All deeds, contracts or leases, before registration, except those executed prior to January first, one thousand eight hundred and seventy, shall be acknowledged by the grantor, lessee or the person executing the same, or their signature proven on oath by one or more witnesses in the manner prescribed by law, and all deeds executed and registered according to law shall be valid, and pass title and estates without livery of seizin, attachment or other ceremony. (Rev., s. 979; Code, s. 1245; 1885, c. 147, s. 3; 29, Ch. II, c. 3; R. C., c. 37, s. 1; 1715, ch. 7; 1756, c. 58, s. 3; 1838-9, c. 33; 1905, c. 277; C. S. 3308.)

Purpose of Section.—This section together with section 47-20 were intended to uproot all secret trusts, trusts, unregistered mortgages, etc., and under its force it has been held that no notice, however full and formal, will supply the place of registration. Robinson v. Willoughby, 70 N. C. 358; Hooker v. Nichols, 116 N. C. 157, 160, 21 S. E. 207.

Registration between Parties Not Necessary to Validity of Conveyance.—See annotations to § 47-18.

Evidence Supporting Judgment for Recovery of Land.—Evidence showing the title to the land, without any record evidence of title in defendant, held to support judgment for plaintiff for recovery of land. Knowles v. Walborn, 210 N. C. 600, 188 S. E. 195.


§ 47-18. Conveyances, contracts to convey, and leases of land.—No conveyance of land, or contract to convey, or lease of land for more than three years shall be valid to pass any property, without the presence of a grantor, lessor or the person executing the same, or the signature proven on oath by one or more witnesses in the manner prescribed by law, and all deeds executed and registered according to law shall be valid, and pass title and estates without livery of seizin, attachment or other ceremony. (Rev., s. 979; Code, s. 1245; 1885, c. 147, s. 3; 29, Ch. II, c. 3; R. C., c. 37, s. 1; 1715, ch. 7; 1756, c. 58, s. 3; 1838-9, c. 33; 1905, c. 277; C. S. 3308.)

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Registration between Parties Not Necessary to Validity of Conveyance.—See annotations to § 47-18.
The registration laws are not for the protection of the


registered deed was fraudulently obtained, in which fraud plaintiff participated, for the purpose of depriving defendant of her life estate in the land, theretofore created by paper writing executed by plaintiff's grantor, this section does not apply, and defendant's rights are superior to those of plaintiff under the registered deed, even though the paper writing giving defendant a life estate was not registered, the statute does not apply in such case of title by the registered deed, or the claim of the person holding or claiming thereunder. (Rev. s. 59; Code s. 1245; 1885, c. 147, s. 1; C. S. 3390.)

I. In General.

II. Registration as between the Parties.

III. What Instruments Affected.

IV. Rights of Persons Protected.

V. Notice.

VI. Effect of Defective Registration.

VII. Unregistered Deed as Color of Title.

Cross Reference.

As to the statute of frauds with reference to contracts for sale of land, leases, etc., see § 22:2.

I. IN GENERAL.

The object of probate and registration in the county where the land lies was intended to give notice to creditors and purchasers for value, or others whose rights might otherwise be seriously and unjustly impaired by the deed. Warren v. Williford, 148 N. C. 474, 63 S. E. 697; Weston v. Roper Lumber Co., 159 N. C. 263, 266, 75 S. E. 800; Massachusetts Bonding, etc., Co. v. Knox, 220 N. C. 725, 18 S. E. (2d) 1438.

The purpose of the registration laws is to give notice, and where the index is sufficient to put a careful and prudent examiner upon inquiry, the records are notice of all matters which would be discovered by reasonable inquiry, but the records are intended to be self-sufficient, and a person examining a title is not required to go out upon the premises and actually examine the premises and search under what claim, the provision of this section being applicable only to deeds executed prior to 1 December, 1885. Dorman v. Goodman, 213 N. C. 406, 196 S. E. 352.

The purpose of this section was to enable purchasers to rely with safety upon the examination of the records, and act upon the assurance that, as against all persons claiming under the "donor, bargainor, or lessor," what did not appear did not exist. Grimes v. Guion, 220 N. C. 676, 679, 18 S. E. (2d) 170.

An unregistered deed does not convey complete title and is ineffective as a conveyance of land unless subsequently guaranteed by the deed or registered. Warren v. Williford, 148 N. C. 474, 63 S. E. 697; Weston v. Roper Lumber Co., 212 N. C. 676, 679, 18 S. E. (2d) 170.

No conveyance of land nor contract to convey, etc., shall be valid to the extent of any interest in real property to another, after the decree of sale for partition, unless the same shall be recorded in the county where the land lies. The manifest purpose of this section therefore, is to protect purchasers for value and creditors, and leave the parties to contract for the sale of lands inter se to litigate their rights in the Circuit Court. Hargrove v. Acodoc, 111 N. C. 166, 167, 170, S. E. 16.

At Present Instrument Good between Parties without Registration.—A deed is good and valid between the parties to it, even though the registration of which is required by the statutes as at common law. Warren v. Williford, 148 N. C. 474, 62 S. E. 697; Weston v. Roper Lumber Co., 160 N. C. 263, 75 S. E. 1148; Glass v. Lynchburg Shoe Co., 212 N. C. 750, 18 S. E. (2d) 235.

II. REGISTRATION AS BETWEEN THE PARTIES.

Formerly Registration Prerequisite Even as between Parties.—The provision of this section prior to its amendment, as construed in White v. Holly, 91 N. C. 67, was that "no conveyance of land nor contract to convey, etc., shall be valid to the extent of any interest in real property to another, after the decree of sale for partition, unless the same shall be recorded in the county where the land lies." The effect of the registration laws is to give notice to creditors and purchasers for value, even though the deed by which the grantee acquired title is unregistered. Durham v. Pollard, 219 N. C. 750, 14 S. E. (2d) 835.

As a general rule, to prevent fraud, registration of the deed is necessary. Glass v. Lynchburg Shoe Co., 212 N. C. 676, 679, 18 S. E. (2d) 170.

Unregistered Deed Good Although Deed to Grantor Was Unregistered.—Upon registration, the deed is good even as against creditors and purchasers for value, even though the deed by which the grantee acquired title is unregistered. Durham v. Pollard, 219 N. C. 750, 14 S. E. (2d) 835.

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An unregistered deed is good as between the parties and the fact that it is not registered does not affect the equities between the parties, the sole purpose of the statute being to determine and make certain the question of title. Patterson v. Bryant, 216 N. C. 550, 5 S. E. (2d) 849.

Same—Deed Effective under Statute of Uses.—Under this section registration of deeds is not necessary in order to perfect a conveyance for valuable consideration, effective under the Statute of Uses, as between the parties. In cases where livery of seisin was formerly required registration still supplies the necessary constructive notice. Hinton v. Moore, 139 N. C. 44, 46, 31 S. E. 787.

Same—Registration after Commencement of Action.—As a general rule, registration after the commencement of an action is admissible in evidence. Hudson v. Jordan, 108 N. C. 10, 12 S. E. 1029.

Registration in a pleading after the commencement of an action is not admissible in evidence. Hudson v. Jordan, 108 N. C. 10, 12 S. E. 1029.

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grantee, and therefore laches on the part of his grantee in failing to promptly record his deed is not available as an equitable defense to another. A grantee in good faith for failure of title by reason of the execution by the grantor of a second deed to the same property which is first recorded. Patterson v. Bryant, 216 N. C. 550, 5 S. E. 2d 649.


III. WHAT INSTRUMENTS AFFECTED.

Instruments in Writing Dealing with Estates Which Lie in Grant.—It will be observed that this section, in terms, applies only to conveyances of land, contracts to convey, and certain other instruments in writing where an estate in land deals with estates that lie in grant, and therefore, are required to be in writing under the statute of frauds and under the law of North Carolina. Spence v. Foster Pottery Co., 185 N. C. 218, 220, 117 S. E. 32.

Same—Parol and Implied Trusts Not Affected.—The primary purpose and intent of the Legislature, in the passage of this act, was to establish a known and ready method for the settlement of conflicting claims and priorities arising from registrations. Hence, from its very nature and purpose it would seem to require that it be restricted to written instruments capable of being registered. There are certain parol trusts, and those created by operation of law, dealing with beneficial interests in lands, which are fully recognized in this jurisdiction. Jones v. Jones, 104 N. C. 220, 3 S. E. 707; Whaley v. Employer's Ins. Co., 215 N. C. 580, 197 S. E. 367; Williams v. Smith, 175 N. C. 319, 95 S. E. 570; Roberts v. Massey, 170 N. C. 589, 127 S. E. 697; Eaton v. Doub, 190 N. C. 14, 128 S. E. 494.

Parol trusts, and those created by operation of law, such as are recognized in this jurisdiction, do not come within the meaning of this act. Where a trust is sought to be established, not by virtue of the express provisions of the statute, refer to such instruments as are in writing and capable of registration. Spence v. Foster Pottery Co., 185 N. C. 218, 117 S. E. 32.

Certain parol trusts in land are enforceable in this jurisdiction when the holder of the legal title, or those claiming under him, have not acquired it for a fair and reasonable value and, therefore, as against purchasers, the legal title vested in the mortgagee comes within the provisions of this act, and this section includes mortgages within its terms. First Nat. Bank v. Sauls, 183 N. C. 165, 170, 110 S. E. 855.

Lease in Writing.—In order to affect with notice and bind a purchaser of lands to a contract of lease for more than three years made by a tenant with a former owner, it is necessary that the lease be registered. Hinton v. Moore, 139 N. C. 44, 51 S. E. 787.

Mortgages Included.—Mortgages have been uniformly held to be conveyances of the legal title, and require the formality of a conveyance in their assignment as against purchasers for value, and, therefore, as against purchasers, the legal title vested in the mortgagee comes within the provisions of the registration act. Davis v. Robinson, 189 N. C. 157, 158, 127 S. E. 465.

Rents Accruing Included.—While rents accruing are choses in action and an assignment thereof need not be recorded. rents accruing are incorporeal hereditaments which, if for a period of more than three years, must be registered to pass property as against purchasers for value. First, etc., Nat. Bank v. Sawyer, 124 N. C. 142, 10 S. E. (2d) 655.

IV. RIGHTS OF PERSONS PROTECTED.

In General.—By virtue of this section only creditors of the donor, bargainor, or lessor, and purchasers for value of a conveyance, or contract to convey, or lease of land for more than three years, are protected by the provisions of this act. Spence v. Foster Pottery Co., 185 N. C. 218, 117 S. E. 32.

A declaration of trust is not a conveyance, or contract to convey, or lease of land, requiring registration as against creditors, by virtue of this section. Crotsett v. McQueen, 205 N. C. 48, 51, 169 S. E. 829.

Contracts to Sell—The One First Registered Prevails. —Amendment of a deed to sell land, the one first registered will confer the superior right. Combes v. Adams, 150 N. C. 64, 68, 136 S. E. 186.

Wills Not Affected—Purchaser under a Will Not Pur- chase. —It was likewise held that the execution by the testator of a second will against creditors or purchasers for a valuable consideration for the title conveyed by a registered deed. Harris v. Dudley Lumber Co., 147 N. C. 631, 61 S. E. 694.


Certain parol trusts in land are enforceable in this jurisdiction when the holder of the legal title, or those claiming under him, have not acquired it for a fair and reasonable value and, therefore, as against purchasers, the legal title vested in the mortgagee comes within the provisions of this act.

A declaration of trust is not a conveyance, or contract to convey, or lease of land, requiring registration as against creditors, by virtue of this section. Crotsett v. McQueen, 205 N. C. 48, 51, 169 S. E. 829.

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more than three years and is not recorded. Hildebrand Machinery Co. v. Post, 204 N. C. 744, 169 S. E. 629.

Creditors Put upon the Same Plane as Purchasers.—No distinction is made in the statute or in the opinions of the court, construing and applying the statute, between creditors and mortgagees. § 47-18. A creditor who has expended his money or property, as against a purchaser for value so as to be protected under the Conner Act, so as to take free from the rightful possession of the mortgagor, is neither a purchaser nor a creditor, although he may be put on the same plane with the mortgagee, whether for old or new debts, is a purchaser for value from the vendor, under a duly registered deed, though not registered, will, as a rule, prevail. Tyner v. Barnes, 142 N. C. 110, 113, 54 S. E. 1008.

The trustee in bankruptcy is regarded as a purchaser for value under the amendment to the Bankrupt Act of 1910, and acquires a valid title as against the holder of the unregistered deed, under this section. Lynch v. Johnson, 17 N. C. 611, 89 S. E. 61. This is also true under the Chancery Act, the 1918 amendment to the National Bankruptcy Act.

Deed Executed Prior to Marriage.—Where a man executed and delivered a deed of land to his wife, and before his marriage and remained on the land up to his death, and the deed was not recorded until after his death, his widow is not entitled to dower. She is not a purchaser.

Possessor under Unregistered Contract to Convey—Rights to Improvements.—One who goes into possession of land, under a parol contract to convey, paying the purchase money and making improvements thereon, cannot assert the right to remain in possession until he is repaid the amount expended for improvements, as against a purchaser for value from the vendor, under a duly registered deed. Wood v. Tinsley 138 N. C. 507, 51 S. E. 59. As to a purchaser for value, from the common grantor, the rule applies. Opinion of the supreme court of this state, as to the validity of an unregistered deed, has enhanced the value of the land by improvements, although made in good faith. Eston v. Dubb, 190 N. C. 14, 21, 128 S. E. 494. Expressions in Kelly v. Johnson, 135 N. C. 647, 47 S. E. 297, with these and related cases, are obiter and were corrected by Wood v. Tinsley, supra.

Tort Feasor Neither a Purchaser Nor a Creditor.—A tort feasor, whose negligence has damaged or polluted the rightful possession of the mortgagee, is neither a purchaser nor creditor within the contemplation of our registration laws, §§ 47-18, 47-20, and 47-23, and in action may be maintained against him for the consequent damage either by the mortgagee or mortgagor, and a settlement with one will preclude a recovery by the other. Harris v. Seaboard Air Line R. R. Co. 150 N. C. 239, 58 S. E. 98.5.

Trustee or Mortgagee as Purchaser.—A trustee or mortgagor, whether for old or new debts, is a purchaser for value under the amendment to the execution of a judgment, which was executed before the sale, acquires the title to the land; and the wife in possession of the land continues thereafter, though a trespasser, to have the benefit of the use of the execution of the sheriff's deed to the plaintiff, is not within the saving clause of the act, as the sheriff's deed to the plaintiff is not a conveyance; and as purchaser from the grantor, unless he is a purchaser for value from the donor, bar-

V. NOTICE. 
No Notice Will Supply Want of Registration.—No notice, however full or formal, will supply the want of registration. Board v. McKee, 101 N. C. 507, 8 S. E. 553.

Collateral Attack by Creditors for Want of Registration.—The want of registration does not invalidate the instrument so that creditors, merely as such, may treat it as a nullity in a collateral proceeding; but it is void against proceed-ings, instituted by them and prosecuted to a sale of the property or of the land on which they are located. Boyd v. Turpin, 94 N. C. 137; Brem v. Lockhart, 93 N. C. 191; Francis v. Herren, 101 N. C. 507, 8 S. E. 553.

Priority of Judgment Obtained before Registration of Prior Deed.—Where a judgment is rendered and docketed against the vendor of lands subsequent to the execution of the conveyance, but prior to the time of its registration, the lien of the judgment has priority over the title of the grantor, and the lien of the deed. Collier v. Micks, 190 N. C. 14, 128 S. E. 494.

Same.—Agreement between Parties as to Registration.—Under the provisions of this section the holder of a sub-sequent unregistered deed, conveying land subject to the judgment of a judgment creditor of the grantor where the judgment was rendered and docketed before the registration of the deed, even though there was an agreement between the grantor and the grantee that such deed should not be registered, will supply the want of registration of the conveyance. Board v. Micks, 118 N. C. 162, 34 S. E. 729; Bostic v. Young, 116 N. C. 760, 21 N. E. 555; Francis v. Herren, 101 N. C. 507, 8 S. E. 553; Colonial Trust Co. v. Sterchie Bros., 169 N. C. 21, 24, 85 S. E. 50.

Satisfaction of Judgment.—Where a judgment has been obtained and docketed, conveyed subsequent to the registration of the deed, and cannot be defeated by a deed in trust subsequently registered and carrying out the agreement theretofore rest-ing only in parol, and the consideration recited in the deed is immaterial. Colonial Trust Co. v. Sterchie Bros., 169 N. C. 21, 85 S. E. 50.

Neutral Notice.—Where, for the purpose of conveying title, a notice of the judgment is given, its effect is to put the possessor on inquiry, but does not prevent the notice of the judgment being given by the grantee of the deed, and duly registered before the docketing of the judgment, under the execution of which the conveyance was made, the possessor is estopped from asserting that the notice of the judgment was not given, nor was the judgment docketed, by the grantee, or by the possessor.
that defendant in possession thereunder, it was held that the parol agreement was ineffectual as against plaintiff. In order to show evidence of knowledge, since the probate is never full and formal, will supply notice by registration as required by this section. Grimes v. Guion, 220 N. C. 676, 18 S. E. (2d) 170.

A deed executed prior to the Registration Act of 1885, if not made upon evidence taken of the subscribing witness under oath, and if not so appearing the registration of the deed shall be invalid, and it cannot be introduced in evidence for the purpose of showing an essential link in the chain of title. Bank v. Tolbert, 192 N. C. 125, 133 S. E. 558.

VII. UNREGISTERED DEED AS DEED OF TITLE.

Unregistered Deed as Color of Title—Synopsis of Law.—Formerly an unregistered deed was in all cases color of title if sufficient in form (Hunter v. Kelly, 92 N. C. 265), but after the passage of the Conner Act it was held in Austin v. Staten, 126 N. C. 783, 36 S. E. 333, that an unregistered deed is without force and effect. The prior deed was sufficient in form and the court has since then consistently adhered to the latter decision. Janney v. Robbins, 141 N. C. 400, 53 S. E. 863; Burwell v. Chapman, 19 N. C. (2d) 209, 211, 74 S. E. 638, 644, 77 S. E. 835; King v. McRacken, 168 N. C. 621, 624, 84 S. E. 1027.

The question was again considered in Collins v. Davis, 132 N. C. 106, 43 S. E. 579, and the ruling in the case of Austin v. Staten was modified so that it only applied in favor of the holder of a subsequent deed executed upon valuable consideration, and the court has since then consistently adhered to the latter decision. Janney v. Robbins, 141 N. C. 400, 53 S. E. 863; Burwell v. Chapman, 19 N. C. (2d) 209, 211, 74 S. E. 638, 644, 77 S. E. 835; King v. McRacken, 168 N. C. 621, 624, 84 S. E. 1027.

Where one makes a deed for land, for a valuable consideration, and the grantee fails to register it, but enters into possession thereunder, and remains therein for more than seven years, such deed does not constitute color of title and bar the entry of a grantee, in a subsequent deed for a valuable consideration, who has duly registered his deed. Collins v. Davis, 132 N. C. 106, 43 S. E. 579. Except in cases coming within this rule, the rights acquired by adverse possession are not disturbed or affected by this section. Roberts v. Massey, 185 N. C. 164, 116 S. E. 407; Eaton v. Doub, 190 N. C. 114, 18, 128 S. E. 496; King v. McRacken, 168 N. C. 631, 624, 84 S. E. 1027.

Same—Qualification of Advantage Possession.—The principle that under this section an unregistered deed does not constitute color of title, does not extend to a claim by adverse possession held continuously for the requisite time under deeds "foreign" to the true title or entirely independent of the title under which the plaintiff makes his claim. Austin v. Staten, 126 N. C. 783, 36 S. E. 333, distinguished. Janney v. Robbins, 141 N. C. 400, 53 S. E. 863. But where one makes a deed for land, for a valuable consideration, and the grantee fails to register it, but enters into possession thereunder and remains therein for more than seven years, such deed does not constitute color of title and bar the entry of a grantee in a subsequent deed for a valuable consideration who has duly registered his deed. King v. McRacken, 168 N. C. 631, 624, 84 S. E. 1027.

SIXTH—Unregistered Deed as Color of Title.

The possession of a grantee under an unregistered deed of land is not under color of title as against subsequent judgment creditors of his grantor, who have thus obtained their liens on the locus in quo, the source of title being the ownership of the grantor. Janney v. Robbins, 141 N. C. 400, 53 S. E. 863. Janney v. Robbins was distinguished in Austin v. Staten where one made a deed for land for a valuable consideration and grantee fails to register it, but enters into possession thereunder and remains therein for more than seven years, such deed does not constitute color of title and bar the entry of a grantee in a subsequent deed for a valuable consideration who has duly registered his deed. Eaton v. Doub, 190 N. C. 114, 18, 128 S. E. 496.

Unregistered Deed as Color of Title.

The statute of limitations does not begin to run in favor of a lessee in possession under a lease where one makes a deed for land until the registration of the lease, as against the owner of the fee under a valid paper title. Eaton v. Doub, 190 N. C. 114, 18, 128 S. E. 496. Janney v. Robbins was modified so that it only applied in favor of the holder of a subsequent deed executed upon valuable consideration, and the court has since then consistently adhered to the latter decision. Janney v. Robbins, 141 N. C. 400, 53 S. E. 863; Burwell v. Chapman, 19 N. C. (2d) 209, 211, 74 S. E. 638, 644, 77 S. E. 835; King v. McRacken, 168 N. C. 621, 624, 84 S. E. 1027.

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56, extended the operation of this section to deeds executed between 1895 to 1890.

Affidavit in Case of Corporation Grantees, by Whom Made. —Where a corporation is the holder of such a deed, the affidavit must be executed and sworn to by the president. Richmond Cedar Works v. Pinnix, 208 Fed. 763.

Affirmation of Belief That Deed Is Bona Fide, Essential.—The maker of a deed dated in 1845 upon an affidavit that the affiant believes the deed to be valid, and that the maker of said deed and the witnesses thereto are deceased, and that he cannot make proof of their handwriting, is defeated in his attempt to defeat the conveyance by the affidavit that the "affiant believes such a deed to be a bona fide deed and executed by the grantor therein named.” Allen v. Burch, 142 N. C. 524, 525, 55 S. E. 354.

§ 47-20. Deeds of trust and mortgages, real and personal.—No deed of trust or mortgage for real or personal estate shall be valid at law to pass any

ningham, 64 F. (2d) 296, 299.


Registration of Chattel Mortgages at Common Law.—At common law, mortgages of personal property were not required to be reduced to writing; a formal instrument was not required to be made by the defendant, or personal estate shall be valid at law to pass any

ningham, 64 F. (2d) 296, 299.


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The section was intended primarily to protect creditors requiring registration. Ellington v. Supply Co., 196 N. C. 784, 147 S. E. 307,

than a mortgage, such transaction is valid without registra-

tion. Dukes v. Jones, 51 N. C. 14. etc., to be registered. Wallace v. Cohen, 111 N. C. 103, 15 S. E. 892; Deal v. Palmer, 72 N. C. 582; Leg-
ggett v. Bullock, 44 N. C. 383. And the personal representa-

tive of a deceased mortgagor stands in the shoes of the latter. Hence, the plaintiff holding an unregistered sec-

ond mortgage on the lands of the defendant's intestate is entitled to his lien upon the funds derived from the sale in excess of the first mortgage, in preference to other creditors of the deceased. McBrayer v. Harrill, 152 N. C. 712, 68 S. E. 24.

Intended Primarily to Protect Creditors and Purchasers. — This section was intended primarily to protect creditors and purchasers to the instrument additional efficacy as between the mortgagor and the mortgagee. South Georgia Motor Co. v. Jackson, 184 N. C. 328, 331, 114 S. E. 478.

III. INSTRUMENTS AFFECTED.

Absolute Sale Not Affected. — When the circumstances of a transaction are such as to impose an absolute sale, rather than a mortgage, such transaction is valid without registra-

tion as against the persons protected under this section. Chemical Co. v. Johnson, 98 N. C. 125, 3 C. C. A. 310. We hold that the language of the registered instrument, and the hus-


Where the owner of lands deeds same to a wife, according to the language of the registered instrument, and the hus-

band alone executes a purchase money deed of trust on the lands which is registered prior to the registration of the deed in fee to the wife, the records are insufficient to show that the husband was a beneficiary under the contract. Davis v. National Bank, 196 Fed. 257, 258.

Mortgagee for Future and Contingent Debts. — A debtor may lawfully mortgage his property to secure future and contingent debts, and is thereby not subject to any prosecution for fraud, since the creditors of the bankrupt, he must perfect the same, as against the personal representative of a deceased mortgagor. Moore v. Rag-


where the title passed to the trustee, the mortgage was void as against him. Davis v. Hanover Sav. Fund Soci-


Mortgagee or Mortgagor. — A debtor or creditor may hold a mortgage or security in the property of another, and the mortgage.or security is effective as against the owner thereof, whether for old or new debts, is a purchaser for a value, and his rights are not af-

fected by a prior unregistered mortgage. Moore v. Rag-

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lateral proceeding; but it is void against proceedings instituted by them and prosecuted to a sale of the property or against creditors, however constituted, under Boyd v. Turpin, 94 N. C. 137; Brem v. Lockhart, 93 N. C. 191; Francis v. Herron, 101 N. C. 497, 507, & S. E. 353.

**Rights of Mortgagee Registering within Four Months of Bankruptcy of Mortgagor.** Under the Federal Bankruptcy Act of 1898, section 60b, and under this section a chattel mortgage given by a bankrupt, but not registered until after the registration of a third mortgage, the mortgage third in order of registration is a prior lien for purchase money; it gives the mortgagee a lien on the land described superior to that of a later executed and registered mortgage thereon. Fleming v. Graham, 110 N. C. 374, 14 S. E. 922.

**Chattel Mortgage Good against Purchasers and Creditors Only from Registration.**—Under this section a chattel mortgage as against the trustee in bankruptcy of a corporation, to which the mortgagee subsequently conveyed the property in consideration of stock in such corporation. Estate of Tucker vy. The North Carolina Life R. Co., 190 N. C. 480, 130 S. E. 319, annotations, sec. 47-18.

**Trustee in Bankruptcy.**—A mortgagee who fails to register his mortgage has no right to the property mortgaged as against the trustee in bankruptcy of a corporation, to which the mortgagee subsequently conveyed the property in consideration of stock in such corporation. Fleming v. Graham, 110 N. C. 374, 14 S. E. 922.

**Right of Surety Is Superior to That of Trustee in Bankruptcy.**—Where no creditor has secured a lien upon the property of a road contractor prior to bankruptcy, the transfer of possession of the property to the surety-mortgagee for purchase money, as against a subsequent mortgagee secured under the Act of 1898, is effective against the trustee. Williams vy. Lewis, 158 N. C. 571, 74 S. E. 17, cited in support of the plaintiff's position.

**Applications of Road Contractor Not Valid as against Subsequent Mortgagee.**—The application of a road contractor in so far as they profess to convey property, are chattel mortgages and are not valid as against the trustee without registration. Coggin v. Hartford Acci., etc., Co., 78 F. (2d) 471, 476.

**Chattel Mortgage Good against Purchasers and Creditors Only from Registration.**—Under this section a chattel mortgage as against a bona fide purchaser for value and against creditors only from registration. A general creditor must yield to the lien of the mortgage from the moment of its registration, unless the lien can be successfully assailed as a fraudulent conveyance. Coggin v. Hartford Acci., etc., Co., 78 F. (2d) 471, 476.

**Application contracts containing a conveyance whereby a road contractor as of the date thereof assigns, transfers, and conveys to the contractor in consideration of the services in the tools, plant, equipment, and materials that he may then or thereafter have upon the work, authorizing and empowering the surety and its agents to enter upon and take possession thereof, are chattel mortgages within the meaning of this recordation statute. Hartford Acci., etc., Co., v. Coggin, 78 F. (2d) 785, 787.

**Before a creditor can defeat the lien of the mortgage properly registered he must acquire a prior lien by way of justice and conforming to the contract and by levying an execution against personal property. Id.**

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**Where Mortgagee Displaying Property in Sales Room.**—When the mortgagee, as in this case, is a mortgagee, a dealer, to keep it on display at his show room for sale with others therein, and the mortgagee sufficiently describes the property, giving the serial and motor numbers and other identifying marks thereon, for the purpose of the mortgage by his conduct does not lose his right of lien as against a subsequent purchaser from the dealer, and the doctrine of implied authority to the dealer to sell the property free from the mortgage lien as agent of the mortgagor does not apply under the facts of this case. Whitehurst v. Garrett, 196 N. C. 154, 144 S. E. 835.

**Priority in Sales of Chattel Mortgages.**—If the mortgage is properly registered he must acquire a prior lien by way of justice and conforming to the contract and by levying an execution against personal property. Id.
which such inquiry would have disclosed. Collins v. Da-
vis, 249 N. C. 506, 104 S. E. 2d 737.

Registration upon a defective mortgage does not have the effect of actual or constructive notice of the existence of the mortgage deed, so as to affect a subsequent purchaser for value. Section 58-19.

Same—Mortgage for Future Advances—Effect of Actual Notice.—Where the plaintiffs took a mortgage from A. to secure future advancements, there being a prior mortgage to B. to secure a debt, it was held that if after the execution of the plaintiffs' mortgage, and before they had made any part of or all the advancements stipulated, they had been fixed with actual notice of prior mortgages, equity would be equitably entitled to rescind the former ones, and have them made at their peril; but if they were not so fixed, with notice before they paid out their money, their legal title may prevail notwithstanding the registration for repayment. Todd, etc., Co. v. Outlaw, 79 N. C. 235.

Same—Corporate Deed.—Where the execution of a corporate deed of trust was not proved as the statute required, its registration was without warrant or authority of law, and as against creditors and purchasers for value it was not registered until subsequently probated in proper form and again registered. National Bank v. Hill, 226 Fed. 102.

VI. PLACE OF REGISTRATION

County of Actual Personal Residence.—The mere fact that a person had his actual personal residence in a certain county does not constitute residence. The purpose of the statute is to have the deed of trust or mortgage of personalty registered in the county of the personal residence of the mortgagor, not in the county of the land. Where a mortgage on real and/or personal property, filed, indexed and re-

filing, recording and indexing such blank or master form shall be $5.00. When any deed, mortgage, deed of trust, or other instrument conveying an interest in, or creating a lien on, real and/or personal property, re-

fers to the provisions, terms, covenants, conditions, obligations, or powers set forth in any such blank or master form recorded as herein authorized, and states the office of recordation of such blank or master form, book and page where same is recorded such reference shall be equiva-

lent to setting forth in extenso in such deed, mortgage, deed of trust, or other instrument conveying an interest in, or creating a lien on, real and/or personal property, the provisions, terms, covenants, conditions, obligations and powers set forth in such blank or master form. Provided this section shall not apply to Chowan, Stanly, Iredell, Yates, Watauga, Guilford, Camden, Transylvania, Jackson, Washington, Alleghany, Bladen, Halifax, Ashe, Dare, Beaufort, Moore, Swain, Orange, Granville, Perquimans, Martin, Vance, Columbus, Cartaret, Cumberland, Cleveland, Avery, Sampson counties. (1935, c. 153.)

Editor's Note.—The scheme authorized by this section has obvious advantages and disadvantages. The advantages lie in the shortening of the later instruments. There will be some saving in recording fees to persons and corporations giving or taking numerous deeds, deeds of trust, and mort-

gages, especially documents of a bulky character, such as

some corporate mortgages. The disadvantages are that per-

sons concerned with the subsequent documents will be obliged
to examine the record of the master form in order to be sure what the provisions of the documents are. Furthermore, if single provisions as distinguished from all the provisions of the master form may be incorporated by reference to the master form, the device is dangerous. 13 N. C. Law Rev. 396. It is hard to see why the section authorizes specifically a master form for mortgages and deeds of trust, but does not mention deeds. Deeds are included in the words "other in-

strument conveying an interest in—real and/or personal property," but so are mortgages. The intent to include deeds is made clear, however, by the specific mention of deeds. Deeds are included in the words "conveying an interest in" personal property. Id.

§ 47-21. Counties may provide for photographic or photostatic registration.—The board of county commissioners of any county is hereby authorized and empowered to provide for photographic or photostatic recording of all instruments filed in the office of the register of deeds and in the office of the clerk of the superior court and in other offices of such county where said board may deem such recording feasible. The board of county commissioners may also provide for filing such copies of said instruments in loose leaf binders. (1941, c. 286.)

For comment on the 1941 amendment, see 19 N. C. Law Rev. 513.

§ 47-22. Conditional sales of personal property.—All conditional sales of personal property in which the title is retained by the bargainer shall be reduced to writing and registered in the same manner, for the same fees and with the same legal effect as is provided for chattel mortgages, in the county where the purchaser resides, or, in
case the purchaser shall reside out of the state, then in the county where the personal estate or some part thereof is situated, or in case of choses in action, where the donee, bargainee or mortgagor resides. (Rev. s. 983; Code, s. 1275; 1891, c. 883.)

Cross References.—As to foreclosure in the event of a conditional sale, see § 45-24. As to chattel mortgages generally, see § 45-1 et seq.

In General.—Prior to the time when this section became operative, creditors of personal property, that is, sales, whether of contract as was reduced to writing or not, in which it was stipulated, that although the prop- erty should pass to the buyer, the title should pass to the person having the title at the time of the sale, are regarded as real or personal bargainee and used by him, the title to the same should not pass to him, but should remain in, and be retained by, the bargainor, until the bargainee should have paid the agreed price to be paid for it, to be reduced to writing and registered, is all persons claiming under the bargainee, without registration. Such sales became frequent and a public grievance. They were the source of much fraud, and many fraudulent practices. The bargainor having possession of the property, and being the apparent owner, easily obtained credit on the faith of it, and when it became necessary to resort to it to save the bargainor, it was found to have been sold to another bargainor, who retained the title. To cure this evil, the statute was passed. The bargainor really retained the title to the property so sold by him, only as a security for the pur- chase-money due. The Legislature, therefore, deemed it just and salutary, that he should be required to reduce the contract of sale to writing, and register the same, just as creditors are required to do to take the same legal effect as chattels mortgaged. Empire Drill Co. v. Alli- son, 94 N. C. 548, 552.

The purpose of this section requiring all conditional sales of personal property to be reduced to writing and registered, is to protect creditors and purchasers for value. It is no part of its purpose to render such sales, whether in writing or not, invalid as between the parties to it. As between them, such sale has the same qualities and is just as effect- 2VNe as it would have, and may be proven by the like evi- dence as before the statute was enacted, and the parties may have recourse to the same extent and manner of claim and action, as that given by law to chattel mortgages. But chattel mortgages are not required to be reduced to writing, exempt from registration. Observer Co. v. Little, 175 N. C. 663, 137 S. E. 874.

Priority between Vendor and Mortgagee of After-Acquired Property. — Under this section conditional sales are regarded as chattel mortgages and void as to creditors and purchasers, except from registration. Observer Co. v. Little, 175 N. C. 62, 94 S. E. 526.

PRIORITY BETWEEN WIDOWER'S YEAR'S ALLOWANCE AND VENDOIR'S RIGHTS. — Prior to the enactment of this section, a conditional sale contract was valid without registration, and only became of record on the books of the county or state. Perry v. Young, 103 N. C. 463, 466, 11 S. E. 531.

SUFFICIENCY OF FORM.—The certificate of registration of a conditional sale of personal property, as a mortgage, is not complete until it is signed by the clerk of the court of that county, and in the caption of the contract also appears the name of the county and state in which it had been registered, and the reference to the record of the paper in which the certificate of registration of the parties sufficiently appears, it was held, that the contract is sufficient in form for the purposes of registration as to the venue, the name of the party, and as to its having been sufficiently acknowledged; the fact that it was sworn to as well as subscribed is regarded as surplusage and immaterial. Manufacturers' Finance Co. v. Amazon Cotton Mills Co., 182 N. C. 406, 109 S. E. 67.

No Registration or Writing as between Parties.—As between the parties, a conditional sale is binding without reg- istration, and is only void if not reduced to writing and registered. Butts v. Screws, 95 N. C. 215; Kornegay v. Kornegay, 109 N. C. 188, 190, 13 S. E. 770.

Purpose of Section.—Forfeiture Proceedings by Govern- ment. — This section is designed for the protection of the creditors or purchasers for value, without notice, and the government of the United States, in a forfeiture proceed- ing, where the property has passed into the hands of a receiver for the act gives to conditional sales the same effect as that given by law to chattel mortgages. But chattel mortgages are not required to be reduced to writing, except from registration, and thus, by virtue of this section, where a condi- tional sale contract has not been registered, a subsequent sale or purchase from a corporation containing an after-acquired property clause, is void as to creditors and purchasers, except from registration. Cutter Realty Co. v. Dunn Moneyhun Co., 204 N. C. 651, 653, 169 S. E. 274.

No Notice Will Take Place of Registration.—No notice however formal or formal can supply notice by regis- tration, and thus, by virtue of this section, where a condi- tional sale contract has not been registered, a subsequent sale from the corporation containing an after-acquired property clause, is void as to creditors and purchasers, except from registration. Cutter Realty Co. v. Dunn Moneyhun Co., 204 N. C. 651, 653, 169 S. E. 274.

§ 47-24. Conditional sales or leases of railroad property. — When any railroad equipment and rolling stock is sold, leased or loaned on the condition that the title to the same is not transferred until the possession and use of the same by the vendee, lessee, or bailee, shall remain in the vendor, lessee or bailee until the terms of the contract, as to the payment of the installments, amounts or rentals payable, or the performance of other obligations thereunder, shall have been fully complied with, such contract shall be invalid as to any subsequent judgment creditor, or any subsequent purchaser for a valuable consideration without notice, unless:

1. The same is evidenced by writing duly acknowledged before some person authorized to take acknowledgments of deeds.

2. Such writing is registered as mortgages are registered, in the office of the register of deeds in at least one county in which such vendee, lessee or bailee of the equipment resides.

3. Each locomotive or car so sold, leased or loaned has the name of the vendor, lessee, or bailee, or the assignee of such vendor, lessee, or bailee plainly marked upon both sides thereof, followed by the word owner, lessee, or assignee as the case may be.

This section shall not apply to or invalidate any contract made before the twelfth day of March, one thousand eight hundred and eighty-three. (Rev. s. 985; Code, s. 2006; 1883, c. 416; 1907, c. 150, s. 1; Ch. C. S. 3313.)

§ 47-25. Marriage settlements. — All marriage settlements and other marriage contracts, whereby any money or other estate is secured to the wife or husband, shall be proved or acknowledged and registered in the same manner as deeds for lands, and shall be valid against creditors and purchasers for value only from registration. (Rev. s. 985; Code, ss. 1389, 1370, 1281; 1885, c. 147; L. C. C. 37, ss. 24, 25; 1785, c. 238; 1817-5, c. 193, s. 12; Ch. C. S. 3314.)

Cross Reference.—As to marriage settlements, void as to existing creditors, see § 47-19.

Place of Registration.—Registration of a marriage settlement, embracing the slaves of a feme, was held to be properly made in the county where the feme resided and the
Deed Possessing Two Characters.—A deed combining the two characters of a deed of trust to secure creditors, and a deed of settlement in trust for a wife and children, may overlap without violating the statute. Provided it has been duly proved and registered. Johnston v. Malcolm, 59 N. C. 120.

Registration after Three Years, as against Subsequent Creditors.—Where a married man, with his wife and children, proved and registered three years after the date of its execution, was held to be valid as against creditors, whose deeds were contracted after such registration. Johnston v. Malcolm, 59 N. C. 120.

Agreement in Effect Not a Marriage Settlement.—An agreement by which the husband consents that the wife may convert one tract of land, which is in nowise subject to his estate, into another tract of land, for which she signs and records a deed, and in which, in order to enable her to make the conversion, she stipulates to allow her to hold as her separate property the price of her land until it can be reinvested in another tract of land, is not a marriage settlement falling within the section. Teague v. Downs, 69 N. C. 280, 287.

The Law of What Time Governs.—Where a marriage took place, and a deed was made between husband and wife prior to 1869, it is governed by the law as it then existed and is not affected by changes in the marital relations brought about by the Constitution of 1868, and the statutes passed thereunder, although the deed was not registered until 1884. Walton v. Parish, 95 N. C. 259.

Registration in Another State.—An antenuptial contract entered into between a husband and wife domiciled in New York, where the property was originally situated, and which was duly registered in New York, but not in North Carolina, is good against the creditors of the husband. The property, although in New York at the time it was purchased, became in North Carolina and changed from what it originally was when the contract was signed. Hicks v. Skinner, 71 N. C. 539.

§ 47-26. Deeds of gift.—All deeds of gift of any estate of any nature shall within two years after the making thereof be proved in due form and registered, or otherwise shall be void, and shall be good against creditors and purchasers for value only from the time of registration. (Rev. s. 986; Code, s. 3252; 1885, c. 147; R. C., c. 37, s. 18; 1799, c. 315, s. 2; C. S. 3315.)

Cross Reference.—As to extension of time for registering deeds of gift, see § 47-27.

Editor's Note.—The time of the registration of deeds of gifts under this section has been unaffected by § 146-64 which extended the time in which certain instruments could be registered until 1927. The sections now in force have given rise to some conflict of opinion in the case of Booth v. Hairston, 193 N. C. 278, 136 S. E. 879. In that case A made a deed of gift of her property, which deed was not registered until after the statutory period of two years had expired. After such expiration A devised this land to her daughter. The question arose whether the effect of continuity without any interruption was lost in the deed which vested in the grantee the interest of the grantor in land sold by the grantor after the death of the testatrix (for the will speaks as of the date of the death of its maker) no vested rights of third parties were involved and that as between the grantor and the grantee the deed would be valid, even though not registered within two years, under the extension given by the above referred to statute. Though made withoutUYEN and dissent, it seems that the majority holding is correct. This conclusion may be justified upon the analogy of the effect of curative statutes upon a right of action already barred under the statute of limitations. The law of this country that where a right of action has been barred by the statute of limitations a subsequent statute extending the time of registration does not revalidate an action of right which had already barred. It may also be justified upon the ground of legislative intention as expressed by the word of the statute "extended". This word in its etymological sense conveys the idea of extending without any interruption. In the following part of the word "extended" as used in this statute cannot refer to the registration of a deed which has already been barred. Extension of time as applied here means the effect from the date of the time prescribed by this section is void, and that the registration is without power to bring it to life by the enactment of a statute lengthening the period in which it may be registered. (Rev. s. 146-64; 193 N. C. 154 S. E. 460; affirming Booth v. Hairston, 193 N. C. 278, 136 S. E. 879; 57 A. L. R. 1186, on rehearing.)

Forbearance to register the deed was differently worded. It was held that the requirement of recordation of deeds of gift applied only where creditors and purchasers were interested. Hancock v. Hovey, 1 N. C. 152. But the present section in plain terms is not affected by this holding.—Ed. Note.

"Making" means date of execution. The execution of a deed is not complete until the instrument is signed, sealed and delivered. Turpin v. Neighbors, 222 N. C. 694, 697, 59 S. E. (2d) 468.

Registration as Notice.—The registration of the prior voluntary deed is notice to the subsequent purchaser. Taylor v. Ratman, 22 N. C. 652.

Unregistered Deed Void Regardless of Fraud.—Where a deed appearing on its face to be a deed of gift is not registered within two years from its execution as required by this section. It is void against creditors and may not be revived by curative act of creditors of the grantor regardless of whether it was executed in fraud of creditors. Reeves v. Miller, 209 N. C. 662, 170 S. E. 253.

Acknowledgment and Registration after Lapse of Period.—Where the owner of lands executed a deed of gift thereto and delivered same to the grantee, and some three and a half years thereafter registered the same for registration, the acknowledgment of the execution was not a re-execution of the deed, and the deed of gift, not having been registered within two years of its execution, was void, and may not be revived by curative act of the legislature. Cutts v. McGhee, 221 N. C. 465, 50 S. E. (2d) 376.


§ 47-27. Deeds of easements.—All persons, firms, or corporations now owning or hereafter acquiring any deed or agreement for rights of way and easements of any character whatsoever shall record such deeds and agreements in the office of the register of deeds of the county where the land affected is situated. Where such deeds and agreements may have been acquired, but no use has been made thereof, the person, firm, or corporation holding such deed or agreement has no vested rights of third parties, and as between the grantor and the grantee the deed would be valid, even though not registered within two years, under the extension given by the above referred to statute. Though made without knowledge and dissent, it seems that the majority holding is correct. This conclusion may be justified upon the analogy of the effect of curative statutes upon a right of action already barred under the statute of limitations. The law of this country that where a right of action has been barred by the statute of limitations a subsequent statute extending the time of registration does not revalidate an action of right which had already barred. It may also be justified upon the ground of legislative intention as expressed by the word of the statute "extended". This word in its etymological sense conveys the idea of extending without any interruption. In the following part of the word "extended" as used in this statute cannot refer to
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§ 47-28. Powers of attorney.—Every power of attorney, wherever made or concerning whatsoever matter, may, on acknowledgment or proof of the same before any competent official, be registered in the county wherein the property or estate which it concerns is situate, and no power of attorney shall relate to the conveyance thereof, if it does not relate to the conveyance of any estate or property, then in the county in which the attorney resides or the business is to be transacted. (Rev., s. 987; Code, s. 1249; 1899, c. 235, s. 15; C. S. 3317.)

Cross Reference.—As to form for acknowledgment of instrument executed by attorney in fact, see § 47-43.

Power of Attorney Given by Married Woman.—See Hollingsworth v. Harman, 83 N. C. 153, prior to this section, holding that a power of attorney given by a married woman to dismiss an action concerning her land need not be registered to give it validity.

§ 47-29. Recording of bankruptcy records.—A copy of the petition with the schedules omitted beginning a proceeding under the United States Bankruptcy Act, or of the decree of adjudication in such proceeding, or of the order approving the bond of the trustee appointed in such proceeding, shall be recorded in the office of the register of deeds in North Carolina, and it shall be the duty of the register of deeds, on request, to record the same. The register of deeds shall be entitled to the same fees for such registration as he is now entitled to for recording conveyances. (1939, c. 254.)

For comment on this enactment, see 17 N. C. Law Rev. 344.

§ 47-30. Plats and subdivisions.—Any person, firm or corporation owning land in this State may have a plat thereof recorded in the office of the register of deeds of the county in which such land or any part thereof is situated, upon proof upon oath by the surveyor making such plat that the same is in all respects correct and was prepared from an actual survey by him made, giving the date of such survey, or if the surveyor making such plat is dead, or where land has been sold and conveyed according to a plat prepared by the surveyor, upon the oath of a duly licensed surveyor that the said map is in all respects correct and that the same was actually and fully checked and verified by him, giving the date on which the same was verified and checked. Such plat, when so proven and probated as deeds and other conveyances, shall be recorded either by transcribing a correct copy thereof upon or by permanently attaching the original to the records or in a book to be designated the "Book of Plats"; and when so recorded shall be duly indexed. Reference in any instrument heretofofore or hereafter executed to the record of any plat herein authorized or validated shall have the same effect as if the description of the lands as indicated on the record of the plat were set out in the instrument.

Where any map or plat has been recorded, either by transcribing a correct copy thereof upon or by permanently attaching the original to the records or in a book designated "Book of Plats," such map or plat shall be deemed to have been recorded in full compliance with this section, notwithstanding the fact that the same has not been probated in accordance with the provisions hereof; and the registration of all plats and maps which have been recorded by transcribing a correct copy thereof upon or by permanently attaching the original to the records or in a book designated "Book of Plats" is hereby validated fully as if the statute had been fully and completely complied with. (Rev., s. 2; 1933, c. 105; 1935, c. 219; 1941, c. 249; C. S. 3318.)

Editor's Note.—The amendment of 1935 so changed this section that a comparison is necessary to determine the full extent. The 1941 amendment added the provision as to recording plats when the surveyor making the plat is dead.

For comment on the 1941 amendment, see 19 N. C. Law Rev. 513.

Object in Enacting Section.—This section was enacted in view of a decision of the Supreme Court in Sexton v. Elizabeth City, 169 N. C. 385, 86 S. E. 344, in which it was held that a purchaser in reference to a second plat who had registered his deed would take precedence over one under a former plat, but who had failed to have his deed registered; this on the ground that, as no statute provided for registration of plats, the date of registration of the deed would determine the matter. Wittson v. Dowling, 179 N. C. 542, 547, 103 S. E. 18. Intended to Regulate Priorities.—The statute was designed to regulate priorities as between two conflicting dedications, and does not and was not intended to affect the general principles, dedication and acceptance, and the owner's right of revocation. Wittson v. Dowling, 179 N. C. 542, 547, 103 S. E. 18.

§ 47-31. Certified copies may be registered; used as evidence.—A duly certified copy of any deed or writing required or allowed to be registered may be registered in any county; and the registry or duly certified copy of any deed or writing when registered in the county where the land is situate may be given in evidence in any court of the state.

§ 47-32. Common plats to be recorded.—Any plats, surveys or maps required by law to be filed with the records of deeds or other public offices of any county shall be recorded in the office of the register of deeds thereof.

§ 47-33. Copy of plat to be filed in deeds.—If any conveyance be made for any estate in fee simple or any interest in fee simple, the grantor shall file a copy of the plat with the deed, in accordance with the provisions of law, and the register of deeds shall record the same in accordance with the provisions of law, and the register of deeds shall record the same in accordance with the provisions of law.
stroved instruments, see §§ 98-12, 98-13. As to certified copies of registered instruments as evidence, see § 8-18. As to certified copies of deeds, mortgages, etc., as evidence and for registry, see § 6-20.

Registration of Copies in Proper County Allowed.—This section and a certified copy of deeds erroneously registered to be recorded in the proper county. Weston v. Roper Lumber Co., 160 N. C. 263, 75 S. E. 800.

Proper Registration of the Original Presumed.—It is to be presumed that the deed was properly put upon the registry, until the contrary is made to appear, and nothing more is required to render the copy competent evidence when certified, as in the registered instrument. Sturke v. Etheridge, 71 N. C. 241; Love v. Hardin, 87 N. C. 249; Strickland v. Draughan, 83 N. C. 315, 317.

Copy of Contract Used in Evidence to Prove Lost Original.—For proof of the loss of a contract to convey land, a copy thereof, if shown to be correct, is admissible as secondary evidence to prove the contents of the original, though no search was made to ascertain whether the original was registered. Such a contract is valid between the parties without registration. Mauney v. Crowell, 84 N. C. 314.

Certified Copy 100 Years Old May Be Registered though Mutilated.—Under this section a certified copy of a deed over 100 years old, which showed that the original was a perfect deed of conveyance, is admissible to prove and register, though by reason of the mutilation of the record, the execution and/or delivery of the deed were lost; this being particularly true where an earlier certified copy of the same conveyance included the deed containing portions. Richmond Cedar Works v. Stringfellow, 236 Fed. 264.

Cited in United States v. 7,405.3 Acres of Land, 97 F. (2d) 417.

§ 47-32. Photostatic copies of plats, etc.; fees of clerks. In all special proceedings in which a plat, map or blue-print shall be filed as a part of the papers, the Clerk of the Superior Court may have a photostatic copy of said plat, map or blue-print made on a sheet of the same size as the leaves in the book in which the special proceeding is recorded, and when made, shall send said photostatic copy in said book at the end of the report of the commissioners or other document referring to said plat, map or blue-print. The Clerk of Superior Court shall be allowed a fee to be fixed by the County Commissioners not exceeding the sum of five dollars to be taxed in the bill of costs, which fee shall cover the cost of making said photostatic copy and all services of the clerk in connection therewith. (1931, c. 171.)

§ 47-33. Certified copies of deeds made by alien property custodian may be registered.—Any copy of a deed made, or purporting to be made, by the United States alien property custodian duly certified pursuant to Title twenty-eight, section six hundred sixty-one of United States Code by the department of justice of the United States, with its official seal impressed thereon, when the said certified copy reveals the fact that the execution of the original was acknowledged by the alien property custodian before a notary public of the department of justice of the United States, and that the official seal of the alien property custodian conveyed the lands and premises described in said registered copy to the vendees therein named, as said copy reveals, and title to such land shall pass by such recorded instrument. (1937, c. 5, s. 2.)

§ 47-34. Certified copies of deeds made by alien property custodian admissible in evidence.—The record of any such recorded copies of such instruments authorized in § 47-33 shall be admitted in evidence in all the courts of this state and the courts of the United States in the trial of any cause pending therein, the same as though and with like effect as if the original thereof had been probated and recorded as required by the law of North Carolina, and the record in the office of register of deeds of such recorded copy of such an instrument shall be presumptive evidence that the original of said copy was executed and delivered to the vendee, or vendees therein named, and that the original thereof has been lost or unintentionally destroyed without registration, and in the absence of legal proof to the contrary said recorded copy shall be evidence that the United States alien property custodian conveyed the lands and premises described in said registered copy to the vendees therein named, as said copy reveals, and title to such land shall pass by such recorded instrument. (1937, c. 5, s. 2.)

§ 47-35. Register to fill in deeds on blank forms with lines.—Registers of deeds shall, in registering deeds and other instruments, where printed skeletons or forms are used by the register, fill all spaces left blank in such skeletons or forms by drawing or stamping a line or lines in ink through such blank spaces. (1911, c. 6, s. 1; C. S. 3320.)

§ 47-36. Errors in registration corrected on petition to clerk.—Every person who discovers that there is an error in the registration of his grant, conveyance, bill of sale or other instrument of writing, may prefer a petition to the clerk of the superior court of the county in which said writing is registered, in the same manner as is directed for petitioners to correct errors in grants or patents, and if on hearing the same before said clerk it appears that errors have been committed, the clerk shall order the register of the county to correct such errors and make the record conformable to the original. The petitioner must notify his grantor and every person claiming title to or having lands adjoining those mentioned in the petition, thirty days previous to preferring the same. Any person dissatisfied with the judgment may appeal to the superior court as in other cases. (Rev. s. 1068; Code, s. 1266; R. C. c. 37, s. 28; 1790, c. 326, ss. 2, 3, 4; C. S. 3328.)

Cross Reference.—As to correction of grants, see § 146 et seq.

Proceedings provided for by this section are exclusive. Hopper v. Justice, 111 N. C. 419, 16 S. E. 636.

§ 47-37. Record of all certified copy used in evidence to show correctness of record. Where, by the mistake or oversight of the makers of a deed, the same is incorrectly written, they have no equity to call upon the grantee to correct the mistake in the books of registry, as they have an ample remedy under this section and a promise by the grantee to make such correction at his own expense and trouble would be nudum pactum. Love v. Hardin, 87 N. C. 249; Strickland v. Draughan, 83 N. C. 315, 317.

The Register May Correct His Mistake.—The order of registration by the clerk is a continuous one, with which the register may subsequently comply upon inadvertently having certified a copy that was contained upon his book. Brown v. Hutchinson, 155 N. C. 265, 71 S. E. 352.

Original Deed as Evidence to Show Mistake of Register.—The original deed may be shown in evidence to correct an omission by the register of deeds of the signature of the
justice of the peace before whom the deed was acknowledged. Brown v. Hutchinson, 155 N. C. 205, 71 S. E. 302.

Art. 3. Forms of Acknowledgment, Probate and Order of Registration.

§ 47-37. Adjudication and order of registration.—The form of adjudication and order of registration required by § 47-14 shall be substantially as follows:

North Carolina, ...... County.

The foregoing (or annexed) certificate of (here give name and official title of the officer signing the certificate passed upon) is adjudged to be correct. Let the instrument and the certificate be registered.

This ...... day of .........., A. D. ...... (Official seal.)

(Signature of officer.)

But the order of registration may be substantially in the form: "Let the same with this certificate be registered." (Rev., ss. 1001, 1010; 1899, c. 233, s. 7; 1905, c. 344; C. S. 3328.)

It is a sufficient compliance with this section for the clerk of the superior court of the county wherein the land lay, to certify that "the foregoing and annexed certificate of (naming the clerk), a clerk of the Supreme Court, etc., duly authenticated by his official seal, is adjudged to be correct, in due form and according to law, and the foregoing and annexed deed of trust is adjudged to be duly proved, etc." Kleybolte & Co. v. Black Mountain Timber Co., 351 N. C. 615, 66 S. E. 663.

§ 47-38. Acknowledgment by grantor.—Where the instrument is acknowledged by the grantor or maker, the form of acknowledgment shall be in substance as follows:

North Carolina, ...... County.

I (here give the name of the official and his official title), do hereby certify that (here give the name of the grantor or maker) personally appeared before me this day and acknowledged the due execution of the foregoing instrument. Witness my hand and (when an official seal is required by law) official seal this ...... day of ...... (day of month), A. D. ...... (year).

(Official seal.)

(Signature of officer.)

(Certificates of acknowledgment will be liberally construed and will be upheld if in substantial compliance with the statute. Freeman v. Morrison, 214 N. C. 240, 199 S. E. 12.

"Acknowledgment" describes the act of personal appearance before a proper officer and there stating to him the fact of the execution of the instrument as a voluntary act. Freeman v. Morrison, 214 N. C. 240, 199 S. E. 12.

Acknowledgment Taken Over Telephone. — Section 39-7, providing the proper mode of conveyance of real property by husband and wife of his lands, tenements and hereditaments, contemplates that the acknowledgment and the privy examination of the wife provided for shall be made in the presence of the officer, which is emphasized by this section and section 47-39 as to acknowledgments of grants and married women; and such acknowledgment, taken of the wife over a telephone, does not meet the statutory requirements, and renders the conveyance invalid as to her. Southern State Bank v. Summer, 187 N. C. 765, 122 S. E. 848.

Position of the Name of the Justice.—It is not necessary to the validity of the probate of a deed that the signature of the name of the justice before whom it was acknowledged should be recorded at the end, when it appears from the certificate as recorded and from the clerk's adjudication thereon that his name appeared in the first line, and that in fact he properly took the acknowledgment. Brown v. Hutchinson, 155 N. C. 205, 71 S. E. 302.

Cited in McClure v. Crow, 196 N. C. 657, 146 S. E. 713.

§ 47-39. Private examination of wife.—When an instrument purports to be signed by a married woman, the form of certificate of her acknowledgment and private examination before any officer authorized to take the same shall be in substance as follows:

North Carolina, ...... County.

I (here give name of the official and his official title), do hereby certify that (here give name of the married woman who executed the instrument), wife of (here give husband's name), personally appeared before me this day and acknowledged the due execution of the foregoing (or annexed) instrument; and the said (here give married woman's name), being by me privately examined, separate and apart from her said husband, touching her voluntary execution of the same, doth state that she signed the same freely and voluntarily, without fear or compulsion of her said husband or any other person, and that she doth still voluntarily assent thereto.

Witness my hand and (when an official seal is required by law) official seal, this ...... (day of month), A. D. ...... (year).

(Official seal.)

(Signature of officer.)

Cross Reference.—As to conveyances by husband and wife and requirement of private examination of wife, see § 39-7 et seq.

"And Doth Voluntarily Assent Thereto" Not Essential.—The privy examination of a feme covert which sets out that she signed the deed of her own free will and accord, and without any compulsion of her husband, is sufficient, without adding the words, "and doth voluntarily assent thereto." Robbins v. Harris, 96 N. C. 557, 2 S. E. 70.

§ 47-40. Husband's acknowledgment and wife's examination before same officer.—Where the instrument is acknowledged by both husband and wife or by other grantor before the same officer the form of acknowledgment shall be in substance as follows:

North Carolina, ...... County.

I (here give name of official and his official title), do hereby certify that (here give name of the grantors whose acknowledgment is being taken) personally appeared before me this day and acknowledged the due execution of the foregoing (or annexed) instrument, and the said (here give name of the married woman or women), wife (or wives) of (here give name of husband or husbands), being by me privately examined, separate and apart from her said husband, touching her voluntary execution of the same, doth state that she signed the same freely and voluntarily, without fear or compulsion of her said husband or any other person, and that she doth still voluntarily assent thereto.

Witness my hand and (when an official seal is required by law) official seal, this ...... (day of month), A. D. ...... (year).

(Official seal.)

(Signature of officer.)

Cross Reference.—As to necessity of seal of probating officer when such officer has an official seal, see § 45-5.

§ 47-41. Corporate conveyances.—The following
forms of probate for deeds and other conveyances executed by a corporation shall be deemed sufficient, but shall not exclude other forms of probate which would be deemed sufficient in law. If the deed or other instrument is executed by the president or vice president of the corporation, is sealed with its corporate seal, and is attested by its secretary or assistant secretary, or, in case of a bank, by its secretary, assistant secretary, cashier or assistant cashier, the following form of acknowledgment is sufficient:

(State and county, or other description of place where acknowledgment is taken)

I, ........................................ (Name of officer taking acknowledgment) taking acknowledgment, personally came before me (here give name and official title of officer who signs certificate) and officially came before me (here give the name and official title of the officer who signs this certificate), A. B. (here give the name of the subscribing witness), who, being by me duly sworn, says that he knows the common seal of the (here give the name of the corporation), and is also acquainted with C. D., who is the president of said corporation, and that he, the said A. B., is the (official title of office, if officer taking acknowledgment) of said president of said corporation. Witness my hand and official seal, this the ...... day of (year).

(Official seal.)

(My commission expires) (Date of expiration of commission as notary public)
Witness my hand and official seal, this the ...... day of (Month) (Year).

(Signature of officer taking acknowledgment) (Official seal, if officer taking acknowledgment has one.)

(a) The words “a corporation” following the blank for the name of the corporation may be omitted when the name of the corporation ends with the word “Corporation” or “Incorporated.”

(b) The words “My commission expires” and the date of expiration of the notary public’s commission may be omitted except when a notary public is the officer taking acknowledgment.

(c) The words “and official seal” and the seal itself may be omitted when the officer taking the acknowledgment has no seal or when such officer is the clerk, assistant clerk or deputy clerk of the superior court of the county in which the deed or other instrument acknowledged is to be registered.

If the instrument is executed by the president or presiding member or trustee and two other members of the corporation, and sealed with the common seal, the following form shall be sufficient:

North Carolina, ....... County.

This ...... day of ....... A. D. ....... personally came before me (here give the name and official title of the officer who signs this certificate), A. B. (here give the name of the subscribing witness), who, being by me duly sworn, says that he knows the common seal of the (here give the name of the corporation), and is also acquainted with C. D., who is the president (or presiding member or trustee), and also with E. F. and G. H., two other members of said corporation; and that he, the said A. B., saw the said president (or presiding member or trustee) and the two said other members sign the said instrument, and saw the said president (or presiding member or trustee) affix the said common seal of said corporation thereto, and that he, the said subscribing witness, signed his name as such subscribing witness in the presence of the said president of said corporation in their presence. Witness my hand and (when an official seal is required by law) official seal, this ...... day of ....... (year).

(Official seal.)

(Signature of officer.)

If the deed or other instrument is executed by the president, presiding member or trustee of the corporation, and sealed with its common seal, and attested by its secretary or assistant secretary, either of the following forms of proof and certificate thereof shall be deemed sufficient:

North Carolina, ....... County.

This ...... day of ....... A. D. ....... personally came before me (here give name and official title of the officer who signs the certificate) A. B. (here give the name of the officer attesting secretary or assistant secretary), who, being by me duly sworn, says that he knows the common seal of (here give the name of the corporation), and is acquainted with C. D., who is the president of said corporation, and that, the said A. B., is the secretary (or assistant secretary) of the said corporation, and saw the said president sign the foregoing (or annexed) instrument, and saw the said common seal of said corporation affixed to said instrument by said president (or that he, the said A. B., secretary or assistant secretary as aforesaid, affixed said seal to said instrument), and that he, the said A. B., signed his name in attestation of the execution of said instrument in the presence of said president of said corporation. Witness my hand and (when an official seal is required by law) official seal, this the ...... day of ....... (year).

(Official seal.)

(Signature of officer.)

North Carolina, ....... County.

This is to certify that on the ...... day of ....... 19...., before me personally came ....... (president, vice-president, secretary or assistant secretary, as the case may be), with whom I am personally acquainted, who, being by me duly sworn, says that ....... is the president (or vice-president), and ....... is the secretary (or assistant secretary) of the ...... the corporation described in and which executed the foregoing instrument; that he knows the common seal of said corporation; that the seal affixed to the foregoing instrument is said common seal, and the name of the corporation was subscribed thereto by the said president (or vice-president), and that said president (or vice-president) and secretary (or assistant secretary) subscribed their names thereto, and said common seal was affixed, all by order of the board of directors of said corporation, and that the said instrument is the act and deed of said corporation. Witness my hand and (when an official seal is required by law) official seal, this the ...... day of ....... (year).

(Official seal.)

(Signature of officer.)
If the deed or other instrument is executed by the signature of the president, presiding member or trustee of the corporation, and sealed with its common seal and attested by its secretary, or assistant secretary, the following form of proof and certificate thereof shall be deemed sufficient:

This "..." day of ..., A. D. ..., personally came before me (here give name and official title of the officer who signs the certificate) A. B., who, being by me duly sworn, says that he is president (presiding member or trustee) of the "..." Company, and that the seal affixed to the foregoing (or annexed) instrument in writing is the corporate seal of the company, and that said writing was signed and sealed by him in behalf of said corporation by its authority duly given. And the said A. B. acknowledged the said writing to be the act and deed of said corporation.

(Official seal.)

(__Signature of officer__)  

If the officer before whom the same is proven be the clerk or deputy clerk of the superior court of the county in which the instrument is offered for registration, he shall add to the foregoing certificate the following: "Let the instrument with the certificate be registered."

All corporate conveyances probated and recorded prior to February 14, 1939, wherein the signature of the president, presiding member or trustee is used in stead of the secretary, and otherwise regular, are hereby validated as if attested by the secretary of the corporation. (Rev. s. 1005; 1899, c. 235, s. 17; 1901, c. 2, s. 110; 1905, c. 114; 1907, c. 927, s. 1; 1939, c. 20, ss. 1, 2; 1943, c. 172; C. S. 3326.)

Cross Reference.—As to sections validating certain corporate acknowledgments, see §§ 47-70, 47-71, 47-72, 47-73.

Editor's Note.—The 1941 amendment inserted the first form of acknowledgment and paragraphs (a), (b) and (c).

Power of Directors to Mortgage Corporate Property.—This section appears to recognize inferentially the power of a board of directors to mortgage the corporate property. W. & L. E. v. Mazzeo, 154 N. C. 390, 68 S. E. 17.

Reference to Forms of Probate Sufficient by Common Law.—This section providing that it shall not exclude "other forms of probate which would be deemed sufficient in accordance with the common law," makes it a valid execution and probate of the deed as an act of the corporation itself; and were it otherwise, the defects as to the "seal" seems to be cured under the provisions of § 47-72, and as to signatures of the officials by §§ 47-73. Bailey v. Hassell, 184 N. C. 450, 115 S. E. 156.

Reference to Forms of Probate Sufficient by Common Law.—This section providing that the corporate officials acknowledged the instrument as the act and deed of the corporation, or that the official executing the deed in behalf of and under authority from the corporation acknowledged it to be "his" act and deed, as such. Wrelle v. Murphy, 154 N. C. 69, 69 S. E. 210.

Same—Seal of Corporation.—It is not necessary to the valid probate of a deed made by a corporation that it literally follows the statutory printed forms of this section and is attested by an officer of the corporation, provided the facts required by the statute which expressly provides for the form of acknowledgment and paragraphs (a), (b) and (c). Withrell v. Murphy, 154 N. C. 82, 69 S. E. 748.

Same—Attestation of Banking Corporation Conveyances by Cashier.—In all forms of proof and certificate for deeds and conveyances executed by banking corporations, which corporations have no corporate officers, the cashier of said banking corporation may attest such instruments; all deeds and conveyances executed prior to February 14, 1939, by banking corporations, where the cashier of said banking corporation has attested said said instruments, which deeds and conveyances are otherwise regular, are hereby validated. (1939, c. 20, s. 25.)

Cross Reference.—As to probate of deeds by examination of subscribing witness in certain cases, when corporation has ceased to exist, see § 47-16.

§ 47-43. Form of certificate of acknowledgment of instrument executed by attorney in fact.—When an instrument purports to be signed by parties acting through another by virtue of the execution of a power of attorney, the following form of certificate shall be deemed sufficient, but shall not exclude other forms which would be deemed sufficient in law:

"North Carolina, .........County.
I (here give name of the official and his official title), do hereby certify that (here give name of attorney in fact), attorney in fact for (here give names of parties who executed the instrument through attorney in fact), personally appeared before me this day, and being by me duly sworn, says that he executed the foregoing and annexed instrument for and in behalf of (here give names of parties who executed the instrument through attorney in fact), and that his authority to execute and acknowledge said instrument is contained in an instrument duly executed, acknowledged, and recorded in the office of (here insert name of official who recorded), and that the instrument is executed under and by virtue of the authority given by said instrument: granting him power of attorney; that the said (here give name of attorney in fact) acknowledged the due execution of the foregoing

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and annexed instrument for the purposes therein expressed for and in behalf of the said (here give names of parties who executed the instrument through attorney in fact).

WITNESS my hand and official seal, this day of _______ , (year) _______.

(Official Seal) _____________________________________________

Signature of Officer

(1941, c. 235.)

§ 47-44. Clerk's certificate upon probate by justice of peace. — When the proof or acknowledgment of any instrument is had before a justice of the peace of some other state or territory of the United States, or before a justice of the peace of this state, but of a county different from that in which the instrument is offered for registration, the form of certificate as to his official position and signature shall be substantially as follows:

North Carolina, County.

I, A. B. (here give name and official title of a clerk of a court of record), do hereby certify that C. D. (here give the name of the justice of the peace taking the proof, etc.), was at the time of signing the foregoing (or annexed) certificate an acting justice of the peace in and for the county of _______ and state (or territory) of _______ , and that his signature thereto is in his own proper handwriting.

In witness whereof, I hereunto set my hand and official seal, this day of _______.

A. D. _______.

(Official seal) _____________________________________________

(Signature of officer.)

(Rev., s. 1006; 1859, c. 235, s. 8; C. S. 3327.)

§ 47-45. Clerk's certificate upon probate by nonresident official without seal. — When the proof or acknowledgment of any instrument is had before any official of some other state, territory or country and such official has no official seal, then the certificate of such official shall be accompanied by the certificate of a clerk of a court of record of the state, territory or country in which the official taking the proof or acknowledgment resides, of the official position and signature of such official; such certificate of the clerk shall be under his hand and official seal and shall be in substance as follows:

_______, County.

I, A. B. (here give name and official title of the clerk of a court of record as provided herein), do hereby certify that C. D. (here give name of the official taking the proof, etc.) was at the time of signing the foregoing (or annexed) certificate a (here give the official title of the officer taking proof, etc.) in and for the county of _______ _______ and state of _______ (or other political division of the state, territory or country, as the case may be), and that his signature thereto is in his own proper handwriting.

In witness whereof, I hereunto set my hand and official seal, this day of _______.

A. D. _______.

(Official seal) _____________________________________________

(Signature of Clerk.)

(Rev., s. 1007; 1899, c. 235, s. 8; C. S. 3328.)

§ 47-46. Verification; form of entry. — The registers of deeds in the several counties of the State shall, after each instrument or document has been transcribed on the record, verify the record with the original and the entry of record shall read "Recorded and Verified," and the same shall be without extra charge. (1899, c. 320, s. 1.)

Art. 4. Curative Statutes; Acknowledgments; Probates; Registration.

§ 47-47. Defective order of registration; "same" for "this instrument." — Where instruments were admitted to registration prior to March 2, 1905, and the clerk's order for the registration used the word "same" in place of "this instrument," the said registrations are good and valid. (Rev., s. 1010; 1905, c. 344; C. S. 3329.)

§ 47-48. Clerk's certificate failing to pass on all prior certificates. — When it appears that the clerk of the superior court or other officer having the power to probate deeds, in passing upon deeds or other instruments, and the certificates thereto, having more than one certificate of the same or a prior date, by other officer or officers taking acknowledgment or probating the same, has in his certificate or order mentioned only one or more of the preceding or foregoing certificates as to the same or other instrument to probate, the said clerk or other probating officer shall be deemed sufficient and the probate and registration of said deed or instrument is hereby made and declared valid for all intents and purposes. (1917, c. 237; C. S. 3330.)

§ 47-49. Defective certification or adjudication of clerk, etc., admitting to registration. — In all cases where, prior to January first, nineteen hundred and nineteen, instruments by law required or authorized to be registered, with certificates showing the acknowledgment or proof of execution thereof as required by the laws of the state of North Carolina, have been ordered registered by the clerk of the superior court or other officer qualified to pass upon probates and admit instruments to registration, and actually put upon the books in the office of the register of deeds as if properly proven and ordered to be registered, all such probates and registrations are hereby validated and made as good and sufficient as if properly proven and ordered to be registered, and all such probates and registrations are hereby validated and made as good and sufficient as if properly proven and ordered to be registered.

In all cases where, prior to January 1, 1941, where it appears from the records in the office of the register of [301]
§ 47-51. Official deeds omitting seals. — All deeds executed prior to July 1, 1939, by any sheriff, commissioner, receiver, or other officer authorized to execute a deed by virtue of his office or appointment, in which the officer has omitted to affix his seal after his signature, shall not be invalid on account of the omission of such seal. (1907, c. 807; 1917, c. 69, s. 1; Ex. Sess. 1924, c. 64; 1941, c. 13; C. S. 3333.)

Editor's Note.—The acts of 1924 and 1941 each changed the date mentioned in this section.

§ 47-52. Defective acknowledgment on old deeds validated. — The clerk of the superior court may order registered any deed, or other conveyance of land, in all cases where the instrument and probate bear date prior to January first, one thousand nine hundred and seven (1907) where the acknowledgment, private examination, or other proof of execution, has been taken or had before a notary public residing in the county where the land is situate, where said officer failed to affix his official seal after his signature, shall not be invalid on account of the omission of such seal. (1907, c. 807; 1917, c. 69, s. 1; Ex. Sess. 1924, c. 64; 1941, c. 13; C. S. 3333.)

§ 47-53. Probates omitting official seals. — In all cases where the acknowledgment, private examination, or other proof of the execution of any deed, mortgage, or other instrument authorized or required to be registered has been taken or had by or before any commissioner of affidavits and deeds of this state, or clerk or deputy clerk of a court of record, or notary public of this or any other state, territory, or district, and such deed, mortgage, or other instrument has heretofore been recorded in any county in this state, but such commissioner, clerk, deputy clerk, or notary public has omitted to attach his or her official or notarial seal thereto, or it does not appear of record that such seal was attached to the original deed, mortgage, or other instrument, or such commissioner, clerk, deputy clerk, or notary public has certified the same as under his or her "official seal," "notarial seal," or words of similar import, and no such seal appears of record, then all such acknowledgments, private examinations, or proofs taken prior to January first, gages, or other instruments, and the registration thereof, are hereby made in all respects valid and binding. The provisions of this section apply to acknowledgments, private examinations, or proofs taken prior to January first, 1929. (Rev., s. 1012; 1907, cc. 213, 665, 971; 1911, c. 4; 1915, c. 36; 1929, c. 8, s. 1; C. S. 3334.)

Editor's Note.—The Act of 1929 amended the last two sentences as formerly appearing in this section to read as the last sentence above.

§ 47-54. Registrations by register's clerks or deputies.—All registration of deeds and other instruments heretofore made by the several registers of deeds of the several counties of the state by their deputies and clerks, and signed in the name of the register of deeds by a deputy or clerk, and when said registration is in all other respects regular, are hereby validated and declared of the same force and effect as if signed in the name of the register and not by a deputy or clerk. (1911, c. 184, s. 1; C. S. 3335.)

§ 47-55. Before officer in wrong capacity or out of jurisdiction.—All deeds, conveyances, or other instruments permitted by law to be registered in this state, which have been probated or ordered to be registered previous to January first, one thousand nine hundred and thirteen, before any officer of this or any other state or country, authorized by law to take acknowledgments or to order registration, where the certificate of the probate or order of registration is sufficient in form, but appears to have been certified by the officer in some capacity other than that in which such officer was authorized to act, or appears to have been made out of the county or district authorized by law, but within the state, and where the instrument with such certificate has been recorded in the proper county, are hereby declared to have been duly proved, probated and recorded, and to be valid. (Rev., ss. 1017, 1030; 1913, c. 125, s. 1; C. S. 3336.)

Deeds, etc., Ordered to Be Registered by Justices Validated.—All deeds, conveyances, or other instruments permitted by law to be registered in this State which have been probated or ordered to be registered by any of the justices of the peace appointed under the Act of nineteen hundred and twenty-five, where the certificate of the probate is sufficient in form, but appears to have been certified by one of the several justices of the peace named in said act, are hereby declared to have been duly proved, probated and recorded, and to be valid. 1927, ch. 199, section 2.

Has no Retroactive Effect as to Vested Rights of Third Parties.—Acts validating irregular acknowledgments and probates while good, as between the parties, and as to third parties from the passage of the acts, would not validate such acknowledgments and probates as to third parties whose rights had already been acquired prior to the validating statutes. Gordon v. Collett, 107 N. C. 363, 12 S. E. 332; Williams v. Kerr, 113 N. C. 306, 310, 18 S. E. 501.

§ 47-56. Before justices of peace, where clerk's certificate or order or registration defective.—In every case where it appears from the record of the office of any register of deeds in this state that a justice of the peace in this state has taken and certified the proof of any instrument required by law to be registered, or the privy examination of a married woman therein, and the deed and certificate have been registered prior to the first Monday in April, nineteen hundred and twenty-five, where the certificate of the probate is sufficient in form, but appears to have been certified by one of the several justices of the peace named in said act, are hereby declared to have been duly proved, probated and recorded, and to be valid, 1927, ch. 199, section 2.

Has no Retroactive Effect as to Vested Rights of Third Parties.—Acts validating irregular acknowledgments and probates while good, as between the parties, and as to third parties from the passage of the acts, would not validate such acknowledgments and probates as to third parties whose rights had already been acquired prior to the validating statutes. Gordon v. Collett, 107 N. C. 363, 12 S. E. 332; Williams v. Kerr, 113 N. C. 306, 310, 18 S. E. 501.
§ 47-57. Probates on proof of handwriting of maker refusing to acknowledge.—All registrations of instruments, prior to February fifth, one thousand eight hundred and ninety-seven, required or allowed by law to be registered, which were ordered or registered, and prove of the handwriting of the grantor or maker who refused to acknowledge the execution, are hereby validated. (Rev. s. 1026; 1897, c. 28; C. S. 3338.)

§ 47-58. Before judges of superior or supreme courts or clerks before 1889.—Wherever the judges of the supreme or the superior court, or the clerks or deputy clerks of the superior court, or courts or their deputies, or by assistant clerks of the superior court, or justice of the supreme court, to which the privy examinations of femes covert, whose names are signed to such deeds, and have ordered said deeds to registration, and the same have been registered, all such probates, privy examinations and registrations are validated. (Rev., s. 1009; Code, s. 1260; 1871-5, c. 200, s. 1; 1889, c. 233; 1891, c. 484; C. S. 3339.)

In General.—It is evident from the general scope of all the legislation upon this important subject that this section was not intended to validate errors in the handwriting of the maker, but only intentional breaches of propriety in disregarding a plain prohibition of the statute, and committing a breach of propriety in breaking over the barriers which could be cured without injury to the rights of others. Weston v. Roper Lumber Co., 160 N. C. 263, 75 S. E. 800, 801.

Defective Probates of County Courts Embraced.—Where it is shown that this section does not refer to probates taken by the county courts, but to those of the clerks of said counties, it was held that the probates of the county courts were intended to be validated. The phraseology and punctuation, as well as the grammatical construction, of the statute, lead to that conclusion. If the other meaning had been intended, the preposition "of" would have been inserted before the words "courts of pleas and quarter sessions." The section also validates registrations made upon such probates. Weston v. Roper Lumber Co., 160 N. C. 263, 75 S. E. 800, 801.

Was Not Intended to Validate Intentional Breaches of Authority.—There was no purpose to give efficacy and vitality to a certificate of probate or adjudication of its correctness, where the error consisted not in misconceiving the legal requirements, but in disregarding a plain prohibition concocted by law, in disregarding a plain prohibition of the statute, and committing a breach of propriety in breaking over the barriers constructed to limit their authority. It was never intended that an officer, who exercised authority in the face of a plain statutory prohibition, should under the curative provisions of this section derive benefit from thus disregarding such a law, or from a power affirmed by law, in disregarding a plain prohibition of the statute, and committing a breach of propriety in breaking over the barriers constructed to limit their authority. It was never intended that an officer, who exercised authority in the face of a plain statutory prohibition, should under the curative provisions of this section derive benefit from thus disregarding such a law, or from a power affirmed by law, in disregarding a plain prohibition of the statute, and committing a breach of propriety in breaking over the barriers constructed to limit their authority. Freeman v. Person, 106 N. C. 251, 253, 10 S. E. 1037.

Probate of Officer Who is a Party Not Validated.—This section does not validate probates ordered by a judge of the superior court, even if the judge is a party to the probate. Freeman v. Person, 106 N. C. 251, 10 S. E. 1037, and it is there held that it cannot be construed to validate the probate of an officer in regard to a matter in which he or his wife was a party. White v. Collett, 107 N. C. 302, 12 S. E. 332.

Probate by Deputy Clerks.—At the time, and prior to the enactment of this section, deputy clerks could not, take proof of deeds and other instruments requiring registration; but at an erroneous impression from a misapprehension of the law, that they and the judges of the courts had authority to do so, and in many instances they undertook to exercise such authority. This was attributable to confused legislation on the subject of the probate of deeds and other instruments, and the fact that such officers were invested with such power before the present statutes on that subject were enacted. To cure this wrong impression, and render effectual many official acts done by home officials under a misapprehension of the law, the Legislature enacted this section. Tatom v. White, 95 N. C. 453, 458. Deputy clerks are now authorized by section 47-1 to take probate on instruments.—Ed. Note.

Same—Signing by Deputy Clerk.—This section validates probates and registrations taken before a deputy clerk prior to January 1, 1889, and it is there held whether the deputy clerk, in making the probate, signed as deputy clerk or merely signed the name of the clerk thereto. Gordon v. Collett, 107 N. C. 302, 12 S. E. 332.

Constitutionality.—This curative statute is constitutional and valid if rights of third parties have not accrued, but it would not divest the title of a party acquired by a subsequent deed from the same grantor which is registered prior to the enactment of the curative statute. Gordon v. Collett, 107 N. C. 362, 12 S. E. 332.

Scope of the Original Section.—This section originally rendered valid all probates of deeds, etc., made before the officers therein named, prior to 12 February, 1872; and registrations made in pursuance of such probates were held embraced within the operation of the statutes, although made after that date, but before the enactment of the Code. Tatom v. White, 95 N. C. 453.

§ 47-59. Before clerks of inferior courts.—All probates and orders of registration made by, and taken before any clerk of any inferior or criminal court prior to the twentieth day of February, one thousand eight hundred and eighty-five, and valid in form and substance, shall be valid and effectual, and all deeds, mortgages or other instruments requiring registration, registered upon such probate and registration, so that the essence of what was done should not be sacrificed to the form of doing it, and in disregarding a plain prohibition, which was intended to ratify and validate what had, erroneously been done by officials having general or special powers of the statute, and all probates of deeds, etc., made before the officers therein named, prior to 12 February, 1872; and registrations made in pursuance of such probates were held embraced within the operation of the statutes, although made after that date, but before the enactment of the Code. Tatom v. White, 95 N. C. 453.

§ 47-60. Order of registration by judge, where clerk party.—All deeds, mortgages or other instruments which prior to the twentieth day of January, one thousand eight hundred and ninety-three, have been probated by a justice of the peace and ordered to registration by a judge of the superior court or justice of the supreme court, to which clerks or the superior court, or party, are hereby confirmed, and the probates and orders for registration declared to be valid. (Rev., s. 1020, 1021; 1885, cc. 105, 108; 1889, c. 143; 1899, c. 463; C. S. 3340.)

§ 47-61. Order of registration by interested clerk.—The probate and registration of all deeds, mortgages and other instruments requiring registration prior to the fifteenth day of January, one thousand nine hundred and thirty-five, to take the probate of any instrument required or allowed by law to be registered, which were ordered to registration by a judge of the superior court, or party, are hereby confirmed, and the probates and orders for registration declared to be valid. (Rev., s. 1011; 1893, c. 3, s. 2; C. S. 3342.)

§ 47-61. Order of registration by interested clerk.—The probate and registration of all deeds, mortgages and other instruments requiring registration prior to the fifteenth day of January, one thousand nine hundred and thirty-five, to take the probate of any instrument required or allowed by law to be registered, which were ordered to registration by a judge of the superior court, or party, are hereby confirmed, and the probates and orders for registration declared to be valid. (Rev., s. 1011; 1893, c. 3, s. 2; C. S. 3342.)
and the same are declared valid. (Rev., s. 1015; 1891, c. 102; 1899, c. 258; 1905, c. 427; 1907, c. 1003, s. 2; Ex. Sess. 1908, c. 105, s. 1; 1935, c. 235; C. S. 3344.)

Editor's Note.—The amendment of 1935 changed the date from "prior to the fourth day of March, 1908" to "prior to the fifteenth day of January, 1935." It also validated registration on the order of deputies or assistant clerks.

§ 47-62. Probates before interested notaries.—The proof and acknowledgment of instruments required by law to be registered in the office of the register of deeds of a county, and all privy examinations of a feme covert to such instruments made before any notary public on or since March eleventh, one thousand nine hundred and seven, are hereby declared valid and sufficient, notwithstanding the notary may have been attorney, counsel or otherwise in such instruments. (Ex. Sess. 1908, c. 105, s. 2; C. S. 3344.)

§ 47-63. Probates before officer of interested corporation.—In all cases when acknowledgment or proof of any conveyance has been taken before a clerk of superior court, justice of the peace or notary public, who was at the time a stockholder or officer in any corporation, bank or other institution which was a party to such instrument, the certificates of such clerk, justice of the peace, or notary public shall be held valid, and are so declared. (Rev., s. 1015; 1907, c. 1003, s. 1; C. S. 3345.)

Although a grantee in a chattel mortgage is not qualified to take the acknowledgment thereof, a chattel mortgage to a bank will not be declared void because the acknowledgment thereof was taken by its cashier. Bank of Duplin v. Hall, 203 N. C. 570, 106 S. E. 526.

§ 47-64. Probates before officers, stockholders or directors of corporations prior to January 1, 1943.—No acknowledgment or proof of execution, including privy examination of married women, of any deed, mortgage or deed of trust to which instrument a corporation is a party, executed prior to the first day of January, one thousand nine hundred and forty-three, shall be held invalid by reason of the fact that the officer taking such acknowledgment, proof or privy examination was or one in this state and the other in another state, or foreign country, the said probate, in the cases mentioned, shall be valid to all intents and purposes, and all deeds and other instruments required to be registered, and which have been ordered to registration by the proper officer in this state, and upon such probate or probates, and which have been taken as to the husband and the wife by different officers having the power to take probates of deeds, whether both officers reside in this state or one in this state and the other in another state, in the true intendment of the act, the rights of such third parties acquired before the curative act, though with notice of such defectively probated instruments, the rights of such third parties could not be divested or impaired by this curative statute. Robinson v. Loomis, 27 N. C. 348; Smith v. Castrin, 27 N. C. 318; Gordon v. Collett, 107 N. C. 362, 12 S. E. 332; Long v. Crews, 113 N. C. 256, 18 S. E. 499; Williams v. Kerr, 113 N. C. 306, 18 S. E. 501; Quinnerly v. Quinnerly, 114 N. C. 19, 19 S. E. 99; Barrett v. Barrett, 120 N. C. 127, 129, 26 S. E. 691.

Husband's Acknowledged or Subscribed by Witnesses.—The Curative Act, 1893, chap. 253, made valid probates where the wife's privy examination was had prior to the husband's "acknowledgment," and under this provision it was held that this embraces, in the true intendment of the act, cases in which the execution of the deed by the husband was proved by a subscribing witness, and not by his technical acknowledgment. Barrett v. Barrett, 120 N. C. 127, 129, 26 S. E. 691. The wording of the present section seems to cover both situations.—Ed. Note.

§ 47-68. Probates of husband and wife before different officers.—Where, prior to the second day of March, one thousand eight hundred and ninety-five, the probate of a deed or other instrument, executed by husband and wife, has been taken as to the husband and the wife by different officers having the power to take probates of deeds, whether both officers reside in this state or one in this state and the other in another state, in the true intendment of the act, the rights of such third parties acquired before the curative act, though with notice of such defectively probated instruments, the rights of such third parties could not be divested or impaired by this curative statute. Robinson v. Loomis, 27 N. C. 348; Smith v. Castrin, 27 N. C. 318; Gordon v. Collett, 107 N. C. 362, 12 S. E. 332; Long v. Crews, 113 N. C. 256, 18 S. E. 499; Williams v. Kerr, 113 N. C. 306, 18 S. E. 501; Quinnerly v. Quinnerly, 114 N. C. 19, 19 S. E. 99; Barrett v. Barrett, 120 N. C. 127, 129, 26 S. E. 691.

Wife free trader; no examination or husband's assent.—In all cases prior to the twenty-fourth day of September, nineteen hundred and thirteen, where a married woman who was at the time a free trader by her husband's consent has executed and delivered a deed conveying her land, without her privy examination having been taken, and without the written assent of her husband other than his written assent contained in the instrument making her a free trader, such deed shall be valid and effectual to
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convey her land as if she had been, at the time of the execution and delivery of such deed, a feme sole. This section does not validate such deed where it would fail to convey the title to land or property of purchasers or their grantees or assignees from such married woman and free trader subsequent to the execution of such deed. (Ex. Sess. 1913, c. 54, s. 1; C. S. 3351.)

§ 47-72. Corporate name not affixed, but signed otherwise prior to January, 1927.—In all cases prior to the first day of January, one thousand nine hundred and twenty-seven, where any deed conveying lands purported to be executed by a corporation, but the corporate name was in fact not affixed to said deed, but same was signed by the president and secretary of said corporation, or by the president and two members of the governing body of said corporation, and said deed has been registered in the county where the land conveyed by said deed is located, said defective execution above described shall be and the same is hereby declared to be in all respects valid, and such deed shall be deemed to be in all respects the deed of said corporation. (1919, c. 53, s. 1; 1927, c. 128; C. S. 3354.)

§ 47-73. Probated and registered on oath of subscribing witness.—In all cases prior to the first day of January, one thousand nine hundred and nineteen, where any deed conveying lands was executed by a corporation, and said deed was probated and ordered registered upon the oath and examination of a subscribing witness, by the clerk of the superior court of the county in which the land conveyed by said deed is located, and said deed has been duly registered by the register of deeds of said county, such probate and order of registration shall be, and the same is hereby, declared to be in all respects valid. (1919, c. 53, s. 2; C. S. 3355.)

§ 47-74. Certificate alleging examination of grantor instead of witness.—Wherever any deed of conveyance registered prior to January first, eighteen hundred and eighty-six, purports to have been attested by two witnesses and in the certificate of probate and acknowledgment it is stated that the execution of such deed was proven by the oath and examination of one of the grantors in said deed instead of either of the witnesses named, all such probates and certificates are hereby validated and confirmed, and any such deed shall be considered as duly acknowledged and probated. (1925, c. 84.)

§ 47-75. Proof of corporate articles before officer authorized to probate.—All proofs of articles of agreement for the creation of corporations which were, prior to the eighteenth day of February, one thousand nine hundred and one, made before any officer who was at that time authorized by the law to take proofs and acknowledgments of deeds and mortgages are ratified. (Rev., s. 1028; 1905, c. 307; C. S. 3352.)

§ 47-76. Before officials of wrong state. — In all cases where the acknowledgment, examination and probate of any deed, mortgage, power of attorney or other instrument required or authorized to be registered has been taken before any judge, clerk of a court of record, notary public having a notarial seal, mayor of a city having a seal, or justice of the peace of a state other than the state in which the grantor, maker or subscribing witness resided at the time of the execution, acknowledgment, examination or probate thereof, and such acknowledgment, examination or probate is in other respects according to law, and such instrument has been duly ordered to registration and has been registered, then such acknowledgment, examination, probate and registration are sufficient for all purposes made valid and binding. This section applies to probates and acknowledgments of deputy clerks of other states when such probate and acknowledgment has been attested by the official seal of said official and adjudged sufficient and in due form of law by the clerk of the court in the state where the instrument is required to be registered. (Rev., s. 1027; 1901, c. 170; C. S. 3356.)
§ 47-77. Before notaries and clerks in other states.—All deeds and conveyances made for lands in this state which have, previous to February fifteenth, one thousand eight hundred and eighty-three, been proved before a notary public or clerk of a court of record, or before a court of record, not including mayor's court, of any other state, where such proof has been duly certified by such notary or clerk under his official seal, or the seal of the court, or in accordance with the act of congress regulating the certificate of the records of the courts of one state to another state, or under the seal of such courts, and such deed or conveyance, with the certificate, has been registered in the office of register of deeds in the book of records thereof for the county in which such lands were situate at the time of such registration, are declared to be validly registered, and the proof thereof registration is adjudged valid. All deeds and conveyances so proved, certified and registered, or certified copies of the same, may be used as evidence of title for the lands on the trial of any suit in any courts where title to the lands come into controversy. (Rev., ss. 1029, 1023; Code, ss. 1262, 1263; 1883, c. 129, ss. 1, 2; 1885, c. 11; 1915, c. 213; C. S. 3358.)

Deed Probated in Tennessee in 1869.—When no vested rights are impaired, a deed dated in 1869 is not incompetent evidence upon the ground of defective probate, showing the acknowledgment of the grantor and his wife, and the transfer of the deed, taken before a clerk of a court of record, of Tennessee, with the seal of that court, which was probated by a commissioner of deeds, is validated; and its registration is adjudged valid. All deeds and conveyances so proved, certified and registered, or certified copies of the same, may be used as evidence of title for the lands on the trial of any suit in any courts where title to the lands come into controversy. (Rev., ss. 1029, 1023; Code, ss. 1262, 1263; 1883, c. 129, ss. 1, 2; 1885, c. 11; 1915, c. 213; C. S. 3358.)

§ 47-78. Acknowledgment by resident taken out of state.—When prior to the ninth day of March, one thousand eight hundred and ninety-five, a deed or mortgage executed by a resident of this state has been proved or acknowledged by the maker thereof before a notary public of any other state of the United States, and has been ordered to be registered by the clerk of the superior court of the county in which the land conveyed is situated, and said deed or mortgage has been registered, such registration is valid. (Rev., s. 1019; 1905, c. 181; C. S. 3359.)

§ 47-79. Before deputy clerks of courts of other states.—Where any deed or conveyance of lands in this state, executed prior to January first, one thousand nine hundred and thirteen, has been acknowledged by the grantor or the privy examination of any married woman has been taken before the deputy clerk of a court of record of another state, and the certificate of acknowledgment and privy examination is otherwise sufficient under the laws of this state, except that it appears to have been signed in the office of the clerk of said court, by the deputy clerk, and the seal of the court has been affixed thereto, and such certificate has been duly approved by the clerk of the superior court of this state in the county where the lands conveyed are situated and the instrument ordered to be recorded, such certificate and probate and the registration made thereon is validated, and the conveyance, if otherwise sufficient, is declared valid. (1913, c. 57, ss. 1, 2; C. S. 3360.)

§ 47-80. Sister state probates without governor's authentication.—In all cases where any deed concerning lands or any power of attorney for the conveyance of the same, or any other instrument required or allowed to be registered, has been, prior to the twenty-ninth day of January, one thousand nine hundred and one, acknowledged by the grantor therein, or proved and the private examination of any married woman, who was a party thereto, taken according to law, before any judge of a supreme, superior or circuit court of any other state or territory of the United States where the parties to such instrument reside, and the certificate of such judge as to such acknowledgment, probate or private examination, and also the certificate of the secretary of state of said state or territory instead of the governor thereof (as required by the laws of this state then in force) signed by the judge, before whom the acknowledgment, probate or private examination were taken, was at the time of taking the same a judge as aforesaid, are attached to said deed, or other instrument, and the said deed or other instrument, having said certificates attached, has been exhibited before the former judge of probate, or the clerk of the superior court of the county in which the property is situated, and such acknowledgment, or probate and private examination have been adjudged by him to be sufficient and said deed or other instrument ordered to be registered and has been registered accordingly, such probate and registration shall be valid. Nothing herein contained affects the rights of third parties who are purchasers for value, without notice, from the grantor in such deed or other instrument. (Rev., s. 1014; 1901, c. 39; C. S. 3361.)

§ 47-81. Before commissioners of deeds.—Any deed or other instrument permitted by law to be registered, and which has prior to the third day of March, one thousand nine hundred and thirteen, been proved or acknowledged before a commissioner of deeds, is validated; and its registration is authorized and validated. (1913, c. 39, s. 2; C. S. 3362.)

Does Not Interfere with Vested Rights.—This section is remedial in character and beneficent in purpose—making for the saving of titles, and not their destruction—yet it will not be permitted to impair or to interfere with the vested rights of others. Champion Fibre Co. v. Cozard, 183 N. C. 600, 611, 112 S. E. 810.

Same.—Purchasers at Execution Sale.—This section cannot have the effect of impairing vested rights of purchasers at an execution sale under judgment, or those holding the land under his deed. Champion Fibre Co. v. Cozard, 183 N. C. 600, 611, 112 S. E. 810.

§ 47-81.1 Before commissioner of oaths.—All deeds, mortgages or other instruments required to be registered, which prior to March 5, 1943, have been probated by a commissioner of oaths and ordered registered, are hereby validated and confirmed as properly probated and registered instruments. (1943, c. 471, s. 2.)

§ 47-81.2 Before army, etc., officers.—In all
cases where instruments and writings have been proved or acknowledged before any officer of the army of the United States, or of the United States marine corps having the rank of captain or higher, or before any officer of the United States navy or coast guard having the rank of lieutenant, senior grade, or higher, or any officer of the United States merchant marine having the rank of lieutenant, senior grade, or higher, such proofs or acknowledgments, where valid in other respects, are hereby ratified, confirmed and declared valid. (1943, c. 159, s. 2.)

§ 47-82. Foreign probates omitting seals.—In all cases where the acknowledgment, privy examination or other proof of the execution of any instrument authorized or required to be registered has been taken by or before any ambassador, minister, consul, vice consul, vice consul general or commercial agent of the United States in any country beyond the limits of the United States, and such instrument has heretofore been recorded in any county in this state, but the official before whom it was taken has omitted to attach his seal of office, or it does not appear of record that such seal was attached to the instrument, or such official has certified the same as under his "official seal" or seal of his office, or courts of similar import, and no such seal appears of record, then all such acknowledgments, privy examinations or other proof of such instruments, and the registration thereof, are hereby made in all respects valid, and such instruments, after the ratification hereof, shall be competent to be read in evidence. (1913, c. 69, s. 1; C. S. 3363.)

§ 47-83. Before consuls general.—Any deed or other instrument permitted by law to be registered, and which has prior to the thirteenth day of October, nineteen hundred and thirteen, been proved or acknowledged before a "consul general," is validated; and its registration is authorized and validated. (Ex. Sess. 1913, c. 72, s. 2; C. S. 3364.)

§ 47-84. Before vice consuls and vice consuls general.—The order for registration by the clerk of the superior court and the registration thereof of all deeds of conveyance and other instruments in any county in this state prior to January first, one thousand nine hundred and five, upon the certificate of any vice consul or vice consul general of the United States residing in a foreign country, certifying in due form under his name and the official seal of the United States consul or United States consul general of the same place and country where such vice consul or vice consul general resided and acted, that he has taken the proof or acknowledgments of the parties to such instruments, together with the privy examinations of married women parties thereto, are hereby, together with such proof and acknowledgments, privy examinations and certificates, validated. (Rev., s. 1024; 1905, c. 451, s. 2; C. S. 3365.)

Application to Right Prior to Statute.—Person Not Claiming from Same Grantor Not Protected.—This section validating acknowledgments of deeds in foreign countries before "vice consuls and vice consuls general," though not valid against a deed from the same grantor duly registered or a lien against the grantor acquired before the validating act, is good as against a person not claiming under the grantor therein. Powers v. Baker, 152 N. C. 718, 66 S. E. 203.

§ 47-85. Before masters in chancery.—All probates, acknowledgments, and private examinations of deeds and conveyances of land heretofore taken before masters in equity or masters in chancery in any other state prior to January first, nineteen hundred and five, upon the certificate of any and every such deed, acknowledgment, privy examination, or other proof of execution, of any deed, mortgage, or other instrument, authorized to be registered has been taken before a clerk of a court of record in another state, and such clerk has failed or neglected to affix his official seal to his certificate of such acknowledgment, privy examination, or other proof of execution, of such deed, mortgage or other instrument, or where such court had no official seal and no official seal was affixed to such certificate by reason of that fact, and such deed, mortgage, or other instrument has been ordered to registration by the clerk of the superior court of any county in this state and has been registered, the probate of any and every such deed, mortgage, or other instrument authorized to be registered shall be and hereby is to all intents and purposes validated. (1921, c. 15, ss. 1, 2; C. S. 3366(a).)

§ 47-86. Validation of probate of deeds by clerks of courts of record of other states, when official seal is omitted.—In all cases where, prior to the first day of January, one thousand eight hundred and ninety-one, the acknowledgment, privy examination of a married woman, or other proof of the execution of any deed, mortgage, or other instrument authorized to be registered has been taken before a clerk of a court of record in another state, and such clerk has failed or neglected to affix his official seal to his certificate of such acknowledgment, privy examination, or other proof of execution, of such deed, mortgage or other instrument, or where such court had no official seal and no official seal was affixed to such certificate by reason of that fact, and such deed, mortgage, or other instrument has been ordered to registration by the clerk of the superior court of any county in this state and has been registered, the probate of any and every such deed, mortgage, or other instrument authorized to be registered shall be and hereby is to all intents and purposes validated. (1921, c. 19, ss. 1, 4; C. S. 3366(b).)

§ 47-87. Validation of probates by different officers of deeds by wife and husband.—In all cases where, prior to the second day of March, one thousand eight hundred and ninety-five, the acknowledgment, privy examination of a married woman, or other proof of the execution of any deed, mortgage, or other instrument, authorized to be registered, executed by husband and wife, has been taken as to the husband and wife in different states and by different officers having power to take acknowledgments, any and every such acknowledgment, privy examination of a married woman, or other proof of execution, and the probate of any and every such deed, mortgage or other instrument shall be and hereby is, to all intents and purposes validated. (1921, c. 19, ss. 1, 4; C. S. 3366(b).)

§ 47-88. Registration without formal order validated. — In all cases where the acknowledg-
ment, privy examination of a married woman, or other proof of the execution of any deed, mortgage or other instrument, authorized to be registered, has been taken before a commissioner in another state appointed by the probate judge of any county of this state, under the provisions of section twenty of chapter thirty-five of Battle's Revisal, during the time said chapter remained in force and effect, and such commissioner has certified to such acknowledgment, privy examination or other proof, and has returned such deed, mortgage or other instrument to said probate judge, with his certificate endorsed thereon, and such deed, mortgage or other instrument, together with such certificate, has been registered, without any adjudication or order of registration by such probate judge, the probate and registration of any and every such deed shall be, and hereby is, to all intents and purposes validated. (1921, c. 19, ss. 2, 4; C. S. 3366(e).)

§ 47-89. Same.—In all cases where any deed, mortgage or other instrument has heretofore been acknowledged or probated in accordance with the provisions of §§ 47-87 and 47-88, and such deed, mortgage or other instrument has been registered, without any order of registration by the probate judge or clerk of the superior court appearing thereon, the probate and registration of any and every such deed, mortgage or other instrument shall be, and hereby is to all intents and purposes validated. (1921, c. 19, ss. 3, 4; C. S. 3366(d).)

§ 47-90. Validation of acknowledgments taken by notaries public holding other office.—In every case where deeds or other instruments have been acknowledged before a notary public, when the notary public, at the time was also holding some other office, and the deed or other instrument has been duly probated and recorded, such acknowledgment taken by such notary public is hereby declared to be sufficient and valid. (1921, c. 21; C. S. 3366(e).)

§ 47-91. Validation of certain probates of deeds before consular agents of the United States. —In all cases where the acknowledgment, privy examination of a married woman, or other proof of the execution of any deed, mortgage or other instrument authorized or required to be registered has been taken before any consular agent of the United States, during the time chapter thirty-five of Battle's Revisal remained in force and effect, and such acknowledgment, privy examination, or other proof of the execution of such deed, mortgage, or other instrument is in other respects regular and in proper form, and such deed, mortgage, or other instrument has been duly ordered to registration and registered in the proper county, the acknowledgment, probate, and registration of any and every such deed, mortgage, or other instrument is hereby validated as fully and to the same effect as though such acknowledgment, privy examination, or other proof of execution had been taken before one of the officers named in subsection five of section two of said chapter thirty-five of Battle's Revisal. (1921, c. 157; C. S. 3366(f).)

§ 47-92. Probates before stockholders and directors of banks.—No acknowledgment or proof of execution, including privy examination of married women, of any mortgage, or deed of trust executed to secure the payment of any indebtedness to any banking corporation taken prior to the first day of January, one thousand nine hundred and twenty-three (1923), shall be held invalid by reason of the fact that the officer, taking such acknowledgment, proof, or privy examination was a stockholder or director in such banking corporation. (1923, c. 17; C. S. 3366(g).)

Editor's Note.—A provision for a similar purpose to that of this section is found in section 47-63.

This section is summarized in 1 N. C. Law Rev. 302.

§ 47-93. Acknowledgments taken by stockholder, officer, or director of bank.—No acknowledgment or proof of execution, including privy examination of married women, of any mortgage or deed of trust executed to secure the payment of any indebtedness to any banking corporation taken prior to the first day of January, one thousand nine hundred and twenty-four, shall be held invalid by reason of the fact that the officer taking such acknowledgment, proof, or privy examination was a stockholder, officer, or director in such banking corporation. (Ex. Sess. 1924, c. 68.)

§ 47-94. Acknowledgment and registration by officer or stockholder in building and loan association.—All acknowledgments and proofs of execution, including privy examination of married women, of any mortgage or deed of trust executed to secure the payment of any indebtedness to any building and loan association prior to the first day of January, one thousand nine hundred and twenty-nine, shall not be, nor held to be, invalid by reason of the fact that the clerk of the Superior Court, justice of the peace, notary public, or other officer taking such acknowledgment, proof of execution or privy examination, was an officer or stockholder in such building and loan association; but such proofs and acknowledgments of all such instruments, and the registration thereof, if in all other respects valid, are hereby declared to be valid.

Nor shall the registration of any such mortgage or deed of trust ordered to be registered by the clerk of the Superior Court, or by any deputy or assistant clerk of the Superior Court, be or held to be invalid by reason of the fact that the clerk of the Superior Court, or deputy, or assistant clerk of the Superior Court, ordering such mortgages or deeds of trust to be registered was an officer or stockholder in any building and loan association, whose indebtedness is secured in and by such mortgage or deed of trust. (Ex. Sess. 1924, c. 108; 1929, c. 146, s. 1.)

Editor's Note.—The Act of 1929 made this section applicable to acknowledgments and registrations prior to Jan. 1, 1929, instead of Aug. 10, 1924, as formerly provided.

§ 47-95. Acknowledgments taken by notaries interested as trustee or holding other office.—In every case where deeds and other instruments have been acknowledged and privy examination of wives had before notaries public, or justices of the peace, prior to January 1, 1929, instead of Aug. 10, 1924, as formerly provided.
§ 47-96. Validation of instruments registered without probate.—In every case where it shall appear from the records in the office of the register of deeds of any county in the state that any instrument of writing required or allowed by law to be registered prior to January first, eighteen hundred and sixty-nine, without any acknowledgment, proof, privy examination, or probate, or upon a defective acknowledgment, proof, privy examination, or probate, the record of such instrument may, notwithstanding, be read in evidence in any of the courts of this state, if otherwise competent. (1923, c. 215, s. 1; C. S. 3366(j).)

Local Modification.—Cherokee, Graham: 1935, c. 92.

§ 47-97. Validation of corporate deed with mistake as to officer's name.—In all cases where the deed of a corporation executed before the first day of January, 1918, is properly executed, properly recorded and there is error in the probate of said corporation's deed as to the name or names of the officers in said probate, said deed shall be construed to be a deed of the same force and effect as if said probate were in every way proper. (1933, c. 412, s. 1.)

§ 47-98. Registration on defective probates beyond state.—In every case where it shall appear from the records in the office of the register of deeds of any county in this state that any instrument required or allowed by law to be registered, bearing date prior to the year one thousand eight hundred and thirty-five, executed by any person or persons residing in any of the United States, other than this state, or in any of the territories of the United States, or in the District of Columbia, has been proven or acknowledged, or the privy examination of any feme covert taken there to, before any officer or person authorized by any of the laws of this state in force prior to the said year one thousand eight hundred and thirty-five to take such proofs, privy examinations and acknowledgments, and the said instrument has been registered in the proper county without the certificate of the governor of the state or territory in which such proofs, acknowledgments or privy examinations were taken, or of the secretary of state of the United States, when such certificate or certificates were required, as to the official character of the person taking such acknowledgment, proof or privy examination, as aforesaid, and without an order of registration made by a court or judge in this state having jurisdiction to make such order, then and in all such cases such proofs, privy examinations, acknowledgments and registrations are hereby in all respects fully validated and confirmed and declared to be sufficient in law, and such instruments so registered may be read in evidence in any of the courts of this state. (1933, c. 215, ss. 2, 3; C. S. 3366(j).)

§ 47-99. Certificate of clerks without seal.—All certificates of acknowledgment and all verifications of pleadings, affidavits, and other instruments executed by clerks of the Superior Court of the State prior to March 10, 1928, and which do not bear the official seal of such clerks, are hereby validated in all cases in which the instruments bearing such acknowledgment or certification are filed or recorded in any county in the State other than the county in which the clerk executing such certificates of acknowledgment or verifications resides, and such acknowledgments and verifications are hereby made and declared to be binding, valid and effective to the same extent and in the same manner as if said official seal had been affixed. (1925, c. 248.)

§ 47-100. Acknowledgments taken by officer who was grantor.—In all cases where a deed or deeds dated prior to the first day of January, 1910, purporting to convey lands, have been registered in the office of the Register of Deeds of the county where the lands conveyed in said deed or deeds are located, prior to said first day of January, nineteen hundred and ten, and the acknowledgments or proof of execution of such deed or deeds has been taken as to some of the grantors by an officer who was himself one of the grantors named in such deed or deeds, such defective execution, acknowledgment and proof of execution and probate of such deed or deeds thereon shall be valid and effectual, and the record of such deed or deeds shall be declared to be in all respects duly executed, probated and recorded to the same effect as if such officer taking such proof or acknowledgment of execution had not been named as a grantor therein, or in anywise interested therein. (1929, c. 48, s. 1.)

Editor's Note.—By express provision this section does not affect actions and proceedings pending at the time of its ratification, which was on the 21st of February, 1929.

§ 47-101. Seal of acknowledging officer omitted; deeds made presumptive evidence.—In all cases where a deed or deeds prior to January 1, 1900, and which do not appear to have been recorded for one year prior to January 1, 1900, and appear to have been recorded in the offices of the registers of deeds in the proper counties in this state, and the same appear to have been acknowledged before commissioners of affidavits (or deeds) of North Carolina, residing in the District of Columbia or elsewhere in the different states, or appear to have been recorded without any certificate being recorded on the record of such deed or deeds, such record or records shall be presumptive evidence of the execution of such deed or deeds by the grantor or the grantors to the grantee or grantees therein named for the lands therein described, and the record of such deed or deeds may be offered or read in evidence upon the trial or hearing of any cause in any of the courts of this state as if the same had been properly probated and recorded. Provided, however, that nothing herein contained shall prevent such record or records from being attacked for fraud, and provided further that this section shall not apply to creditors or purchasers, but as to then
§ 47-102. Absence of notarial seal.—Any deed executed prior to the first day of January, nineteen hundred and thirty-five, and duly acknowledged before a North Carolina notary public, and the probate recites “witness my hand and notarial seal,” or words of similar import, and no seal was affixed to the said deed, shall be ordered registered by the clerk of the superior court of the county in which the land lies, upon presentation to him: Provided, the probate is otherwise in due form. (1935, c. 130; 1943, c. 472.)

The 1943 amendment changed the year named in this section from 1910 to 1935.

§ 47-103. Deeds probated and registered with notary's seal not affixed, validated.—Any deed conveying or affecting real estate executed prior to January 1, 1926, and ordered registered and recorded in the county in which the land lies prior to said date, from which deed and the acknowledgment and privy examination thereof the seal of the notary public taking the acknowledgment or privy examination of the grantor or grantors thereof was omitted, is hereby declared to be sufficient and valid, and the probate and registration thereof are hereby in all respects validated and confirmed to the same effect as if the seal of said notary was affixed to the acknowledgment or privy examination thereof. (1941, c. 20.)

§ 47-104. Acknowledgments of notary holding another office.—In every case where deeds or other instruments have been acknowledged before a notary public, when the notary public at the time was also holding some other office, and the deed or other instrument has been duly probated and recorded, such acknowledgment taken by such notary public, is hereby declared to be sufficient and valid. (1935, c. 139; 1937, c. 284.)

Editor's Note.—The 1937 amendment re-enacted this section without change.

§ 47-105. Acknowledgment and private examination of married woman taken by officer who was grantor.—In all cases where a deed or deeds of trust, conveyances or other instruments permitted by law to be registered in this state, which have been registered prior to January first, one thousand nine hundred and twenty-four, and in which the name of a grantor which appears in the body of the instrument and as a signer of the instrument has ordered the instrument to be recorded, but in which the name of a grantor which appears in the body of the instrument and as a signer of the instrument has been omitted from the record of the superior court was a party, validated.—In all cases where a deed, or other conveyance of land dated prior to the first day of January, one thousand nine hundred and eighteen, purporting to convey land, wherein the grantor or one of the grantors therein was at the time clerk of the superior court of the county where the land purporting to be conveyed was located, was acknowledged, proof of execution, privy examination of a married woman, and, or, order of registration had and taken before a deputy clerk of the superior court of the said county, and the instrument registered upon the order of said deputy clerk of the superior court in the office of the register of deeds of said county, within two years from the date of said instrument, such instrument and its probate are hereby in all respects validated and confirmed; and such instrument, together with such defective acknowledgment, proof of execution, privy examination of a married woman, order of registration, and the certificate of such deputy clerk of the superior court, and the registration thereof, are hereby declared in all respects to be valid and binding upon the parties of such instrument and their privies, and such instrument so probated and recorded together with its certificate may be read in evidence as a muniment of title, for all intents and purposes, in any of the courts of this state. (1939, c. 261.)

§ 47-106. Certain instruments in which clerk of superior court was a party, validated.—In all cases where a deed, or other conveyance of land dated prior to the first day of January, one thousand nine hundred and eighteen, purporting to convey land, wherein the grantor or one of the grantors therein was at the time clerk of the superior court of the county where the land purporting to be conveyed was located, was acknowledged, proof of execution or taking the private examination of the grantor or grantors thereof the seal of the notary public taking the acknowledgment or privy examination of the grantor or grantors thereof was omitted, is hereby declared to have been duly proved, probated and recorded and to be valid. (1941, c. 30.)

§ 47-107. Validation of probate and registration of certain instruments where name of grantor omitted from record.—All deeds, deeds of trust, conveyances or other instruments permitted by law to be registered in this state, which have been registered prior to January first, one thousand nine hundred and twenty-four, and in which a clerk of the superior court has adjudged the certificate of the officer before whom the acknowledgment was taken to be in due form and correct and has ordered the instrument to be recorded, but in which the name of a grantor which appears in the body of the instrument and as a signer of the instrument has been omitted from the record of the certificate of the officer before whom the acknowledgment was taken, are hereby declared to have been duly proved, probated and recorded and to be valid. (1941, c. 30.)

§ 47-108. Acknowledgments before notaries under age.—All acts of notaries public for the state of North Carolina who were not yet twenty-one years of age at the time of the performance of such acts are hereby validated; and in every case where deeds or other instruments have been acknowledged before such notary public who was not yet twenty-one years of age at the time of taking of said acknowledgment, such acknowledgment taken before such notary public is hereby declared to be sufficient and valid. (1941, c. 283.)

§ 47-108.1. Certain corporate deeds, etc., declared validly admitted to record.—Deeds, con-
veyances and other instruments of writing of corporations entitled to registration, which have been heretofore duly executed in the manner required by law, by the proper officers of the corporation, and which have prior to March 8, 1943, been admitted to registration, on the acknowledgment or proof of the proper executing officer, in the manner required by law, shall be, and the same are hereby declared to be, in all respects validly admitted to record, although such officer at the date of such acknowledgment or proof had ceased to be an officer of such corporation, or such corporation at the date of such acknowledgment or proof had ceased to exist. (1943, c. 598.)

Art. 5. Registration of Official Discharges from the Military and Naval Forces of the United States.

§ 47-109. Book for record of discharges in office of register of deeds; specifications.—There shall be provided, and at all times maintained, in the office of the register of deeds of each county in North Carolina a special and permanent book, in which shall be recorded official discharges from the military and naval forces of the United States. Said book shall be securely bound, and the pages of the same shall be printed in the form of discharge papers, with sufficient blank lines for the recording of such dates as may be contained in the discharge papers offered for registration. (1921, c. 198, s. 1; C. S. 3366(k).)

§ 47-110. Registration of official discharge or certificate of lost discharge—Upon the presentation of any official discharge, or official certificate of lost discharge, from the army, navy, or marine corps of the United States, it shall be the duty of the register of deeds of the several counties of the state to record such discharge in the book provided for in the preceding section. (1921, c. 198, s. 2; 1943, c. 599; C. S. 3366(l).) The 1943 amendment struck out the former provision relating to fee for registration.

§ 47-111. Inquiry by register of deeds; oath of applicant.—If any register of deeds shall be in doubt as to whether or not any paper so presented for registration is an official discharge from the army, navy, or marine corps of the United States, or an official certificate of lost discharge, he shall have power to examine, under oath, the person so presenting such discharge, or otherwise inquire into its validity; and every register of deeds to whom a discharge or certificate of lost discharge is presented for registration shall administer to the person offering such discharge or certificate of lost discharge for registration the following oath, to be recorded with and form a part of the registration of such discharge or certificate of lost discharge:

"I, .............., being duly sworn, depose and say that the foregoing discharge (or certificate of lost discharge) is the original discharge (or certificate of lost discharge) issued to me by the Government of the United States; and that no alterations have been made therein by me, or by any person to my knowledge.

Subscribed and sworn to before me this ...... day of ............, 19 ............

(1921, c. 198, s. 5; C. S. 3366(m).)

§ 47-112. Forgery or alteration of discharge or certificate; punishment. — Any person who shall forge, or in any manner alter any discharge or certificate of lost discharge issued by the Government of the United States, and offer the same for registration or secure the registration of the same under the provisions of this article shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned in the discretion of the court. (1921, c. 198, s. 4; C. S. 3366(n).)

§ 47-113. Certified copy of registration; fee. — Any person desiring a certified copy of any such discharge, or certificate of lost discharge, registered under the provisions of this article shall apply for the same to the register of deeds of the county in which such discharge or certificate of lost discharge is registered; and it shall be the duty of the register of deeds to furnish such certified copy upon the payment of a fee of fifty (50) cents therefor. (1921, c. 198, s. 5; C. S. 3366(o).)
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Chapter 48. Adoption of Minors.

§ 48-1. Petition for adoption and change of name.—Any proper adult person, husband and wife, jointly, who have legal residence in North Carolina may petition the superior court of the county in which he or they have legal residence or the county in which the child resides, or of the county in which the child had legal residence when it became a public charge, or of the county in which is located any agency or institution operating under the laws of this state having guardianship and custody of the child, for leave to adopt a minor and for a change of the name of such child. Provided, that in every instance when the parent, guardian or custodian of the child is not a citizen or resident of the state of North Carolina at the time of filing of petition for adoption, or where the child has been brought into the state for the purpose of placement and adoption by a parent, person, agency, institution or association, the provisions of chapter two hundred twenty-six of the Public Laws of one thousand nine hundred and thirty-one [§§ 110-50 to 110-56] must be complied with before the child shall have the effect of making said husband or wife of the original petitioner and the petitioner in said adoption proceeding and spouse of such child. Provided, that in every instance where a child or children have been duly adopted in North Carolina by a parent, person, agency, institution or association, the provisions of chapter two hundred twenty-six of the Public Laws of one thousand nine hundred and thirty-one [§§ 110-50 to 110-56] must be complied with before the child shall have the effect of making said husband or wife of the original petitioner be made one of the adopting parties, and said order when so made shall have the effect of making said husband or wife one of the adopting parties; that this order shall be made notwithstanding the fact that the adopted child or children have reached their majority, unless said adoptee or adoptees should object to said adoption. (1935, c. 243; 1937, c. 422; 1939, cc. 32, 132, s. 1; 1943, c. 735.)

Editor's Note.—The 1937 amendment to this section limited the former one year's residence requirement to children born outside of the state. Chapter 152 of Public Laws of 1939 inserted the first proviso of the present section in lieu of that provision.

The 1943 amendment added the last proviso.

For a critical analysis and appraisal of this chapter, see 13 N. C. Law Rev. 355.

For an article entitled "Thwarting Adoptions," see 19 N. C. Law Rev. 127.

Strictly Construed.—Since the laws of inheritance and distribution of property are directly involved in an adoption proceeding, and since the proceeding is in derogation of the common law, it must be strictly construed. In re Holder, 218 N. C. 136, 10 S. E. (2d) 620.

Juvenile Court Act Not an Amendment.—The Juvenile Court Act was not an amendment to the former Adoption Law and did not affect the procedure therein prescribed for the adoption of minors. Ward v. Howard, 217 N. C. 201, 7 S. E. (2d) 625.

Jurisdiction.—The evidence disclosed that the child in question was brought by its mother into the juvenile court of the county of their residence charged with being a dependent child, that the court committed it to the custody of a children's home society having its home office in another county of the state, but that the child was immediately taken by the persons seeking to adopt it to their residence in another state. Held, the child never resided in the county in which is located the home office of the children's home society, its mere commitment to the children's home not having the effect of making the child's constructive residence there, and adoption proceedings in that county are void since the child was never within its jurisdiction. In re Holder, 218 N. C. 136, 10 S. E. (2d) 630.

An agreement to adopt a minor, made between the person desiring to adopt the minor and the minor's parents, as the respective parties to the agreement, is not intended as an "Adoption of Minors" under this and following sections. Chambers v. Byers, 214 N. C. 373, 199 S. E. 398.


§ 48-2. Use of true name of child unnecessary; identification.—It shall not be necessary in the petition for adoption or other papers, except the report on investigation of the conditions and antecedents of the child, to give the true or legal name of the child to be adopted, but it shall be competent to name or identify the child to be adopted by such name as may be presented in the petition of adoption, and the adoption proceedings shall not be invalidated by reason thereof. In every case, however, the true name of the child proposed to be adopted shall be set forth in, and made known to the court through, the report upon the conditions and antecedents of the child to be made by the superintendent or superintendents of public welfare or duly authorized representa-
tive of a child-placing agency as hereinafter provided. (1935, c. 243.)

§ 48-3. Investigation of conditions and antecedents of child and of suitableness of foster home. — Upon the filing of a petition for the adoption of a minor child the court shall instruct the county superintendent of Public Welfare, or a duly authorized representative of a child-placing agency, licensed by the State Board of Charities and Public Welfare, to investigate the conditions and antecedents of the child for the purpose of ascertaining whether he is a proper subject for adoption, and to make appropriate inquiry to determine whether the proposed foster home is a suitable one for the child; or the court may instruct the superintendent of public welfare of one county to make an investigation of the conditions and antecedents of the child and the superintendent of public welfare of another county or counties to make any other part of the necessary investigation. The county superintendent or superintendents of public welfare or the duly authorized representative of such agency described hereinbefore shall make a written report of his or their findings, on a standard form supplied by the state board of charities and public welfare, for examination by the court of adoption. (1935, c. 243.)

§ 48-4. Necessary parties to proceeding. — The parents or surviving parent or guardian, or the person or persons having charge of such child, or with whom it may reside, must be a party or parties of record to this proceeding: Provided, that when such parent, parents, or guardian of the child when adoption is sought cannot be found within this state for the service of process, that fact shall be made known to the court either by affidavit or return of the sheriff of the county in which such person or persons were last known to reside. It shall be competent to make such service by publication of summons as provided by §§ 1-98, et seq., and such person shall be bound in every respect by such service: Provided, that when the parent, parents, or guardian of the person of the child has signed a release of all rights to the child, the person, agency, or institution to which said rights were released shall be made a party to this proceeding and it shall not be necessary to make such parent, parents, or guardian necessary: Provided, further, that when such parent, parents, or guardian has consented to an adoption as specified in § 48-5, he shall not be a necessary party of record to this proceeding. (1935, c. 243; 1939, c. 32; 1941, c. 281, s. 1.)

Editor’s Note.—The first proviso in this section was added to the law by Chapter 32 of Public Laws of 1939. The 1941 amendment added the last proviso.

For comment on the 1939 amendment, see 17 N. C. Law Rev. 350.

For comment on the 1941 amendment to this and other sections in this chapter, see 19 N. C. Law Rev. 449.

Noncompliance Deprives Clerk of Jurisdiction.—In True-love v. Parker, 191 N. C. 430, 132 S. E. 295, decided under similar provisions of a former law, it is said: "Upon the remarriage in this case it is held that neither the father nor the mother of the child was a party to the proceeding in the contemplation of the statute, and that the clerk had no jurisdiction of their person, (consequently) he had no jurisdiction of the subject-matter." See note of this case in § 5 N. C. Law Rev. 67.

Mother of illegitimate child must be made a party to proceedings for the adoption of the child, and her consent to the adoption or proof of abandonment of the child in the statutory or legal sense, must be made to appear as a jurisdictional matter. In re Holder, 218 N. C. 136, 10 S. E. (2d) 620.

Parent’s consent to adoption must be shown within record and must relate to particular persons seeking to adopt the child. In re Holder, 218 N. C. 136, 10 S. E. (2d) 620.


§ 48-5. Tentative approval and order of adoption; completion of adoption within two years. — Upon the examination of the written report of the Superintendent of Public Welfare or of a duly authorized representative of said agency described hereinbefore and with the consent of the parent or parents if living or of the guardian, if any, or of the person with whom such child resides, or who may have charge of such child, except in cases hereinafter provided for, the Court, if it be satisfied that the petitioner is a proper and suitable person and that the child is a proper subject for adoption and that the adoption is for the best interests of the child, may tentatively approve the adoption and issue an order giving the care and custody of the child to the petitioner: Provided, that when the parent, parents, or guardian of the person of the child has in written or oral form declined to reside, it shall not be necessary to make such child a party to a duly licensed child-placing agency, or the Superintendent of Public Welfare of the County and has in writing consented to adoption of the child by any person or persons to be designated by said agency or officer, this shall be deemed a sufficient consent for the purposes of this chapter, and no further consent of the parent, parents, or guardian to a subsequent specific adoption shall be necessary: Provided, however, that if any child is placed in any home or institution referred to in this chapter by its mother, then said mother shall give her written consent that said child may be adopted without further consent upon her part. Such consent shall not be revocable by the consenting party. For the purpose of this chapter, a parent under the age of twenty-one shall be deemed to have capacity for the purposes of giving consent, releasing rights in the child, and for all other purposes of this chapter, and shall be as fully bound thereby as if the parent had been twenty-one. Within two years of the interlocutory order, but not earlier than one year from the date of such order, the Court shall complete the proceeding by an order granting letters of adoption or, in its discretion, by an order dismissing the proceeding, and the effect of any adoption so completed shall be retroactive to the date of application. During this interval the child shall remain the ward of the Court and shall be subject to such supervision as the Court may direct. Upon making the interlocutory order the written report of the investigation made by the Superintendent or Superintendents of Public Welfare or representative of the child-placing agency described hereinbefore shall be forwarded by the Clerk of the Superior Court to the State Board of Charities and Public Welfare. Upon receipt of the same the said Board shall cause said report to be recorded in a book to be kept for that purpose, which book shall be properly indexed showing the name of the child, the names of its natural parents, the names of its adoptive parents, and the new legal name, if any, given to said child; and said Board shall also cause the original report to be permanently indexed and filed. Whether the original report nor the record thereof in the aforesaid book shall be made public, nor shall any in-
formation concerning the contents of either of them be disclosed by any person except upon order of a Judge of the Superior Court, made upon application of any party requiring such information, and when the said Judge may be to the interests of the said child or to the public to have such information disclosed. It shall be a misdemeanor for any person having charge of the said report or record to allow said report or records to be examined by anyone or to give any information concerning the contents of either except upon order of a Judge of the Superior Court as herein provided. No party to a completed and final adoption proceeding nor any one claiming under such a party may later question the validity of the adoption proceeding, by reason of any defect or irregularity therein, jurisdictional or otherwise, but shall be deemed to have thereby, save for such appeal as may be allowed by law. Further, no adoption may be questioned by reason of any procedural or other defect by anyone not injured by such defect. Such order granting letters of adoption shall have the force and effect of, and shall be entitled to, all the presumptions attaching to a judgment rendered by a court of general jurisdiction in a common law action. A parent who has not consented to nor been made a party to an adoption proceeding where such steps are required may have the adoption vacated provided he bring action to vacate within one year of the date of the adoption, and provided he failed to appear in the adoption proceedings because he did not know of such proceedings. In any case where a parent or parents in writing surrender a child for adoption (other than to a duly licensed child-placing agency or the Superintendent of Public Welfare of the County, which situation is governed by an earlier part of this section), and the child is taken by prospective adoptive parents in reliance thereon and kept for a period of six months or more, the surrenderer shall not be revocable by the surrendering parent or parents. (1935, c. 243; 1941, c. 281, ss. 2, 3.)

The 1941 amendment struck out the former second sentence of this section and inserted the three provisions following the first sentence and the three sentences following the provision. The amendment also added the last five sentences of the section.

§ 48-6. Form and contents of adoption order; parent-child relationship established; rights of inheritance, etc.—Such order granting letters of adoption shall be made upon a standard form supplied by the state board of charities and public welfare, and shall state whether for the minority or for the life-time of such child and to whom the adoptive parent or parents of said child, age, sex, date of birth, but not on the adopted father. So where the adopted child died seized of realty, without brothers or sisters, the law conferred the right of inheritance on the adopted child only, from his father's ancestors or other kindred, or to be a representative of them. Grimes v. Grimes, 207 N. C. 778, 780, 178 S. E. 573.

§ 48-7. Change of name; report to bureau of vital statistics; entry on birth certificate.—For proper cause shown the court may decree that the name of the child shall be changed to such name as may be prayed in the petition: Provided, that whenever the name of any child is so changed, the court shall immediately report such change to the bureau of vital statistics of the state board of health. The said birth certificate shall contain a statement of name on the original birth certificate of the child and to issue upon request a certificate of birth bearing the new name of a child as shown in the decree of adoption, the name of the foster parents of said child, age, sex, date of birth, but no reference in any certified copy of the birth [317]
certificate shall be made to the adoption of the said child. However, original registration of birth shall remain a part of the record of the said bureau of vital statistics. The provisions of this section shall apply to all minors heretofore adopted in accordance with the laws existing at the time of such adoptions in as full a manner as to adoptions hereunder. (1935, c. 243.)

§ 48-8. Surety bond required of petitioner where child with estate is without guardian. — When the court grants the petitioner the custody of the child, if the child is an orphan and without guardian and possesses any estate, the court shall require from the petitioner such bond as is required by law to be given by guardians. (1935, c. 243.)

§ 48-9. Recordation of adoption proceedings; revocation of orders.—All papers, except the report upon the conditions and antecedents of the child and consent of natural parents or guardian to the adoption, shall be recorded in the book or books in which other special proceedings are recorded in the office of the clerk of the superior court in the county in which the adoption is made; and all orders made in the proceedings may be revoked at any time by the court for good cause shown. On issuing such order granting letters of adoption, the clerk of the superior court of the county in which the order is issued shall also, at the time the order is issued, deliver to the court having jurisdiction of suits in equity to have the child restored, and a copy of the record of the order to said board to be held as a permanent record. (1935, c. 243.)

Editor's Note.—Section 190 of Michie's Code of 1931 provided for the restoration of the parent's right to custody of a child after such right had been forfeited by abandonment. Under that section it was held in Newsome v. Bunch, 142 N. C. 19, 54 S. E. 785, that where the court, in habeas corpus proceedings for the custody of a child, found that there had been no abandonment, it was error to order a restoration of the child without considering the interest and welfare of the child as prescribed by said section. This case was remanded by the supreme court with a direction to the court below to issue an order in accordance with the principles laid down by the supreme court in the Newsome case, and the findings as to the child's interests would be prejudiced, the lower court found that, under the circumstances, no prejudice would result from the restoration, and the supreme court affirmed this decision in 144 N. C. 15, 55 S. E. 509.

§ 48-10. Parents, etc., not necessary parties to adoption proceedings upon finding of unfitness or abandonment.—In all cases where a juvenile court has declared the parent or parents or guardians unfit to have the care and custody of such child, or has declared the child to be an abandoned child, such parent, parents, or guardians shall not be necessary parties to any action or proceeding under this chapter nor shall their consent be required. But in the event that the child be of age beyond the jurisdiction of the juvenile court, and the juvenile court has not theretofore determined that an abandonment has taken place, then on notice to the parent, parents, or guardian the court in the adoption proceedings is hereby authorized to determine that an abandonment has taken place, provided that if the parent, parents, or guardian deny that an abandonment has taken place, this issue of fact shall be determined as provided in § 1-273, and if abandonment be determined, then the consent of the parent, parents, or guardian shall not be required. (1935, c. 243; 1941, c. 281, s. 5.)

Editor's Note.—The 1941 amendment struck out this section as it formerly appeared and inserted the above in lieu thereof.

The cases treated under this section were decided under former provisions of the law.

Abandonment Judicially Determined.—The existence of abandonment as ground for an adoption without parental consent must be judicially determined. Truelove v. Parker, 191 N. C. 430, 439, 122 S. E. 255.

Abandonment Must Be Willful.—Where there was evidence in behalf of the defendant father tending to show that the plaintiff took possession of his children against his will and prevented him from performing his parental duty, as well as evidence to the contrary, it was held that when the jury found for the defendant, the case did not fall within the meaning of this section. Hatwell v. Solomon, 167 N. C. 588, 83 S. E. 609. Willfully as employed in this section means "purposely and deliberately in violation of law." State v. Whitter, 93 N. C. 590.

In the case of In re Jones, 153 N. C. 312, 62 S. E. 217, this section is cited and the statement is made that there was no abandonment shown of an illegitimate child.

Intention to Forego Parental Duties.—To constitute abandonment by a parent of its child, so as to deprive him of the right to prevent the adoption of the child, there must be some conduct on the part of the parent which evinces a purpose to forego the parental duties. Truelove v. Parker, 191 N. C. 430, 122 S. E. 255.

Death by Wrongful Act.—This section does not deprive the parent of the right to recover for the wrongful death of the child. Avery v. Brantley, 191 N. C. 396, 399, 131 S. E. 721.

Stated in re Osborne, 295 N. C. 716, 721, 172 S. E. 491.

§ 48-11. Past adoption proceedings validated.—All proceedings for the adoption of minors in courts of this State are hereby validated and confirmed, and the orders and judgments therein are declared to be binding upon all parties to said proceedings and their privies and all other persons, until the orders or judgments shall be vacated as provided by law. (1935, c. 243.)

§ 48-12. Procuring custody of child by forfeiting parents declared crime.—Any parent whose rights and privileges have been forfeited as provided by § 48-10 and who shall procure the possession and custody of such child, with respect to whom his rights and privileges are forfeited, otherwise than by law provided, shall be guilty of a crime, and shall be punished as for abduction. (1935, c. 243.)

§ 48-13. "Legal resident" defined.—For the purpose of this chapter a legal resident is any person who has had his domicile anywhere in the state of North Carolina for a period of at least twelve consecutive months after entering said state for the purpose of residence. (1939, c. 133, s. 3.)

§ 48-14. Rights of adoptive parents. — When a child is duly adopted pursuant to the provisions of this chapter, the adoptive parents shall not thereafter be deprived of any rights in the child, at the instance of the natural parents or otherwise, except in the same fashion and for the same causes as are applicable in proceedings to deprive natural parents of their children. (1941, c. 281, s. 6.)

§ 48-15. Construction of 1941 Amendment. — The provisions of § 48-6 except for the last sentence, shall apply only to adoptions made after March 15, 1941. All other provisions of chapter 281 of the Public Laws of 1941, amending §§ 48-4, 48-5, 48-16, adding § 48-14, including the last sentence of § 48-6, referred to above, shall apply to all adoptions heretofore and hereafter made. No adoption proceeding had before March 15, 1941, shall be declared void because of procedural defects.
Chapter 49. Bastardy.


Sec. 49-1. Title.

49-2. Non-support of illegitimate child by parents made misdemeanor.—Any parent who willfully neglects or who refuses to support and maintain his or her illegitimate child shall be guilty of a misdemeanor and subject to such penalties as are hereinafter provided. A child within the meaning of this article shall be any person less than fourteen years of age and any person whom either parent might be required under the laws of North Carolina to support and maintain as if such child were the legitimate child of such parent. (1933, c. 228, s. 11.)

Editor's Note.—Prior to the 1907 amendment the age specified was ten years. The 1909 amendment repealed the 1907 act, struck out section one of the 1903 act, and re-enacted this section as it appeared when amended by the 1907 act. A number of the cases treated in the following note were decided under the former law. They are, however, made available to the practitioner with the hope that they may be read in the light of the former law.

The question as to whether bastardy proceedings under the former law are criminal or civil in their nature presents a subject which has occasioned much controversy, and one in which there are three sharp lines of demarcation established by the cases. The early decisions up to and including State v. Edwards, 110 N. C. 511, 14 S. E. 741, (1892) held without dissent that the proceedings were civil in their nature, and that the statute did not even carry a quasi criminal aspect. The period between 1892 and 1904, may be designated as the criminal period. At that time several decisions were rendered by the Supreme Court which flatly reversed the former holdings. See State v. Ostwall, 118 N. C. 1208, 24 S. E. 660, delivered by Judge Avery, is a cogent and forceful declaration of the principle.

Constitutional—This section does not violate due process of law or impose imprisonment but by the law of the land. State v. Spillman, 210 N. C. 271, 186 S. E. 322.

Warrant Must Charge a Crime.—Where the warrant upon which defendant was tried is insufficient to charge any crime, defendant's motion in arrest of judgment should be allowed. State v. Tyron, 206 N. C. 734, 182 S. E. 481; State v. Stanfield, 220 N. C. 535, 17 S. E. (2d) 661; State v. Clarke, 220 N. C. 392, 17 S. E. (2d) 468.

The warrant in a prosecution under this and following sections, must allege that the failure or refusal of defendant to support his illegitimate child was willful, and where it does not so do, defendant's motion in arrest of judgment and declared to be as binding as if said procedural defects did not exist. (1941, c. 281, s. 8.)

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should be allowed. State v. McLamb, 214 N. C. 322, 199 S. E. 81.

Sufficiency of Indictment.—In a prosecution for willful fail-
ure and refusal to support an illegitimate child, under this and
the prior prosecution is not a bar to a prosecution under this statute, nor is
the presumption of innocence which the defendant enjoys in the trial
of the offense, and as such must not only be charged in the bill, but must be proven
reasonably
The begetting of an illegitimate child is not in itself a crime,
and a warrant charging defendant with being the putative father and
willfully neglecting to support his illegitimate child is not
sufficient to support a prosecution under this statute, nor is
such insufficiency cured by an amendment allowing the word
willful to be inserted therein, in the absence of an
establishment of the defendant's refusal to support the child. State v. Oliver, 213 N. C. 386, 190 S. E. 563.

Willfulness Is Essential Element of Offense.—The father
of an illegitimate child may be convicted of neglecting to
support such child only when it is established that such
neglect was willful, that is, without just cause, excuse or
justification. The willfulness of the neglect is an essential
ingredient of the offense, and as such must not only be charged in
the bill, but must be proven reasonably

The willfulness of the neglect is an essential ingredient
of the offense, and as such must not only be charged in the
bill, but must be proven reasonably

A proceeding upon indictment charging defendant with
wilful neglect and refusal to support his illegitimate child,
willful and refusal to support an illegitimate child, under this
statute, is not in itself a crime, but a willful failure to support
such child, and is a misdemeanor. Its language is clear, positive and unbending.

§ 49-4. Action must be commenced within three
years after birth. Proceedings under this article to
establish the paternity of such child may be initiat-
ed at any time within three years next after the
birth of the child, and not thereafter: Provided, however, that
the reputed father has acknowledged the paternity of the child by
payments for the support of such child within three years
from the date of the birth thereof, and not later, then, in such case, prosecution
may be brought under the provisions of said sections within
three years from the date of such acknowledg-
ment of the paternity of such child by the reputed
father thereof. (1933, c. 228, s. 3; 1939, c. 217,
s. 3.)

Editor's Note.—A number of the cases treated under this
section were decided under the former law. They are, how-
ever, made available to the practitioner with the hope that
they may be of some aid in construing the present law, but
they must be read in the light of the former law.

In General.—Even when bastardy proceedings were con-
sidered criminal in their nature it was held that former § 274 provided the limitation and that such proceedings
were not controlled by the provisions for misdemeanors to two years. State v. Perry, 122 N. C. 1043, 30 S. E. 139; State v. Hephzibah, 122 N. C. 999, 30 S. E. 139.

A proceeding to establish the paternity of an illegitimate
child and to prosecute the father, who willfully neglects
or refuses to support and maintain the same, may be
instituted at any time within three years next after the

This section cannot be limited to proceedings to establish
paternity. Its language is clear, positive and unbending.
It seems to have been taken from C. S., 274, of the old
law, which was held to supersede the general statute of

A proceeding upon indictment charging defendant with
willful neglect and refusal to support his illegitimate child,
willful failure to support his illegitimate child; and, after the birth of the
child, is properly dismissed, under this section, and this
result is not affected by the fact that defendant had ad-
mitted paternity of the child in a prior proceeding under
§ 265-279 (O. G., 1933, c. 193, s. 2) limitation provided after
this section not being confined to proceedings to establish
paternity of the child. 1d.

Compliance Must Appear from Examination.—The ex-
mamination of the accused shall be in every case in
his face to have been taken within three years, otherwise the action will
be quashed, State v. Ledbetter, 26 N. C. 242. The objection
proper time, i. e., before issue is tendered, or it will be

A defendant may be prosecuted under this statute, for
willful failure to support his legitimate child born after
the passage of the act although the child was begotten

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before the effective date of the statute, and defendant's contention that in regard to such prosecution the statute is ex post facto cannot be sustained, since the offense is the willful failure to support the child, and the time it was begun is immaterial, State v. Mansfield, 207 N. C. 233, 176 S. E. 761, followed in State v. Morris, 208 N. C. 479, 179 S. E. 19.

Maximum Time for Prosecution Is Six Years from Birth.—In a prosecution for failure to maintain and support his illegitimate child, proceedings to determine the paternity of the child must be instituted within three years from the date of its birth, with the provision that where the reputed father acknowledges paternity by making payments for the support of such child, prosecution may be instituted at any time within three years from the date of such payments made within three years from the date of birth, so that the greatest length of time that may elapse between the birth of the child and the prosecution even under the proviso of the statute is six years, and a prosecution is proper when, upon a special verdict establishing that the reputed father continuously supported the child for eight years and that the prosecution was not instituted until more than nine years after its birth. State v. Killian, 207 N. C. 339, 175 S. E. (2d) 702.

An Acknowledgment Made More than Three Years from Birth Does Not Prevent Running of Limitation.—Where acknowledged paternity of the child by payments for its support within three years from the date of the birth, prosecution for nonsupport may be brought within three years thereafter, but a later acknowledgment, made more than three years from the birth, will not avail to prevent the running of the statute. State v. Hodges, 217 N. C. 625, 9 S. E. (2d) 214.

§ 49-5. Prosecution; indictments; death of mother no bar; determination of fatherhood.—Proceedings under this article may be brought by the mother or her personal representative, or, if the child is likely to become a public charge, the superintendent of public welfare or such person as by law performs the duties of such official in said county where the mother resides or is found, or in the county where the putative father resides or is found, or in the county where the child is found. Indictments under this article may be returned in the county where the mother resides or is found, or in the county where the putative father resides or is found, or in the county where the child is found. The fact that the child was born outside of the state of North Carolina shall not be a bar to the indictment of the putative father in any county where he resides or is found, or in the county where the mother resides or is found. The death of the mother shall in no wise affect any proceedings under this article. Preliminary proceedings under this article to determine the paternity of the child may be instituted prior to the birth of the child but when the judge or court trying the issue of paternity deems it proper, he may continue the case until the woman is delivered of the child. When a continuance is granted, the courts shall notify the parties of the time being the father of the child with surety for his appearance, either at the next term of the court or at a time to be fixed by the judge or court granting a continuance, which shall be after the delivery of the child. (1933, c. 228, s. 4.)

Editor's Note.—The cases treated under this section were decided under the former law. They are, however, made available to the practitioner with the hope that they may be of some aid in construing the new law, but they must be read in light of the former law.

Married Women.—It was held in State v. Pettway, 10 N. C. 623, and in State v. Wilson, 32 N. C. 131, cited with approval in State v. Allison, 61 N. C. 346, that, though the section providing the prosecution of an married woman with child or delivered of the child," the subsequent language in the section, that the object is to protect the public against the charge of illegitimacy upon children, does not extend to married women, since a bastard child can be begotten upon a married woman as well as upon a single woman. See State v. Liles, 114 N. C. 735, 742, 47 S. E. 720; Wilkie v. West, 5 N. C. 319.

Child Not Born.—The former statute expressly authorized the mother to proceed against the putative father before the child was born, that is, when it was en ventre sa mere. The Court may continue the proceedings until the birth of the child. This clearly implies that the prosecution may be commenced during pregnancy. State v. Wynne, 116 N. C. 981, 21 S. E. 35; State v. Addington, 143 N. C. 683, 687, 73 S. E. 236.

§ 49-7. Jurisdiction of inferior courts; issues and orders.—Proceedings under this article shall

§ 49-9. Mother not excused on ground of self-incrimination; not subject to penalty.—No mother of an illegitimate child shall be excused, on the ground that it may tend to incriminate her or subject her to a penalty or a forfeiture, from attending and testifying in obedience to a subpoena of any court, in any suit or proceeding based upon or arising out of the provisions of this article, but no such mother shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing as to which, in obedience to a subpoena and under oath, she may so testify. (1933, c. 228, s. 5; 1939, c. 217, s. 5.)

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be instituted only in the superior court of any county of this state, or in any court inferior to the superior court of this state, except courts of jus-
tices of the peace, under whose criminal juris-
diction do not exceed that of justices of the peace. Justices of the peace may issue warrants for violations of this article made returnable to any court having jurisdiction of such violations under the terms of this article.

The court before which the matter may be brought shall determine whether or not the de-
fendant is a parent of the child on whose behalf the proceeding is instituted. After this matter has been determined in the affirmative, the court shall proceed to determine the issue as to whether or not the defendant has neglected or refused to sup-
port and maintain the child who is the subject of the proceeding. After this matter shall have been determined in the affirmative, the court shall fix by order, subject to modification or increase from time to time, a specific sum of money necessary for the support and maintenance of the particular child who is the object of the proceedings. The court in fixing this sum shall take into account the circumstances of the case, the financial ability to pay and earning capacity of the defendant, and his or her willingness to cooperate for the welfare of the child. The order fixing the sum shall re-
quire the defendant to pay it either as a lump sum or in periodic payments as the circumstances of the case may appear to the court to require. Compli-
ance by the defendant with any or all of the further provisions of this article or the order or orders of the court requiring additional acts to be performed by the defendant shall not be construed to relieve the defendant of his or her responsibility to pay the sum fixed or any modification or in-
crease thereof. (1933, c. 228, s. 6; 1937, c. 432, s.
2; 1939, c. 217, ss. 1, 5.)

Editor's Note.—The possibility of imposing a sentence of imprisonment in excess of thirty days was thought by some to exclude the jurisdiction of justices of the peace, but in many instances they did exercise jurisdiction. The amend-
ment clearly excludes justices, 15 N. C. Law Rev. 347.

For comment on the 1939 amendatory act, see 17 N. C. Law Rev. 113.

Jurisdiction.—Former § 265 expressly conferred jurisdic-
tion upon justices of the peace. State v. Mize, 117 N. C.
789, 23 S. E. 329.

Acquittal on Charge of Non-Support Bars Appeal Involv-
ing Issue of Parentage.—Where the jury found the defend-
ant to be the father of the bastard child, but not guilty of non-support, this is an acquittal. The defendant therefor-
ese is not entitled to an appeal under § 15-189 for the refusal of the court to allow his motions that the action be dismissed, and that the answer to the issue of parentage be set aside. State v. Parsons, 115 N. C. 730, 20 S.
981, 21 S. E. 35.

Effect of Death of Child.—Under former § 273 the inten-
tion was to make the father either ‘the defendant’s’ or ‘the putative father’s’ the person to whom the money or to reimburse her actual outlay, and the death of the child who is the object of the proceedings. The

§ 49-8. Power of court to modify orders; sus-
pend sentence, etc.—Upon the determination of the issues set out in the foregoing section and for the purpose of enforcing the payment of the sum fixed, the court is hereby given discretion, having regard for the circumstances of the case and the financial ability and earning capacity of the de-
fendant and his or her willingness to cooperate, to make an order or orders upon the defendant
 below to refuse a trial by jury, when demanded by the defendant, " 197, 25 S. E. 863.

§ 49-9. Bond for future appearance of defendant.—At the preliminary hearing of any case arising under this article it shall be the duty of the court, if it finds reasonable cause for holding the accused for a further hearing, to require a bond in the sum of not less than one hundred dollars, conditioned upon the appearance of the accused at the next term of the court. The court may order the deposit of the bond and all other bonds provided for in this article shall be justified before, and approved by, the court or the clerk thereof. (1933, c. 228, s. 8.)

Art. 2. Legitimation of Illegitimate Children.

§ 49-10. Legitimation.—The putative father of any illegitimate child may apply by petition in writing to the superior court of the county in which he resides, praying that such child may be declared legitimate; and if it appears that the petitioner is reputed the father of the child, the court may thereafter declare and pronounce the child legitimated; and the clerk shall record the decree. (Rev., s. 263, Code, s. 39; C. S. 277.)

Cross Reference.—As to provision for legitimation persons, see the North Carolina Constitution, Article II, section 11.

Petition Addressed Directly to Judge.—The action of the judge of the court having jurisdiction in passing upon the matter is within the intent and meaning of the statute, and his decree is not void upon the ground that the petition should have been originally addressed to the clerk of the court. Dunn v. Dunn, 199 N. C. 535, 155 S. E. 165.

Presumption.—There exists a rebuttable presumption that child born in wedlock is legitimate. West v. Redmond, 171 N. C. 742, 88 S. E. 341.


§ 49-11. Effects of legitimation.—The effect of such legitimation shall extend no further than to authorize the father to claim and possess the child, to bring suit to recover the child, and to give the child a name; but the father shall have no right to compel the mother to marry him; and the child shall have no right to support, or to claim the support of, the parent, other than the putative father, the mother, or the putative father's parents, if the child is legitimated by the putative father, and the parent not the putative father, is the successor in interest to the putative father, and if a birth certificate showing the true birth of the child was granted after the legitimation, the child's birth certificate shall show that the child was legitimated.

The effect of legitimation shall extend no further than to authorize the father to claim and possess the child, to bring suit to recover the child, and to give the child a name; but the father shall have no right to compel the mother to marry him; and the child shall have no right to support, or to claim the support of, the parent, other than the putative father, the mother, or the putative father's parents, if the child is legitimated by the putative father, and the parent not the putative father, is the successor in interest to the putative father, and if a birth certificate showing the true birth of the child was granted after the legitimation, the child's birth certificate shall show that the child was legitimated.

In General.—The plain intent and language of former section 185 and this section is that a child so adopted, or legitimated, shall inherit his father's real estate, and be entitled to the personal estate of his father "in the same manner as if it had been born in lawful wedlock." Love v. Love, 197 N. C. 311, 111 S. E. 562.

"The word 'only' as used in this section qualifies the words 'inherit from the father,' and not the words 'real estate,' thereby limiting the right of inheritance to the properties of the adopting father, and not to the properties of the natural father, and this is emphasized by the fact that the remaining part of the sentence provides that the adopted child is also entitled to the personal estate of his father." Love v. Love, 179 N. C. 115, 117, 101 S. E. 562.

Right of Inheritance.—In Love v. Love, 179 N. C. 115, 117, 101 S. E. 562, it was said: 'This statute seems to be clear enough on its face. It limits the right to inherit to the properties of the adopting father, and so clearly that it would seem unnecessary to cite authorities; but if authorities are necessary, it will appear that this Court has construed this and other statutes on all-fours to the effect that legitimation of an illegitimate child can only be by the putative father, and cannot inherit from the father's ancestors or other kindred, or be representative of them. Such adopted children can only inherit from their general. The word 'only' as used in this statute qualifies the word 'real estate,' and not the word 'real estate,' thereby limiting the right of inheritance to the properties of the adopting father, and not to the properties of the putative father, and this is emphasized by the fact that the remaining part of the sentence provides that the adopted child is also entitled to the personal estate of his father."
Chapter 50. Divorce and Alimony.

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§ 50-1. Jurisdiction.—The superior court shall have jurisdiction of complaints for divorce and alimony, or either. (Rev., s. 1557; Code, s. 1828; 1868-9, c. 93, s. 45; C. S. 1655.)

Cross Reference.—As to power of the general assembly to pass laws regulating divorce and alimony, see the North Carolina Constitution, Article II, section 10.

Editor's Note.—Divorces have been granted from the earliest time. In England, at the time our government was founded, the question of divorce was handled entirely by the ecclesiastical courts and there seems to have been no common law action of divorce. Since we have never established ecclesiastical courts in this country, the power has been conferred entirely by statute and is one of the powers which is exclusively reserved to the state governments.

The granting of alimony is based upon the duty of support which the husband owes to the wife. On the general question of jurisdiction in divorce, see 1 N. C. Rev. 95.

Definition.—Divorce is the legal separation of man and wife, effected, for cause, by the judgment of a court, and either totally dissolving the marriage relation, or suspending its effects so far as concerns the cohabitation of the parties. Black's Law Dict. p. 382.

Power of Federal Courts to Grant Divorces.—All governments possess inherent power over the dissolution of marriages. Haddock v. Haddock, 201 U. S. 562, 569, 26 S. Ct. 825, 50 L. Ed. 867. See also Maynard v. Hill, 125 U. S. 190, 8 S. Ct. 723, 31 L. Ed. 654.

But in the United States the authority rests with the states entirely, and not with the federal government. Id.

The courts of the United States have no jurisdiction upon the subject of divorce, either as an original proceeding in chancery, or an incident of a divorce or separation, except in the case of the Court in the exercise of its appellate jurisdiction. De La Rama v. De La Rama, 201 U. S. 303, 308, 26 S. Ct. 485, 49 L. Ed. 765.

Successor in Has Sole Original Jurisdiction.—The Legislature has conferred the sole original jurisdiction in all applications for divorce upon the superior courts. Williams v. Williamson, 56 N. C. 446, 448; Barringer v. Barringer, 69 N. C. 179.

Faith and Credit Given to Decree.—No faith and credit should be given to a decree of divorce obtained in a state by service of publication in another state, where neither of the parties reside in the state where the decree is rendered. Bell v. Bell, 181 U. S. 175, 177, 21 S. Ct. 551, 45 L. Ed. 804; Atherton v. Atherton, 181 U. S. 155, 21 S. Ct. 156, 45 L. Ed. 794.

§ 50-2. Bond for costs unnecessary.—It shall not be necessary for either party to a proceeding for divorce or alimony to give any undertaking to the other party to secure such costs as other party may recover. (Rev., s. 1558; Code, s. 1294; 1871-2, c. 193, s. 41; C. S. 1656.)

Cross References.—As to prosecution bonds generally, see § 1-109 et seq. As to costs generally, see § 6-21.

Husband Liable for Own Costs.—In actions for divorce the husband, whether successful or unsuccessful, is liable for his own costs, and whether he shall pay the wife's costs is in all cases left to the discretion of the court. Broom v. Broom, 130 N. C. 62, 554, 41 S. E. 671.

§ 50-3. Venue.—In all proceedings for divorce, the summons shall be returnable to the court of the county in which either the plaintiff or defendant resides. (Rev., s. 1559; Code, s. 1829; 1871-2, c. 193, s. 107; C. S. 1657.)

Section Not Jurisdictional—Waiver.—The provision of this section is not jurisdictional and may be waived, and the failure therein must be taken advantage of by motion to remove the cause to the proper venue, and not to dismiss. Davis v. Davis, 179 N. C. 185, 110 S. E. 220.

Change in Common-Law Rule.—The common-law rule that the wife should bring her action for divorce in the domicile of her husband was changed by this section, as amended by chapter 229, Public Laws 1915, making the summons returnable to the county in which either the plaintiff or defendant resides. Wood v. Wood, 181 N. C. 227, 106 S. E. 761.

Where Wife Resides.—A demurrer to an action for divorce brought by the wife in the county of her own residence, when the husband resides in a different county, on the ground that the summons should have been made re-
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This section will not be dismissed because of failure to make the affidavit prescribed in section 50-8. Taylor v. White, 160 N. C. 618, 130 S. E. 195.

§ 50-4. What marriages may be declared void on application of either party.—The superior court in term time, on application made as by law provided, by either party to a marriage contracted contrary to the provisions contained in the chapter entitled Marriage, or declared void by said chapter, may declare such marriage void from the beginning, subject, however, to the proviso contained in § 51-3 (Rev. 1560; Code, s. 1282; 1817-18, c. 193, s. 33; C. S. 1658.)

Cross References.—As to marriage generally, see § 51-1 et seq. As to void and voidable marriages, see §§ 51-3 and annotations.

Effect of Note.—It should be noted that the word “divorce” is frequently used in referring to a decree of nullity in cases where the parties were never validly married as well as in cases where the decree is granted to dissolve a valid marriage. Often the word “void” is used in cases where the court is granting a decree except for cause previously existing to the marriage —causes which rendered the marriage a nullity. The word “divorce” was regularly used in cases where there had never been a marriage.

In Johnson v. Kincade, 37 N. C. 470, the marriage of the parties was declared nullity because of the mental incapacity of one of the parties at the time of the marriage. In that decision the court declared that the “plaintiff ought to be, and is divorced from the defendant.” See Lea v. Lea, 104 N. C. 603, 10 S. E. 488; Taylor v. White, 160 N. C. 38, 75 S. E. 941; Cooke v. Cooke, 164 N. C. 272, 274, 80 S. E. 178.

Procedure Similar to Divorce Action.—An action, under this section, to have a marriage declared void, so far as procedure is concerned, is an action for divorce. Johnson v. Watters, 168 N. C. 411, 84 S. E. 703; Lea v. Lea, 104 N. C. 603, 607, 10 S. E. 488.

While not technically actions for divorce they come under that heading, in a general way, in that alimony pendente lite may be allowed. Taylor v. White, 160 N. C. 38, 75 S. E. 941; Lea v. Lea, 104 N. C. 603, 10 S. E. 488.

Affidavit Not Necessary.—Actions for annulment under this section will not be dismissed because of failure to make the affidavit prescribed in section 50-8. Taylor v. White, 160 N. C. 38, 75 S. E. 941.

Marriage Void Until So Declared by Court.—The court, in its own jurisdiction, may declare a marriage in proper cases void ab initio, but they are not so ipso facto, and must be so declared by a decree of the court, for only in the instances set out in the second proviso to section 51-3 cases of marriage void in a collateral proceeding may be declared.

Watters v. Watters, 168 N. C. 411, 414, 84 S. E. 703; State v. Setzer, 97 N. C. 252, 1 S. E. 557.

Formal Deed When Marriage Originally Void.—Though the marriage of a lunatic is absolutely void, without being so declared, yet the court will formally declare its nullity, as well for the sake of the good order of society as for the quiet and relief of the party seeking the relief. Johnson v. Kincade, 37 N. C. 470, cited in notes in 40 L. R. A. 737, 744; Lea v. Lea, 104 N. C. 603, 10 S. E. 488.

How Action Brought.—A suit for nullity of marriage on the ground of insanity may be brought either in the name of the lunatic, by her guardian, or in the name of the guardian of the ground of insanity may be brought either in the name of the guardian of the said lunatic, as well for the sake of the good order of society as for the protection of the said lunatic.

What Marriages Absolutely Void.—The only marriages (under section 51-3) which are absolutely void are those between a white person and one of negro or Indian blood (or mongrels) and marriages contracted between persons of different degrees of descent from a common ancestor.

Effect of Twenty Years Ratification.—Where a marriage was consummated by a contract and ratification between the parties, after the death of one of the parties, it will be declared valid. State v. Parker, 106 N. C. 711, 11 S. E. 517.

Effect of Void Marriage.—A former marriage, which has been decreed to have been void because induced by duress, was void ab initio, and hence does not afford ground for subsequent marriage. Rector v. Rector, 106 N. C. 419, 11 S. E. 89; and a third person, though such decree was rendered after the second marriage. Taylor v. White, 160 N. C. 38, 75 S. E. 941.

Subsequent Insanity.—Insanity afterwards affecting a party to a contract of marriage is not a ground for annulment. Watters v. Watters, 168 N. C. 411, 84 S. E. 703.

License Issued Upon Fraudulent Representations as to Age.—Suit by Parent or Register of Deeds.—Where the register of deeds has been induced by fraudulent representations to issue a license for the marriage of a female under the age of fourteen and sixteen without conforming with § 51-2, as to the written consent of her parent, the marriage is voidable only at the suit of the female, and the parent or the register of deeds may maintain a suit to declare the marriage void, though the latter may at most maintain an action to revoke and cancel the license. Sawyer v. Slack, 196 N. C. 697, 146 S. E. 864. This case was decided prior to the 1939 amendment to § 51-2 which amendment makes the parents the sole parties to an annulment proceeding.

Effect of Decree.—A decree annulling a marriage is final and conclusive and not open to collateral impeachment, although it may be vacated or set aside for good cause on motion and on notice. Its effect is to annul a pretended marriage as if it had never existed, and hence it restores both parties to their former status and to all rights they would have as, before the marriage.

Taylor v. White, 160 N. C. 38, 41, 75 S. E. 941, 26 Cyc. 920.

Same.—Children Legitimate.—The children of a marriage which is subsequently annulled are made legitimate by section 50-11. Taylor v. White, 160 N. C. 38, 75 S. E. 941.

Appeal from Judgment.—If either party to an action to annul a marriage contract desires to move to set aside the judgment rendered, it must be done in an adversary proceeding after due notice is served upon the other party, and notice to counsel of record in the original action is not sufficient. Johnson v. Johnson, 141 N. C. 91, 53 S. E. 623.


§ 50-5. Grounds for absolute divorce. — Marriages may be dissolved and the parties thereto divorced from the bonds of matrimony, on application of the party injured, made as by law provided, in the following cases:

Divorce Is Entirely Statutory.—It has always been the policy of this state to regard marriage as indissoluble except for the cause of divorce. House v. House, 131 N. C. 140, 42 S. E. 546.

Divorce is entirely statutory. March v. Long, 27 N. C. 130, 125 U. S. 917, 125 U. S. 139.

When Legislature Will Grant a Divorce.—In some states in the absence of constitutional prohibition, when the object of the marriage relation has been defeated by any cause other than the death of one of the parties, the legislature may at most maintain an action to revoke and cancel the marriage. Sawyer v. Slack, 196 N. C. 697, 146 S. E. 864. This case was decided prior to the 1939 amendment to § 51-2 which amendment makes the parents the sole parties to an annulment proceeding.

Facts Must Be Plead and Proved.—Divorces are granted only when the facts constituting a sufficient cause, under the provisions of this chapter, are pleaded and proved as by law directed.

Legislative Control.—Subject to the constitutional restriction that “it may not grant a divorce nor secure alimony in any individual case," the question of divorce is a matter exclusively of legislative cognizance. Cooke v. Cooke, 164 N. C. 274, 80 S. E. 178; Hyder v. Hyder, 210 N. C. 486, 187 S. E. 798.

When Legislation Will Grant a Divorce.—In some states in the absence of constitutional prohibition, when the object of the marriage relation has been defeated by any cause other than the death of one of the parties, the legislature may at most maintain an action to revoke and cancel the marriage. Sawyer v. Slack, 196 N. C. 697, 146 S. E. 864. This case was decided prior to the 1939 amendment to § 51-2 which amendment makes the parents the sole parties to an annulment proceeding.

Matters of the Court.—In all cases affecting any divorce, the court shall have jurisdiction to grant a divorce, or annul a marriage, or to dissolve a marriage, when it is proved to the satisfaction of the court that the grounds for divorce or annulment exist.

Appeal from Judgment.—If either party to an action to annul a marriage contract desires to move to set aside the judgment rendered, it must be done in an adversary proceeding after due notice is served upon the other party, and notice to counsel of record in the original action is not sufficient. Johnson v. Johnson, 141 N. C. 91, 53 S. E. 623.

1. If the husband or wife commits adultery.

Plaintiff Need Not Set Up His Innocence.—A party seeking divorce is not bound to set forth or prove that he has not himself been guilty of adultery or is not in fault. Steel v. Steel, 104 N. C. 631, 10 S. E. 707. Smith v. Moore, 59 N. C. 360.

Abduction Even after Abandonment Sufficient Cause.—Abduction by the wife alleged, should not be construed as a separate incident of the marriage. Smith v. Moore, 59 N. C. 360.

2. If either party at the time of the marriage was pregnant, and the husband is ignorant of the fact of such pregnancy and is not the father of the child when born. Barlow v. Barlow, 59 N. C. 360.

Pregnancy Must Result.—Unknown illicit intercourse, even though incestuous, prior to marriage will not authorize a decree for divorce under this section unless pregnancy results. Britton v. Britton, 104 N. C. 631, 10 S. E. 707.

False Representation of Age.—A man who by false representation marries a woman by her false representation that she is pregnant by him, he cannot secure a divorce under this section. Bryant v. Bryant, 171 N. C. 746, 88 S. E. 147.

Abandonment Not Implied.—In an action for divorce a vinculo brought by the husband against the wife, an allegation in his complaint that the adultery was committed without the husband’s procurement and without his knowledge or consent, and that he has not cohabited with her since he discovered her acts of adultery, does not imply his abandonment of her or put that matter at issue. Kinney v. Kinney, 149 N. C. 321, 63 S. E. 97.

Abandonment as Defense Must Be Set up in Answer.—Where a judgment has been entered granting a divorce under this section, there must not only be evidence of the desire of one of the parties to be relieved of the bonds of matrimony, but such desire must be shown to be ground for divorce. Ellett v. Ellett, 157 N. C. 161, 72 S. E. 861. This case overrules Steel v. Steel, 104 N. C. 631, 10 S. E. 707.

Abandonment Not Implied.—In an action for divorce a vinculo brought by the husband against the wife, an allegation in his complaint that the adultery was committed without the husband’s procurement and without his knowledge or consent, and that he has not cohabited with her since he discovered her acts of adultery, does not imply his abandonment of her or put that matter at issue. Kinney v. Kinney, 149 N. C. 321, 63 S. E. 97.

Appeal and Error. — Where a husband appeals from a judgment allowing a divorce under § 50-5, he must set up in his answer that a part of the time, it is necessary that the evidence therein shall include evidence that he was insane for a part of the time, necessary for the proof of the existence of such separation, be found by a jury. Wood v. Wood, 27 N. C. 674.

Separation Without Fault.—It certainly was not intended that this statute should apply to cases where the separation was without fault on either side. While it is in the power of the Legislature to make a ground for divorce it has not done so, and the court cannot by judicial construction extend the grounds of divorce beyond the statute. Ellis v. Ellis, 190 N. C. 418, 130 S. E. 7.
Divorce after separation of two years on application of either party.—Marriages may be dissolved and the parties thereto divorced from the bonds of matrimony, after two years, standing alone, will not constitute a cause of action for divorce. There must be at least an intention on the part of one of the parties to cease cohabitation, and this must be shown to have existed at the alleged beginning of the period of separation. It must appear that the separation is with that definite purpose on the part of at least one of the parties. The existence of a separation agreement only, was erroneous entitling plaintiff to a new trial. Byers v. Byers, 222 N. C. 298, 22 S. E. (2d) 902.

Section Did Not Apply Where Separation Was without Cause and without Agreement.—While the applicant need not be the injured party, the statute did not authorize a divorce where the husband has separated himself from his wife, or the wife has separated herself from her husband, without cause and without agreement, express or implied. Parker v. Parker, supra; Reynolds v. Reynolds, 210 N. C. 250; Long v. Long, 206 N. C. 706, 175 S. E. 85, distinguished. Followed in Hyder v. Hyder, 210 N. C. 486, 187 S. E. 768, decided prior to the 1927 amendment.


Section 50-6. Divorce after separation of two years on application of either party. — Mariages may be dissolved and the parties thereto divorced from the bonds of matrimony, after two years, standing alone, will not constitute a cause of action for divorce. There must be at least an intention on the part of one of the parties to cease cohabitation, and this must be shown to have existed at the alleged beginning of the period of separation. It must appear that the separation is with that definite purpose on the part of at least one of the parties. The existence of a separation agreement only, was erroneous entitling plaintiff to a new trial. Byers v. Byers, 222 N. C. 298, 22 S. E. (2d) 902.

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Plaintiff Must Petition for Divorce a Mensa.—A decree of divorce a mensa will not be granted in an action where plaintiff petitioned for absolute divorce. Morris v. Morris, 75 N. C. 551, 76 S. E. 189.

Allegations in the cross action for divorce a mensa et thoro, set up by defendant wife in the husband’s action for divorce a mensa et thoro, are insufficient. Ragan v. Ragan, 214 N. C. 36, 197 S. E. 554.

Effect of Delay in Bringing Action.—An unreasonable delay by one party, after a probable knowledge of the criminal conduct of the other, will, if unaccounted for, preclude such party from obtaining a decree for a separation from bed and board. Whittington v. Whittington, 19 N. C. 348.

But a delay of seven years in filing a petition is sufficiently accounted for by the allegations that at the happening of the matters relied upon for divorce, the petitioner was a resident of the State, and is now a pauper. Schonwald v. Schonwald, 62 N. C. 215.

Condonation.—Evidence merely of forgiveness by the plaintiff in her action for divorce a mensa et thoro against her husband, is insufficient to establish such offenses as would bar a divorce. Page v. Page, 167 N. C. 346, 347, 83 S. E. 625; Jones v. Jones, 173 N. C. 279, 91 S. E. 960.

For condonation is forgiveness upon condition, and the condition is, that the party forgives will abate from all like offenses afterward. If the condition is violated, the original offense is revived. Lassiter v. Lassiter, 92 N. C. 130.


Grounds Available to Husband as Well as Wife.—The grounds for divorce a mensa given by this section are not limited to complaints available to the husband as well as to the wife. Where, by the express language of the statute to “the injured party,” Brewer v. Brewer, 198 N. C. 659, 153 S. E. 163.

Only the party injured is entitled to a divorce under this section. Vaughn v. Vaughn, 211 N. C. 354, 358, 190 S. E. 492; citing Childs v. Carnes, 204 N. C. 363, 169 S. E. 722; Albritton v. Albritton, 210 N. C. 111, 185 S. E. 762.


1. If either party abandons his or her family.

Acts Constituting Abandonment.—Where husband drives his wife from his house, or obtains her removal by stratagem or withholds from her support while there, he is deemed to have abandoned her. Setzer v. Setzer, 128 N. C. 110, 172 S. E. 721.

To constitute abandonment it is not necessary that the husband should leave the state. Witty v. Barham, 149 N. C. 497, 61 S. E. 372.

2. Maliciously turns the other out of doors.

This Section an Instance of Abandonment in Sec. 1.—The conduct of a husband for divorce a mensa et thoro under this section, because of being maliciously turned out of doors by her husband, is but an instance of wrongful abandonment of his wife, under subsection 1, and the basic facts of these two suits are the same. Mollin v. Mollin, 175 N. C. 529, 95 S. E. 857.

Adverse Ruling in Previous Action.—A denial of alimony in an independent action under sec. 50-16 brought by the wife, on the ground that the husband maliciously turned her out of doors, will conclude her upon her cross-bill setting up the same matter in an action thereafter brought by her husband against her for a divorce a vinculo. Mollin v. Mollin, 175 N. C. 529, 95 S. E. 857.

3. By cruel or barbarous treatment endangers the life of the other.

Revival of Cause.—Much less cruelty or indignity is sufficient to revive a transaction occurring before the condonation, than to support an original suit for divorce. Lassiter v. Lassiter, 92 N. C. 130.


Communication of Disease.—The communication of an infectious disease by the husband to the wife is not sufficient ground for divorce. Long v. Long, 189 N. C. 189.

Acts Committed More Than Ten Years Before.—A divorce will not be granted for cruel and barbarous treatment where in the action complained of were committed more than ten years before the commencement of the action; in the meantime the parties had continued to reside together. O’Connor v. O’Connor, 109 N. C. 140, 13 S. E. 887.

Causes within Six Months.—Nor will a divorce be granted under this section for causes arising within six months before the commencement of the action. O’Connor v. O’Connor, 109 N. C. 140, 13 S. E. 887; Green v. Green, 131 N. C. 533, 42 S. E. 954.

4. Offers such indignities to the person of the other as to render his or her condition intolerable and life burdensome.

This Section Remedial.—It would seem that the Legislature, in providing for the specific acts of condemnation, did not intend to specify the particular acts of indignity for which divorces may in all cases be obtained. The matter is left at large under general words, thus leaving the courts to deal with each particular case and to determine in each case whether the conduct complained of will carry into effect the purpose and remedial object of the statute. Sanders v. Sanders, 157 N. C. 229, 234, 72 S. E. 576; Taylor v. Taylor, 76 N. C. 433, 437.

Suits in Compulsory Causes Determining.—The acts of the husband which will render the wife’s condition intolerable and her life burdensome so as to entitle her to a divorce a mensa are largely dependent on the facts in each particular case, such as the husband’s conduct, temper, habits and feelings of the plaintiff. Sanders v. Sanders, 157 N. C. 229, 72 S. E. 576.

Complaint Must Show Plaintiff’s Innocence.—The complaint must aver, and facts must be found upon which it can be seen that the plaintiff did not by her own conduct contribute to the wrongs and abuses of which she complains. Garsed v. Garsed, 170 N. C. 672, 673, 87 S. E. 45; White v. White, 84 N. C. 340.

Same.—General Allegation Insufficient.—It is essential that the plaintiff shall specifically set forth in her complaint the allegations by which she seeks the divorce. This is not done by general allegation that such conduct was “without cause or provocation on her part” is insufficient. O’Connor v. O’Connor, 109 N. C. 140, 13 S. E. 887; Martin v. Martin, 130 N. C. 27, 40 S. E. 822; Everett v. Everett, 50 N. C. 202.

Requisites in Proving Cause.—Where a drunken husband cursed his wife and drove her from his house, and by demonstrations of violence caused her to leave the bedside of a dying child, and seek safety and protection at a distance of several miles, it is sufficient to prove a cause under this section. Scoggins v. Scoggins, 85 N. C. 348.

A persistent charge of adultery against a virtuous woman, accompanied by a contemptuous declaration that she was no longer his wife, is by an abandonment of her by him such an indignity to her person as would entitle her to a partial divorce and to alimony. Everett v. Everett, 50 N. C. 202, 210.

To entitle a wife to a divorce from bed and board under this section, the indignity offered by the husband must be such as may be expected to seriously annoy a woman of ordinary sense and temper, and must be repeated, or continuous, so to the point of cruelty and inhumanity, and intentionally or at least consciously by the husband to the annoyance of the wife. Miller v. Miller, 78 N. C. 192.

Finding in favor of the husband, where the wife had evidence tending to show that the plaintiff, in her married life, was free from blame and that the defendant’s conduct was a long course of neglect, cruelty, humiliation, and insult, repeated and persisted in, is sufficient to bring the cause within the words of this section, that he had offered “such indignities to her person as to render her condition intolerable and her life burdensome.” Sanders v. Sanders, 157 N. C. 229, 72 S. E. 576.

Where a petitioner alleges that her husband had become jealous of her without cause, had shook his fist in her face and threatened her, and declared to her face and to the neighborhood that the child with which she was pregnant was not his; that her condition had from such conduct became intolerable and her life burdensome, it is evidence tending to show that the plaintiff, in her married life, was free from blame and that the defendant’s conduct was a long course of neglect, cruelty, humiliation, and insult, repeated and persisted in, is sufficient to bring the cause within the words of this section, that he had offered “such indignities to her person as to render her condition intolerable and her life burdensome.” Erwin v. Erwin, 57 N. C. 82.

A divorce from bed and board will be granted the wife if it is shown that the husband made foul and injurious accusations, and refused to bed with her and denied that she was his wife. Green v. Green, 131 N. C. 533, 42 S. E. 954.

Becomes a habitual drunkard. (Rev. s. 1562; Code, s. 1286; 1871-2, c. 193, s. 36; C. S. 1660.)

Cross References.—As to effect of divorce a mensa et thoro on right to administer, see § 28-12. As to effect of divorce a mensa et thoro on wife’s right to administer and

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interest in property, see § 53-20. As to effect of divorce a mensa et thoro on husband's right to administer and interest in property, see § 52-21.

§ 50-8. Affidavit to be filed with complaint; affidavit of intention to file complaint.—The plaintiff in a complaint seeking either divorce or alimony, or both, shall file with his or her complaint an affidavit that the facts set forth in the complaint are true to the best of affiant's knowledge and belief, and that the said complaint is not made out of levity or by collusion between husband and wife; and if for divorce, not for the mere purpose of being freed and separated from each other, but in sincerity and truth for the cause set forth in the complaint. The plaintiff shall also set forth in such affidavit, either that the facts set forth in the complaint, as grounds for divorce, have existed to his or her knowledge at least six months prior to the filing of the complaint, and that complainant has been a resident of the state for two years? was changed to "one year" by Public Laws 1933, c. 71.

Purpose of Section.—The affidavit was intended to prevent bad faith and collusion on the part of the parties to the action, and is an indispensable part of the complaint and allegations in a divorce. Williams v. Williams, 130 N. C. 333, 41 S. E. 854.

Requirements Mandatory.—All the requisites mentioned in the affidavit required by this section are mandatory and a failure to set out these averments in the affidavit prevents the superior court from having jurisdiction. Nichols v. Nichols, 128 N. C. 108, 38 S. E. 256; Johnson v. Johnson, 141 N. C. 91, 41 S. E. 127; Walker v. Walker, 179 N. C. 421, 156 S. E. 266.


Verification According to Statute.—In an application for alimony pendente lite the affidavit and petition must be verified. Foy v. Foy, 35 N. C. 90. Action to Annul Marriage—The affidavit required under this section is not necessary to show such facts in supplementary or additional affidavits. Sanders v. Sanders, 157 N. C. 229, 72 S. E. 876.

Supplementary Affidavits.—No order should be made to deprive the defendant of his property unless the facts appear upon which the plaintiff's information and belief are founded, and the proper form is not used. Scott v. Scott, 77 N. C. 348, 15 S. E. 534; Sanders v. Sanders, 157 N. C. 229, 72 S. E. 876.

Verification of Answers Setting Up Cross Action.—In the husband's answer for divorce which affords, the wife's answer setting up a cross action must be verified under this section, as a jurisdictional prerequisite, and when the answer is not verified the action is a nullity. Silver v. Silver, 220 N. C. 191, 16 S. E. (2d) 634.

Six Months Prior Knowledge.—By chapter 91, Pub. Laws of 1925, this section was amended so that in cases where the necessary affidavit is made under this section, then the six months prior knowledge need not be alleged in the affidavit, it being the purpose of sec. 50-5, par. 1, that an action for divorce within ninety days of the commencement of the action is not allowed. Silver v. Silver, 220 N. C. 191, 16 S. E. (2d) 634.

Proof Must Correspond to Allegations.—As the allegations in a petition for a divorce are directed by statute to prove the facts upon which the right of divorce or alimony is founded, there is no jurisdiction unless there is evidence to support such allegations. Sanders v. Sanders, 157 N. C. 229, 72 S. E. 876.

§ 50-9. Effect of answer of summons by de-
fendant.—In all cases upon an action for a divorce absolute, where the plaintiff had caused to be served upon the defendant in person a legal summons, whether by verified complaint or unverified complaint, and such defendant answered such summons, and where the trial of said action was duly and legally had in all other respects and judgments rendered by a Judge of the Superior Court upon issues answered by a judge and jury, in accordance with law, such judgments are hereby declared to have the same force and effect as any judgment rendered in a court of record and the facts therein found by said judgment are facts found by a jury, and the jury in any such case are deemed to be present and to have had a prior knowledge of the said facts as a jury having jurisdiction of the case, and the court has no power to set aside such judgment, and the judgment is a nullity. (1929, c. 290, s. 1.)

Cross Reference.—As to procedure in trial generally, see § 1-170 et seq.

§ 50-10. Material facts found by jury; parties cannot testify to adultery.—The material facts in every complaint asking for a divorce shall be deemed to be denied by the defendant, whether the same shall be actually denied by pleading or not, and no judgment shall be given in favor of the plaintiff in any such complaint until such facts have been found by a jury, and on such trial neither the husband nor wife shall be a competent witness to prove the adultery of the other, nor shall the admissions of either party be received as evidence to prove such fact. (Rev., s. 1564; Code, s. 1288; 1868-9, c. 93, s. 47; C. S. 1662.)

Cross Reference.—As to competency of spouse as witness in civil actions, see § 50-11.

Purpose of Section.—The object of this section was to prevent a judgment from being taken by default, or by collision, and to require the facts to be found by a jury. Campbell v. Campbell, 179 N. C. 413, 102 S. E. 727; Moss v. Moss, 24 N. C. 55, 58; Hooper v. Hooper, 165 N. C. 698, 11 S. E. 933.

Prohibition of Denial.—The provisions of this section that the allegations of the complaint in an action for divorce “are deemed to be denied,” applies only to the trial upon the merits, since the facts must be found by a jury. Zimmerman v. Zimmerman, 113 N. C. 433, 18 S. E. 334.

The denial by the statute of the plaintiff’s allegations in an action for divorce, presumes, as a matter of law, a meritorious defense, and does not require that this be found by the jury. Where the issue is not adjudged upon a motion to set aside a judgment rendered in an action. Campbell v. Campbell, 129 N. C. 413, 102 S. E. 727.

Same.—Applies to Cross-Action.—The defendant in an action for divorce a vinculo may file a cross-action, the same relief, and where no reply has been filed by the plaintiff, an issue is raised by the complaint of the defendant, and upon a verdict on the required issues, a judgment may be rendered upon the cross action if the pleadings and the evidence are sufficient. Ellis v. Ellis, 190 N. C. 415, 130 S. E. 7.

Same.—Time for Answering Not Affected.—The provisions of this section, putting in a denial of the plaintiff’s allegations in an action for divorce, does not affect the defendant’s right to twenty days after completion of the service of summons by publication, in which to answer or demur, etc. Campbell v. Campbell, 179 N. C. 413, 102 S. E. 727.

Applies to Cross-Action.—This section is applicable to a defendant who files a cross-action, and prays for divorce therein from the plaintiff. Saunderson v. Saunderson, 195 N. C. 169, 141 S. E. 572; citing Cook v. Cook, 159 N. C. 74, 74 S. E. 639.

Where the wife’s cross-action for a divorce is a messuage is sustained by the verdict of the jury, a judgment rendered must accord therewith, and if entered for a divorce absolutely, and transferred to the parties, the judgment is a nullity. Saunderson v. Saunderson, 195 N. C. 169, 141 S. E. 572.

Verdict of Jury.—In an proceeding for a divorce the issue submitted and the verdict found should be as specific and certain as is alleged in the pleading. Wood v. Wood, 27 N. C. 67.

Same.—Eleven Jurors.—In an action for divorce, a verdict by eleven jurors, consented to by both parties, is valid if for the defendant, but invalid if for plaintiff. Hall v. Hall, 131 N. C. 185, 47 S. E. 562.

Witnesses in Actions on Ground of Adultery.—The statutory limitation that the husband and wife will not be permitted to testify for or against each other prevails under the circumstances of any particular case it would seemingly appear that there was no collusion or otherwise; and the inhibition extends to any and all admissions or declarations made by the other, tending to establish the acts of adultery, either in the pleadings or otherwise. Hooper v. Hooper, 165 N. C. 665, 81 S. E. 933.

It is incompetent for the husband to testify that the wife had a certain contagious venereal disease, since he had been free, under circumstances tending necessarily to establish her improper relations with other men. Hooper v. Hooper, 165 N. C. 665, 81 S. E. 933.

Injunction for Maintenance With Section.—In an action for absolute divorce a charge in reference to the admissions of counsel that the evidence was sufficient to support an affirmative finding to the issues of marriage, separation and residence and held not competent to a directed verdict and not to be at variance with the provisions of this section. Nelson v. Nelson, 197 N. C. 465, 149 S. E. 385.

In Vickers v. Vickers, 108 N. C. 498, 490, 124 S. E. 737, the court said:—"On perusal of the record it appears that the affidavit of the wife, charging adultery on the husband, is substantially a part of the evidence pertinent to the inquiry. As an independent fact, such evidence seems to be absolutely forbidden by the statutes and public policy controlling in the matter."

Declaration—Presence of Third Person.—A declaration made by a husband and his wife in the presence of a third party is not such a confidential communication, as is privileged. Toole v. Toole, 112 N. C. 153, 16 S. E. 912.

Same—Of Alleged Paramour.—The declarations of an alleged paramour, made to or in the presence of a party to a suit for divorce a vinculo matrimonii, tending to show that improper familiarities had been or were about to be indulged in, are not admissible in evidence, nor is the motion for a directed verdict made by a husband to his wife in the presence of a third party is not such a confidential communication, as is privileged. Toole v. Toole, 112 N. C. 153, 16 S. E. 912.

Stated in State v. Williams, 220 N. C. 445, 17 S. E. (2d) 769.

§ 50-11. Effects of absolute divorce.—After a judgment of divorce from the bonds of matrimony, all rights arising out of the marriage shall cease and determine, and either party may marry again unless otherwise provided by law: Provided, that no judgment of divorce shall render illegitimate any children in esse, or begotten of the body of the wife during coverture; and, Provided further, that a decree of absolute divorce upon the ground of separation for two successive years as provided in § 50-5 or § 50-6 shall not impair or destroy the right of the wife to receive alimony under any judgment or decree of the court rendered before the commencement of the proceeding for absolute divorce. (Rev., s. 1569; Code, s. 1295; 1871-2, c. 193, s. 43; 1919, c. 204; C. S. 1663.)

Time Reduced to Two Years.—Section 50-6, as amended, reduced the time in this section from ten to two years. Howell v. Howell, 206 N. C. 672, 174 S. E. 921; Dyer v. Dyer, 212 N. C. 630, 194 S. E. 278.

Permanent Alimony.—Upon the granting of an absolute divorce a married couple are entitled to alimony and alimony; and determine and hence the court has no power in such cases to allow permanent alimony. Duffy v. Duffy, 120 N. C. 158, 27 S. E. 622.

Consent Judgment and Consent.—Where a consent judgment has been entered, a condition of which is that the wife remain unmarried, the subsequent decreeing of a divorce a vinculo matrimonii, is set aside, on the theory that the consent judgment, and the judge has no authority to modify it upon that ground. Lentz v. Lentz, 193 N. C. 742, 158 S. E. 12.

Cited in Dyer v. Dyer, 212 N. C. 630, 194 S. E. 278.
§ 50-12. Resumption of maiden name authorized; adoptions of name of prior deceased husband validated.—Any woman at any time after the bonds of matrimony theretofore existing between herself and her husband have been dissolved by a decree of absolute divorce, may resume the use of her maiden name or the name of a prior deceased husband, or a name composed of her given name and the surname of a prior deceased husband. The name of the applicant, the name of the county in which the court of the county wherein the petitioner, or the name composed of her given name and the surname of a prior deceased husband, or a name composed of her given name and the surname of a prior deceased husband upon application to the clerk of the court of the county in which she resides, setting forth her intention so to do. Said application shall be addressed to the clerk of the court of the county in which such divorced woman resides, and shall set forth the full name of the former husband of the applicant, the name of the minor children of said divorce was granted, and the term of court at which such divorce was granted, and shall be signed by the applicant in her full maiden name. The clerks of court of the several counties of the state shall provide a permanent book in which shall be recorded all such applications herein provided for, which shall be indexed under the name of the former husband of the applicant and under the maiden name of such applicant. The clerk of the court of the county in which said application shall be recorded shall charge a fee of one ($1.00) dollar for such registration. In every case where a married woman has a married name registered, by this divorce and has since the divorce, adopted the name of a prior deceased husband, or a name composed of her given name and the surname of a prior deceased husband, the adoption by her of such name is hereby validated. (1937, c. 53; 1941, c. 1570.)

Editor's Note.—Public Laws of 1941, chapter 9, inserted in the first sentence of this section the words “or the name of a prior deceased husband, or a name composed of her given name and the surname of a prior deceased husband.” The amendment also added the words “or a name composed of her given name and the surname of a prior deceased husband,” in the last sentence.

§ 50-13. Custody of children in divorce.—After the filing of a complaint in any action for divorce, whether from the bonds of matrimony or from bed and board, both before and after final judgment therein, it is lawful for the judge of the court in which such application is or was pending to make a decree respecting the care, custody, tuition and maintenance of the minor children of the marriage as may be proper, and from time to time to modify or vacate such orders, and may commit their custody and tuition to the father or mother, as may be thought best; or the court may commit the custody and tuition of such infant children, in the first place, to one parent for a limited time, and after the expiration of that time, then to the other parent; and so alternately: Provided, that no order respecting the children shall be made on the application of either party without five days notice to the other party, unless it shall appear that the party having the possession or control of such children has removed or is about to remove the children, or himself, beyond the jurisdiction of the court.

Provided, custody of children of parents who have been divorced outside of North Carolina may be determined in a special proceeding instituted by either of said parents in the superior court of the county wherein the petitioner, or the respondent or child at the time of filing said petition, is a resident. The resident judge of the district wherein the petition is filed may hear the facts and determine the custody of said children upon the evidence designated in his discretion after five days notice of such proceeding to the defendant. Notice of the summons and petition in said proceedings may be served on a nonresident defendant by publishing a notice thereof setting forth the grounds and nature of the proceedings in a newspaper published in the county wherein the petitioner resides once a week for a period of four successive weeks and by posting a copy thereof at the courthouse door of said county for a period of thirty days. Service as aforesaid in said action will be deemed complete thirty days after the date of the first publication of said notice.

In any case where either parent institutes a divorce action when there is a minor child or children, the complaint in such action shall set forth the name and age of such child or children; and if there be no minor child, the complaint shall so state. (Rev., s. 1570; Code, ss. 1296, 1570; 1871-2, c. 193; s. 46; 1939, c. 115: 1941, c. 120; 1943, c. 194; C. S. 1664.)

Cross Reference.—As to habeas corpus proceeding to determine custody of children of parents who are separated without being divorced, see §§ 17-39, 17-40.

Editor's Note.—The 1939 amendment added the second paragraph of this section.

The 1941 amendment inserted the words “or the respondent or child” in the first sentence of the second paragraph.

The 1943 amendment added the last paragraph.

For comment on the 1939 amendatory act, see 17 N. C. L. Rev. 52.

In General.—The superior court, in which a suit for divorce is pending, has exclusive jurisdiction as to the care or custody of the children of the marriage, before and after the decree of divorcement has been entered, by this section, and though by proceedings in habeas corpus under the provisions of sec. 17-39, the custody of a child of the marriage may be awarded as between parents each of whom claims it, this applies only when the parents are living in a state of separation, without being divorced, or are suing for a decree of divorcement; and where the decree of divorcement has been granted without awarding the custody of minor children of the marriage, the exclusive remedy is by motion in that cause. Quere, whether the statutes relating to the juvenile courts, sec. 110-21 et seq., confer jurisdiction in such instances. In re Blake, 184 N. C. 114, 114 S. E. 294.

Upon institution of a divorce action the court acquires jurisdiction over any child born of the marriage and may hear and determine questions both as to the custody and as to the maintenance of such child either before or after final decree of divorce. Story v. Story, 221 N. C. 114, 19 S. E. (2d) 157.

Habeas Corpus Is Not Appropriate Writ When Parties Are Divorced.—Although statutory habeas corpus is an appropriate writ to determine the custody of children as between married parents living in a state of separation under §§ 17-39, it is not appropriate when they are divorced. McEachern v. McEachern, 210 N. C. 98, 185 S. E. 684.

Court May Disregard Agreement Between Husband and Wife Regarding Custody of Child.—Where the court finds that rights and interests of child would be better protected by awarding custody of child either by the father or mother, the court may disregard agreement between husband and wife containing an agreement for the custody of their minor child does not preclude the court, upon proper application for change of custody subsequent to the deed of separation, from awarding the custody of the child in accordance with this section. In re McEachern, 210 N. C. 172, 172 S. E. 442.

No agreement or contract between husband and wife will serve to deprive the court of its inherent as well as statutory authority to protect the interests and provide for the welfare of the child, even though they may be incorporated in an agreement or by a consent judgment; but they cannot thus withdraw children of the marriage from the protective custody of the court. The child is not a party to such agreement and the court cannot be estopped thereby from acting in the interest of the court which is always alert in the discharge of its duty towards its ward—the children of the state whose personal or general interests require protection. State v. Duncan, 222 N. C. 11, 21 S. E. (2d) 822.

Father Primarily Liable for Support.—The liability of the
father primarily to support the children remains after the divorce, as well as before such divorce, and even where the custody of the children has been awarded to the mother. Sanders v. Sanders, 167 N. C. 319, 83 S. E. 490. And the order of the court was a proper one, and that of the property and income of the husband to be divided between the parties. Bailey v. Bailey, 127 N. C. 474, 37 S. E. 502.

Consent Judgments.—Where consent judgment in a suit for a divorce from the bonds of matrimony or for alimony, or for a separation from bed and board is entered in the husband's action for absolute divorce, and may be modified by the court, it will be admissible for the husband to be heard under this or § 50-16, whether in or out of term, in any suit for alimony pendente lite, and in any suit for alimony during the pendency of the suit as applied for. Story v. Story, 221 N. C. 114, 19 S. E. (2d) 136.

Five Days' Notice Is for Protection of Parent Who Does Not Have Possession of Child.—The provision in the statute dispensing with the notice of five days, when it appears that the parent having possession or control of the infant child of the parties to the action has removed or is about to remove such child from the jurisdiction of the court, is applicable only where the application or motion is made by the party who does not have possession or control of the child, and is for the protection of the rights of such parent, and not of the parent who has possession or control of the child at the time the application or motion is made. In such case, no notice to the adverse party is required. Burrows v. Burrows, 210 N. C. 788, 794, 188 S. E. 247.

Appeals by Both Wife and Children.—Upon appeals by the wife and children in separate actions, the appeal of the children will be considered as improvidently taken if the relief sought is identical with that afforded under the judgment obtained in the action of the mother. Sanders v. Sanders, 167 N. C. 317, 83 S. E. 489.

§ 50-14. Alimony on divorce from bed and board.—When any court adjudges any two married persons divorced from bed and board, it may also decree to the party upon whose application such judgment was rendered such alimony as the circumstances of the several parties may render necessary; which, however, shall in any case exceed the one-third part of the net annual income from the estate, occupation or labor of the party against whom the judgment shall be rendered. (Rev., s. 1565; Code, s. 1290; 1871-2, c. 193, s. 37; C. S. 1665.)


Nature of Alimony.—A decree awarding alimony to the wife, or children, or both, is not a debt which has been put into the form of a judgment, but is rather a legal means of enforcing the obligation of the husband and father to support and maintain his wife and children. Wetmore v. Wetmore, 196 N. C. 241, 150 S. E. 344.

But alimony decreed to a wife in a divorce of separation from bed and board is as much a debt of record, until the decree has been recalled, as any other judgment for money. Barber v. Barber, 21 How. 585, 595, 16 L. Ed. 226.

The alimony allowed under this section is incident to and dependent upon a decree of divorce a mensa, and where no decree a mensa was granted on the verdict, no permanent alimony could be allowed. Silver v. Silver, 230 N. C. 191, 16 S. E. (2d) 814.

Permanent alimony under this section may be allowed only upon decree for divorce a mensa, and is erroneously granted in the form of a consent judgment. Any proviso in a mensa is neither prayed nor decreed. Silver v. Silver 230 N. C. 191, 16 S. E. (2d) 834.

Not Permanent.—Alimony is in its nature a provision for a wife separated from her husband, and it cannot continue after reconciliation or the death of either party. Rogers v. Vines, 28 N. C. 293, 297.

Effect of Decree upon Defendant's Property.—The order of a court for alimony pendente lite is not a compelling judgment, which the defendant is not bound to obey. Story v. Story, 221 N. C. 114, 19 S. E. (2d) 136.

Effect of Wife's Abandonment.—The voluntary abandonment by the wife of her husband without just legalization will not entitle her to alimony in her suit for divorce from bed and board. McManus v. McManus, 191 N. C. 740, 133 S. E. 9.

Appeal.—Whether the wife is entitled to alimony is a question of law upon the facts found and is reviewable upon the appeal by either party. Moore v. Moore, 130 N. C. 416, 135 S. E. 491.


§ 50-15. Alimony pendente lite; notice to husband.—If any married woman applies to a court for a divorce from the bonds of matrimony, or from bed and board, with her husband, and sets forth in her complaint such facts, which upon application for alimony shall be found by the judge to be true and to entitle her to the relief demanded in the complaint, and it appears to the judge that the suit is not brought in an improper manner, that she has not sufficient means whereon to subsist during the prosecution of the suit, and to defray the necessary and proper expenses thereof, the judge may order the husband to pay her such alimony during the pendency of the suit as appears to him just and proper, having regard to the circumstances of the parties; and such order may be modified or vacated at any time, on the application of either party or of any one interested: Provided, that no order allowing alimony pendente lite shall be made unless the husband shall have had five days notice thereof, and in all cases of application for alimony pendente lite under this or § 50-16, whether in or out of term, it shall be admissible for the husband to be heard [332]
by affidavit in reply or answer to the allegations of the complaint; Provided further, that if the husband has abandoned his wife and left the state or county of his residence, or is about to remove or dispose of his property for the purpose of leaving the state or county, or procuring the claim of his wife, no notice is necessary. (Rev. s. 1566; Code, s. 1291; 1871-2, c. 193, s. 38; 1883, c. 67; C. S. 1666.)

I. In General.
II. Application and Proceedings Thereon.
III. Prerequisites to Award.
A. Entitled to Relief.
B. Necessity for Alimony.
IV. Notice.
V. The Order.
A. General.
B. Amount.
VI. Pleading and Practice.

I. IN GENERAL.

Editor's Note.—It was formerly held that alimony pendente lite could not be awarded in the absence of a statute conferring this power. Wilson v. Wilson, 19 N. C. 377; Reeves v. Reeves, 82 N. C. 348. In 1832 the Legislature passed an act authorizing the courts upon a petition for divorce and alimony, to decree the petitioner a sum sufficient for her support during the pendency of the suit. Everett v. Everett, 50 N. C. 302. In the case of Medlin v. Medlin, 175 N. C. 529, 95 S. E. 857, the court overruled the contention that divorce pendente lite was not allowed under this section, and held that the court had jurisdiction of this matter by virtue of the common law—the practice having come down from the English Ecclesiastical Courts.

This holding has an important bearing on the construction of this statute, making it remedial in its nature, affirmative in its terms and cumulative in its effect and not abrogating the common law existent upon the subject nor withdrawing from the court any powers already possessed in administering its principles. Medlin v. Medlin, supra, overruling Reeves v. Reeves, supra, on this point.

Purpose of the Section.—The purpose of this section is to afford the wife a measure of protection in a motion so important, which is made and to be determined before the merits of the controversy are ascertained and the rights of the parties settled regularly by final judgment. Morris v. Morris, 89 N. C. 359.

Alimony When the Wife Is Defendant.—When the wife is the defendant she has a right to claim alimony pendente lite under this section. Webber v. Webber, 79 N. C. 572; Barker v. Barker, 136 N. C. 316, 48 S. E. 733. Although she may be excluded by the judgment against her in her former and independent action for divorce a mensa upon the provisions of the statute, the rights of the wife under this section are without prejudice to her remedy in the common law. 175 N. C. 529, 95 S. E. 857.

Cited in Dyer v. Dyer, 212 N. C. 630, 194 S. E. 278.

II. APPLICATION AND PROCEEDINGS THEREON.

An application for alimony pendente lite can be made by motion in the cause. Reeves v. Reeves, 82 N. C. 348.

A motion for alimony pendente lite may be heard any time after the suit is pending in the district in which it resides. Moore v. Moore, 130 N. C. 371, 42 S. E. 822.

But a resident judge holding court in another district can not hear a motion to reduce alimony pendente lite in a suit pending in the district in which he resides. Moore v. Moore, 130 N. C. 371, 42 S. E. 822.

In an action for divorce, in which the wife files answer demanding alimony pendente lite and alimony without divorce, it is error for the court, upon the hearing for alimony pendente lite under this section, to issue an order for alimony without divorce under § 50-16. Adams v. Adams, 212 N. C. 373, 193 S. E. 274.

Kind of Divorce Warranted Immaterial.—Upon an application for alimony pendente lite, it is unnecessary to decide whether the petition warrants a divorce a vinculo, or only a divorce a mensa et thoro. Little v. Little, 63 N. C. 22.

III. PREREQUISITES TO AWARD.

A. Entitled to Relief.

Prima Facie Case.—Under this section a petitioner for divorce a vinculo is entitled to alimony pendente lite upon making an affidavit as follows: "I declare under oath, that I am the owner of certain properties is error. Dawson v. Dawson, 211 N. C. 453, 190 S. E. 749.

An application for alimony pendente lite shall not be held to a fact that the plaintiff was a faithful, dutiful and obedient wife. Lasiter v. Lasiter, 92 N. C. 130.

Where the wife's action is for divorce a mensa on the ground of cruelty, the court having found that defendant was the owner of certain properties is error. Dawson v. Dawson, 211 N. C. 453, 190 S. E. 749.

In an application for alimony pendente lite under this section, it is required that the court finds the facts in order that the correctness of its ruling may be determined on appeal, and the granting of the application solely upon finding that defendant was the owner of certain properties is error. Horton v. Horton, 186 N. C. 335, 67 S. E. 490.

In an application for alimony pendente lite under this section, it is required that the court finds the facts in order that the correctness of its ruling may be determined on appeal, and the granting of the application solely upon finding that defendant was the owner of certain properties is error. Horton v. Horton, 186 N. C. 335, 67 S. E. 490.

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defendant from the State, to the plaintiff, with an addition of the minor children, who have been removed by the order of feme plaintiff in her action for divorce mensa for which she has already received in the course and practice of against whom the judgment is rendered. 19 C. J. 222 (532). 62 N. C. 215; Barker v. Barker, 136 N. C. 316, 48 S. E. 733.

fees and expenses, the amount ordinarily allowed pendente net income of the defendant. Davidson v. Davidson, 189 N. C. 625, 127 S. E. 682, 683; Schonwald v. Schonwald, 173 N. C. 530, 92 S. E. 353; Griffith v. Griffith, 91 S. E. 102.

Alimony May Be a Lien.—Where alimony pendente lite has been regularly granted to the wife in her action for divorce against her nonresident husband, who has abandoned her, discretion, having been vested in the court, his property for several months with that purpose in view, dispenses with the necessity for notice. Barker v. Barker, 136 N. C. 316, 48 S. E. 733.

When pendente lite may be allowed before the return term if the complaint has been filed. Moore v. Moore, 130 N. C. 333, 41 S. E. 943.

V. THE ORDER.

A. In General.

Effect of Insufficient Finding.—An order awarding the wife alimony pendente lite may be declared erroneous on appeal for insufficiently full findings of fact therein, but not void White v. White, 179 N. C. 392, 183 S. E. 216; Moody v. Moody, 118 N. C. 926, 23 S. E. 933.

If Allegations Not Controverted.—If the allegations in the complaint are not controverted, it is sufficient if the judge finds that no answer was filed and adjudges alimony to be paid. Zimmerman v. Zimmerman, 113 N. C. 433, 18 S. E. 334.

Finding of Facts.—On a motion for alimony pendente lite, duly served upon the defendant, different state of facts is shown and a receipt evidence; but a demurrer to the petition for divorce admits that the facts alleged are true and can and will be proved, unless a different state of facts is shown and a receipt ex- amount allowed, in proper instances, by the superior court judge to the wife, in her action for divorce a mensa et thoro, is addressed to his sound judgment and discretion, and not reviewable unless affronted by a wrong discretion is abused. Hennis v. Hennis, 180 N. C. 666, 105 S. E. 274; Jones v. Jones, 173 N. C. 279, 91 S. E. 960.

VI. PLEADING AND PRACTICE.

In application for alimony pendente lite, it is competent for the husband to controvert the allegations of the complaint by answer. W. T. O. N. C. 130; Easeley v. Easeley, 173 N. C. 530, 92 S. E. 353; Griffith v. Griffith, 89 N. C. 113.

Finding of Facts.—On a motion for alimony pendente lite and counsel fees in an action instituted by a wife against her husband under the provisions of this section, whether the wife is entitled to alimony is a question of law upon the facts found, and the court below must find the facts, upon request. Holloway v. Holloway, 214 N. C. 662, 663, 200 S. E. 436.

Where Husband Appeals, Injunction Should Issue.—Where the motion to reduce alimony pendente lite has been, and the hus- band appeals from such order, an injunction should be granted to stay execution against the property of the hus- band pending the appeal. Barker v. Barker, 136 N. C. 316, 48 S. E. 733.

Alimony May Be a Lien.—Where alimony pendente lite has been regularly granted to the wife in her action for divorce against her nonresident husband, who has aban- doned her, discretion, having been vested in the court, his property for several months with that purpose in view, dispenses with the necessity for notice. Barker v. Barker, 136 N. C. 316, 48 S. E. 733.

When pendente lite may be allowed before the return term if the complaint has been filed. Moore v. Moore, 130 N. C. 333, 41 S. E. 943.
mined, in favor of the wife, such wife may make application to the resident judge of the superior court, or the judge holding the superior courts of the district in which the action is brought, for an allowance for such subsistence and counsel fees, and it shall be lawful for such judge to cause the husband to secure so much of his estate or to pay so much of his earnings, or both, as may be proper, according to his condition and circumstances, for the benefit of the named said wife in the marriage, having regard also to the separate estate of the wife. Such application may be heard in or out of term, orally or upon affidavit, or either or both. No order for such allowance shall be made unless the husband shall have had five days notice thereof; but if the husband shall have abandoned his wife and left the state, or shall be in parts unknown to her, she shall be about to remove or dispose of his property for the purpose of defeating the claim of his wife, no notice shall be necessary. The order of allowance herein provided for may be modified or vacated at any time, on the application of either party or of any one interested. In actions brought under this section, the wife shall not be required to file the affidavit provided in § 50-8, but shall verify her complaint as prescribed in the case of ordinary civil actions: Provided further, that in all applications for alimony under this section it shall be competent for the husband to plead the adultery of the wife in bar of her right to such alimony, and if the wife shall deny such plea, and the issue be found against her by the judge, he shall make no order allowing her any sum whatever as alimony, or for her support, but only her reasonable counsel fees. (Rev., s. 1567; Code, s. 1292; 1919, c. 24; 1871-2, c. 193, s. 39; 1921, c. 123; 1923, c. 53; C. S. 1667.)

Cross References.—As to the criminal aspect of abandonment of family by husband, see §§ 14-322, 14-325, 14-324, 14-255. As to abandonment by husband as forfeiture of right of interest in wife’s property and estate, see § 52-21.

Editor’s Note.—Prior to the year 1872 there was no statute regulating the question of alimony without divorce and in considering this section it must be noted that this right to alimony could be granted by courts of equity. See Crews v. Crews, 175 N. C. 168, 170, 95 S. E. 149. By ch. 193, Laws 1872 the Legislature provided for this relief but in that act there was no provision for the wife to file the affidavit provided in this section, in determining the allowance of alimony during the determination of the issues involved in her suit. In 1919 however an amendment was added whereby the wife might apply for allowance for her subsistence during the pendency of her main action. Laws of 1919, ch. 24.

In considering this section therefore it must be noted that two distinct remedies are therein provided—first the action for alimony without divorce—second the application for an allowance for subsistence pendente lite. See McFetters v. McFetters, 220 N. C. 225, 26 S. E. (2d) 616.

Chapter 24—Laws of 1919 made other radical changes in this section. In addition to adding the last four sentences in toto, this amendment added the clauses allowing subsistence pendente lite to such children of the marriage, or for guilt or conduct which would constitute grounds for divorce.

Chapter 52—Laws of 1921 amended this section by allowing the wife to file the affidavit provided in this section in bar of her right to such alimony. This amendment is certainly a proper one and protects the husband who abandons his wife because of her adultery. 1 N. C. L. Rev. 294.

Abandonment of Subsequent Children (Pendente Lite).—Defendant’s contention that the provisions of this section empowering the court to allow subsistence and counsel fees pendente lite to plaintiff in her action for alimony without divorce are invalid on the ground that the husband has no right without trial by jury is untenable, since he is under duty to support plaintiff until the adjudication of issues relating to alimony, and since such alimony by the court does not form any part of the ultimate relief sought nor affect the final rights of the parties. Peete v. Peete, 216 N. C. 359, 100 S. E. (2d) 616.

This section is one solely for support. It provides a remedy for an abandoned wife to obtain support from the estate or earnings of her husband. Shore v. Shore, 220 N. C. 302, 18 S. E. (2d) 560.

Independent Suits.—This section only applies to independent suits for alimony. Reeves v. Reeves, 82 N. C. 352; Skittleharp v. Skittleharp, 130 N. C. 72, 40 S. E. 851; Johnson v. Dawson, 130 N. C. 72, 40 S. E. 851.

It may not be used by the wife as the basis of a cross action in a suit for divorce instituted by the husband. Shore v. Shore, 220 N. C. 202, 18 S. E. (2d) 353; Silver v. Silver, 230 N. C. 191, 16 S. E. (2d) 834.

The phrase “may institute an action” as used in this section is permissive and not mandatory. Miller v. Miller, 206, C. 312, 217 N. C. 172, 17 S. E. 2d 749.

Section Applies Only to Actions Instituted by Wife.—A child of divorced parents is not entitled to an allowance for subsistence pendente lite in her action against her father to force him to provide for her support, this section and § 50-15 applying only to actions instituted by the wife, and such right not existing at common law. Green v. Green, 210 N. C. 147, 185 S. E. 651.

Section 50-14, may be considered in an action under this section for determining the allowance of reasonable subsistence to the wife and children. See McFetters v. McFetters, 219 N. C. 731, 14 S. E. (2d) 833.

Affected by Prior Laws.—In a proceeding under this section, of which a judge of the superior court has jurisdiction, was made returnable at term, does not affect the jurisdiction of the judge to hear and determine the matter. Cram v. Cram, 116 N. C. 288, 21 S. E. 197.

Venue of Action.—A wife who has been forced by her husband to leave his home at night and take refuge elsewhere may acquire a separate domicile, and may sue him for alimony without divorce in the county of her residence, and the husband is not entitled to removal to the county of his residence as a matter of right under the provisions of this section and §§ 1-82, 50-3. Miller v. Miller, 205 N. C. 733, 172 S. E. 493.

The provision that a wife may institute an action for alimony without divorce in the county in which the cause of action arose does not prescribe the exclusive venue, but the wife may institute the action in the county in which she resides at the commencement of the action. Dudley v. Dudley, 219 N. C. 765, 14 S. E. (2d) 767.

What Facts Material.—Under this section the only material facts at issue in the action for alimony without divorce are the existence of the marriage relation and whether the husband abandoned the wife. Skittleharp v. Skittleharp, 130 N. C. 72, 40 S. E. 851; Green v. Green, 210 N. C. 147, 185 S. E. 651.

The effect of this section has been changed by chapter 24, Public Laws of 1919, and thereunder it is not now required that an issue involving the validity of the marriage be first determined as a preliminary matter in the action against her husband for an allowance for a reasonable subsistence and counsel fees pending the trial and final determination of the issue relating to the validity of the marriage. Barber v. Barber, 187 N. C. 335, 125 S. E. 177.

Issue of Fact for Jury.—In actions under this section, when there are issues of fact raised, they should be found by the jury. Crews v. Crews, 175 N. C. 269, 93 S. E. 149. See also, Barber v. Barber, 217 N. C. 422, 6 S. E. (2d) 204.

And the trial judge may not pass upon the issues raised in proceedings for alimony without divorce, under this section or §§ 1-82, 50-3, unless the evidence adduced in the cause arising thereunder is sufficient to raise the issue of abandonment against her husband for an allowance for a reasonable subsistence and counsel fees pending the trial and final determination of the issue of fact for the jury.

Where in his answer defendant alleged that he separated himself from his wife at her bidding after an altercation to avoid continual abuse, nagging and assaults by plaintiff, and that he had provided plaintiff and their children with a furnished house, paid bills for necessary and given them cash, week by week, and plaintiff did not provide substantial subsistence in accordance with his means in life, the answer raises issues of fact determinative of the right to relief sought, which issues must be submitted to the jury, and the trial judge erred in holding otherwise in view of the pleadings was error. Masten v. Masten, 216 N. C. 24, 3 S. E. (2d) 274.

Finding of Facts by Judge Unnecessary.—In the wife’s application for alimony without divorce, it is not required...
that the judge hearing the matter shall find the facts as a basis for his judgment, as in proceedings for alimony pendente lite (sec. 50-15), although it is necessary that she have left her husband because he failed to fulfill his promise to supply certain conveniences, it is insufficient. McManus v. McManus, 191 N. C. 740, 137 S. E. 9. In such proceedings the requirement of a certain sum for alimony, for the court to allow her attorney's fees. Moore v. Moore, 185 N. C. 332, 117 S. E. 633. See also, Wright v. Wright, 216 N. C. 693, 6 S. E. (2d) 555.

Allowance for Attorney's Fees.—Chapter 24, Laws of 1919, amended this section in regard to "subsistence" of the wife pendente lite. The effect of this amendment was to reduce the allowance for subsistence as follows: in the first action for alimony, the judgment and the wife brought a separate action alleging abandonment, it was held that plaintiff's motion until the jury should determine the issue, the presumption is that the trial judge had held adversely to the plaintiff as the fact. Byerly v. Byerly, 194 N. C. 3319, 148 S. E. 550.

Effect of Prior Divorce in Another State.—No action will lie under this section where it appears that a state having jurisdiction over the parties has declared them divorced and an appeal. Bidwell v. Bidwell, 139 N. C. 402, 52 S. E. 55.

Effect of Decree of Divorce.—Where the husband's action for divorce is over a period of two years' separation was consolidated for trial with the wife's subsequent action for alimony without divorce, and the decree of divorce was granted in the first action and judgment entered against the wife for alimony which the jury awarded the wife, the appeal from the decree of divorce is the appeal from the decree of divorce. The court may determine whether it was reasonable to the husband, and whether in taking her civil remedies under the provisions of this section. State v. Falker, 182 N. C. 793, 108 S. E. 756.

Amount.—The amount allowed for the reasonable subsistence, cost and attorneys' fees to the wife in the proceedings against her husband under the provisions of this section, is within the sound discretion of the judge hearing the same and having jurisdiction thereof. Anderson v. Anderson, 183 N. C. 139, 110 S. E. 863; Cram v. Cram, 116 N. C. 288, 21 S. E. 197.

The allowance made under this section is not such a "debt" as will give the husband the right to claim his homestead or personal property exemptions. Anderson v. Anderson, 183 N. C. 139, 143, 110 S. E. 863. See also, Wright v. Wright, 216 N. C. 693, 6 S. E. (2d) 555.

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that the judge hearing the matter shall find the facts as a basis for his judgment, as in proceedings for alimony pendente lite (sec. 50-15), although it is necessary that she have left her husband because he failed to fulfill his promise to supply certain conveniences, it is insufficient. McManus v. McManus, 191 N. C. 740, 137 S. E. 9. In such proceedings the requirement of a certain sum for alimony, for the court to allow her attorney's fees. Moore v. Moore, 185 N. C. 332, 117 S. E. 633. See also, Wright v. Wright, 216 N. C. 693, 6 S. E. (2d) 555.

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Effect of Decree of Divorce.—Where the husband's action for divorce is over a period of two years' separation was consolidated for trial with the wife's subsequent action for alimony without divorce, and the decree of divorce was granted in the first action and judgment entered against the wife for alimony which the jury awarded the wife, the appeal from the decree of divorce is the appeal from the decree of divorce. The court may determine whether it was reasonable to the husband, and whether in taking her civil remedies under the provisions of this section. State v. Falker, 182 N. C. 793, 108 S. E. 756.

Amount.—The amount allowed for the reasonable subsistence, cost and attorneys' fees to the wife in the proceedings against her husband under the provisions of this section, is within the sound discretion of the judge hearing the same and having jurisdiction thereof. Anderson v. Anderson, 183 N. C. 139, 110 S. E. 863; Cram v. Cram, 116 N. C. 288, 21 S. E. 197.

The allowance made under this section is not such a "debt" as will give the husband the right to claim his homestead or personal property exemptions. Anderson v. Anderson, 183 N. C. 139, 143, 110 S. E. 863. See also, Wright v. Wright, 216 N. C. 693, 6 S. E. (2d) 555.

§ 50-16 CH. 50. DIVORCE AND ALIMONY § 50-16

that the judge hearing the matter shall find the facts as a basis for his judgment, as in proceedings for alimony pendente lite (sec. 50-15), although it is necessary that she have left her husband because he failed to fulfill his promise to supply certain conveniences, it is insufficient. McManus v. McManus, 191 N. C. 740, 137 S. E. 9. In such proceedings the requirement of a certain sum for alimony, for the court to allow her attorney's fees. Moore v. Moore, 185 N. C. 332, 117 S. E. 633. See also, Wright v. Wright, 216 N. C. 693, 6 S. E. (2d) 555.

Allowance for Attorney's Fees.—Chapter 24, Laws of 1919, amended this section in regard to "subsistence" of the wife pendente lite. The effect of this amendment was to reduce the allowance for subsistence as follows: in the first action for alimony, the judgment and the wife brought a separate action alleging abandonment, it was held that plaintiff's motion until the jury should determine the issue, the presumption is that the trial judge had held adversely to the plaintiff as the fact. Byerly v. Byerly, 194 N. C. 3319, 148 S. E. 550.

Effect of Prior Divorce in Another State.—No action will lie under this section where it appears that a state having jurisdiction over the parties has declared them divorced and an appeal. Bidwell v. Bidwell, 139 N. C. 402, 52 S. E. 55.

Effect of Decree of Divorce.—Where the husband's action for divorce is over a period of two years' separation was consolidated for trial with the wife's subsequent action for alimony without divorce, and the decree of divorce was granted in the first action and judgment entered against the wife for alimony which the jury awarded the wife, the appeal from the decree of divorce is the appeal from the decree of divorce. The court may determine whether it was reasonable to the husband, and whether in taking her civil remedies under the provisions of this section. State v. Falker, 182 N. C. 793, 108 S. E. 756.

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nonsuit. Plaintiff's attorneys filed petition for counsel fees against defendant, and defendant's attorneys filed a "certificate and affidavit" as an affidavit in support of defendant's resistance to judgment allowing counsel fees against him, in the suit. The court had announced its intention of allowing counsel fees as of nonsuit and tendered and signed by the court. It was held that at the time the petition for counsel fees was filed, no motion for nonsuit was still pending, and after the action was still pending, and the petition amounted to a motion to have the court act upon the prayer as made by plaintiff in her complaint, and the action of the court in allowing counsel fees to plaintiff's attorneys against defendant was affirmed. McFetters v. McFetters, 219 N. C. 731, 14 S. E. (2d) 833.

Establishing of One Cause for Divorce Is Sufficient Although a Suit for Divorce Is Pending Where Three Separate Grounds for Divorce Are Alleged. —Where the complaint is for divorce and alimony, the court may proceed under any of the provisions of the statute, so long as it is made to appear that the court is not attempting to evade the provisions of the statute. Albritton v. Albritton, 210 N. C. 111, 116, 185 S. E. 762. See also, Hagedorn v. Hagedorn, 211 N. C. 175, 189 S. E. 507.

Modification or Vacation of Order.—Where, within the period prescribed by the statute, the superior court judge, having jurisdiction, has allowed the wife a reasonable subsistence, etc., to her, and, in her proceedings under the provisions of this section, the order of allowance may be amended or vacated upon motion of the plaintiff and upon proper notice of plaintiff's subsequent petition for such recovery by special appearance, the court may reopen and amend prior orders awarding subsistence to wife and children. Wright v. Wright, 216 N. C. 693, 6 S. E. (2d) 555.

Amount Due Prior Orders May Be Determined Upon Motion.—The wife may have the amount of alimony due under prior orders determined by the court upon motion in the cause. Barber v. Barber, 217 N. C. 422, 8 S. E. (2d) 204. An action is not ended by the rendition of a judgment, but is still pending until the judgment is satisfied for the purpose of motions affecting the judgment but not the merits of the cause. Barber v. Barber, 217 N. C. 422, 8 S. E. (2d) 204.

Corpus of Husband's Estate May Be Assigned to Secure Allowance.—The court is authorized to assign the corpus of the husband's property to secure the allowance, and therefore it is not necessary to file a separate suit to obtain the lien. The husband's earnings and property, tangible or intangible, in his hands or in the hands of the creditors, are chargeable with the reasonable subsistence and counsel fees which the wife obtains by her husband in an appropriate civil action against him. Whether the lien of the wife will in any event prevail as against a judgment or lien, which has priority over an attachment therein issued, it is necessary that she show that she has a lien which will not be defeated or rendered void by her husband in an appropriate civil action against him. See Crews v. Crews, 175 N. C. 168, 95 S. E. 149.

Wife's Claim Prior.—The wife's inchoate right to alimony makes her a creditor of her husband, enforceable by attachment, in case of her abandonment, which puts every one on notice of her claim and her priority over other creditors of her husband. Walton v. Walton, 178 N. C. 722, 130 S. E. 176.

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No Decree before Final Hearing.—When the application is for alimony without divorce it cannot be entered under this section as the necessity of such provisions for the wife and children will cease if the parties resume the marriage relation, and cannot properly be continued if the husband procures a divorce for the fault of the wife. Skittles Harpe v. Skittles Harpe, 130 N. C. 72, 40 S. E. 851; Hooper v. Hooper, 164 N. C. 1, 105 S. E. 64; Crews v. Crews, 175 N. C. 168, 95 S. E. 149.

Infant's Guardian May Subsequently Attack Consent Judgment.—Where the court in proceedings under this section approves a consent judgment, providing for the support and maintenance of the child, the legitimacy of the judgment may be subsequently attacked by the child's authorized guardians on the ground of irregularity and that it was obtained by the minor, or not being in the best interest of the minor. Mitchell v. Talley, 182 N. C. 683, 109 S. E. 882.

Contempt.—In Little v. Little, 203 N. C. 696, 164 S. E. 89, the defendant was held in contempt for disobedience of court, and for his refusal to pay certain weekly sums to his wife under this section.

Under a consent judgment, entered in an action by a husband against his wife where no reliefs were first provided for certain money payments in lieu of alimony by the
 CHAPTER 51. MARRIAGE—GENERAL

§ 51-1. Requisites of marriage; solemnization.

—The consent of a male and female person who may lawfully marry, presently to take each other as husband and wife, freely, seriously and plainly expressed by each in the presence of the other, and in the presence of an ordained minister of any religious denomination, minister authorized by his church, or of a justice of the peace, and the consequent declaration by such minister or officer that such persons are man and wife, shall be a valid and sufficient marriage: Provided, that the rite of marriage among the Society of Friends, according to a form and custom peculiar to themselves, shall not be interfered with by the provisions of this chapter: Provided further, marriages solemnized before March 9, 1909, by ministers of the gospel licensed, but not ordained, are validated from their consumption. (Rev., s. 2081; Code, s. 1812; 1871-2, c. 193, s. 2; 1908, c. 47; 1909, c. 704, s. 2; 1909, c. 897; C. S. 2493.)


§ 50-17. Alimony in real estate, writ of possession issued. — In all cases in which the court grants alimony by the assignment of real estate, the court has power to issue a writ of possession when necessary in the judgment of the court to do so. (Rev., s. 1568; Code, s. 1293; 1868-9, c. 123, s. 1; C. S. 1668.)

Title to Specific Property Remains in Husband.—Where alimony is allotted to the wife in specific property of the husband, the title to such property remains in him, and will revert at the death of the wife or upon a reconciliation. Taylor v. Taylor, 93 N. C. 418.

Chapter 51. Marriage.


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Cross References.—As to statutes concerning married women, see § 52-1 et seq. As to divorce and alimony, see § 50-1 et seq.

Editor's Note.—For article on common-law marriage in North Carolina, see 16 N. C. L. Rev. 289.

History of Marriage Laws in the State.—In State v. Bray, 35 N. C. 200, Ruffin C. J., in an interesting discussion tracing our marriage law shows that, originally in this colony, valid marriages could only be solemnized by ministers of the Church of England with the result, as we now know from the "Colonial Records," that a large part of the population were not legally married, owing to the scarcity of such ministers. See State v. Wilson, 121 N. C. 650, 656, 28 S. E. 416.

In 1715, ch. 1 of the Colonial Records, reciting the inconvenience from scarcity of ministers of the established Church, authorized the Governor of the colony to solemnize marriages, then, in 1741, Chapter 1, empowered justices of the peace to perform the ceremony. In 1766 by ch. 9, the privilege was extended to ministers of the Presbyterian Church, and at last, in 1778, ch. 7, to ministers of all other denominations and marriages according to the custom of the Society of Friends were also made valid. This list, made a little broader, is now in this section. See State v. Parker, 106 N. C. 711, 11 S. E. 517; State v. Wilson, 121 N. C. 650, 656, 28 S. E. 416.

Common Law Marriage Invalid.—"There is no such thing as marriage simply by consent in this State," said Ruffin, C. J., in State v. Samuel, 19 N. C. 177, and State v. Bray, 35 N. C. 200; Gaston, J., in State v. Patterson, 24 N. C. 346; Pearson, C. J., in Cooke v. Cooke, 61 N. C. 583. And the same is recognized as the law in the more recent cases of State v. Parker, 106 N. C. 711, 11 S. E. 517; State v. Melton, 120 N. C. 591, 26 S. E. 933; State v. Wilson, 121 N. C. 650, 656, 28 S. E. 416.

Celebration Essential.—No celebration was required by the Cannon Law prior to the Council of Trent, nor by the Civil Law, nor by the law in Scotland, nor in many states in this Union. In some states the question has never been decided. In other states celebration before some person authorized by law is held essential, as (after some hesitation) has been held to be the common law in England. Stewart
Marriage and Div., section 50; 14 Am. & Eng. Enc. 515. In the latter class is North Carolina. State v. Wilson, 121 N. C. 650, 656, 28 S. E. 416.

Same—Section Must Be Followed.—While consent is essential to marriage, it is not the only essential, but it must be acknowledged in the manner and before some person prescribed by this section. State v. Wilson, 121 N. C. 650, 28 S. E. 416.

When Marriage Made.—Marriage is in law complete when parties able to contract and willing to contract have actually contracted to be man and wife, in the forms and with the solemnities required by law. Constitution, § 20, n. 7; Code, s. 1809; R. C., c. 68, s. 14; 1871-2, c. 193; 1923, c. 75; 1933, c. 269, s. 1; 1939, c. 375; C. S. 2494.)

Cross References.—As to penalty for marrying female under fourteen, see § 14-319. As to what marriages may be declared void on application of either party, see § 50-4. As to provisions of law requiring affidavit of persons of sixteen years of age by whose marriage a certificate of the blanks shall be filed with the office of the register of deeds, see §§ 51-9 to 51-14 on their return, see § 51-14.

Editor's Note.—Formerly, the legal age of marriage for females was raised to sixteen and for males to eighteen. This was amended by c. 75 Public Laws, 1923, which changes the legal age of marriage for females to sixteen, thus making it lawful for a female at sixteen to marry, but making it unlawful for a female under sixteen and over fourteen to marry, unless a special license shall be issued upon filing with the register of deeds a written consent to such marriage by one of the parents of the female or by one standing in loco parentis. Since the amendment provides for the marriage of female minors under fourteen and under sixteen, it looks as if the Legislature did not intend to change the requirement of consent to marriage provided that the marriage of a female under fourteen and any male shall be void. See 1 N. C. L. R. 295.

Public Laws, 1933, c. 369, § 13, 369, 1933, at the end of this section, relating to filing certificates by those marrying in another state. The 1939 amendment inserted the second proviso.

Annulled.—As to annulment under the 1939 amendment, see 17 N. C. Law Rev. 353.

Effect of Lack of Special License.—The marriage of a female between the ages of fourteen and sixteen without the written consent of her parent and without the special license required by this section is not void but voidable.

Patterson, 24 N. C. 346.

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Patterson, 24 N. C. 346.
tion by striking out the words "Croatian Indians" wherever those words occurred in the section, and inserting in lieu thereof the words "Indians of Robeson County." Chapter VI, Sec. 31.

The effect of the proviso is to be construed as a valid marriage, and to have the same force and effect as if the parties had been married at the time the marriage was contracted, and to have the same legal consequences as if the parties had been married in accordance with the provisions of the section. Baity v. Cranfill, 91 N. C. 293, 300.

Same.—Power.—The intention of the Legislature was to confine its operation to cases where a man and woman had been married under an invalid act and as not to operate as a posthumous bastardizing of children born to them. Baity v. Cranfill, 91 N. C. 293, 297.

Same.—What Must Be Proven.—To bring a case of unlawful marriage into the last proviso to this section, it must be shown not only that one of the parties is dead but that the marriage was unlawful. State v. Whitford, 106 N. C. 711, 11 S. E. 317.

The Proviso as to Death of Party.—The last proviso is broad and comprehensive in its operation, and it applies to marriages contracted before its enactment as well as those contracted thereafter. Baity v. Cranfill, 91 N. C. 293, 297.

Section Expresses Public Policy.—During the existence of slavery and the practice of polygamy, marriages between slaves, and marriage prohibited by positive law when had between whites and free persons of color, which are voidable by positive law, and voidable by virtue of the provisions of this section, are voidable by sentence of separation, and until such sentence, it is deemed valid and subsisting. Smith v. Morehead, 86 N. C. 537.

Provided, that nothing herein contained shall be so construed as to invalidate any marriage heretofore contracted in case where by counting the half-blood as being only half so near kin as those of the same degree of the whole-blood. State v. Whitford, 106 N. C. 711, 11 S. E. 317.

The same section was held applicable to marriages between persons who were of different races, and to marriages between persons of the same race, and between persons of the same race and a person of negro descent. State v. Reinhardt, 86 N. C. 636.

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acknowledgment of assent, and to state the time when it began. Woodard v. Blue, 103 N. C. 109, 114, 9 S. E. 492.

Continuing Cohabitation Supplies Consent.—The necessa-
riness of consent to marriage thereto is supplied under this
section by continuing cohabitation. Battis v. Avery, 140 N.
C. 184, 186, 52 S. E. 584; State v. Whitford, 86 N. C. 636, 639.

By force of the original consent of the parties while they were being kept a boy, he became free, and by the per-
formance of what was required by the statute, they became
to all intents and purposes man and wife. State v. Harris,
( N. C, 5). 5

Same.—Old Rule Adopted.—Our statute of 1866, owing to
the peculiar status of slave marriages, adopted as to such
marriages the rule which has long prevailed in Scotland,
New England and several other states (and which was the
rule of the civil law and of the Canon law till the Council
of Trent), that consent, followed by cohabitation, consti-
tutes a legal marriage. State v. Melton, 120 N. C. 591, 595,
26 S. E. 931.

Provision for Recordation.—Section 6 made the failure to
have the acknowledgment recorded, in a specified time, a
misdemeanor punishable at the discretion of the court. State
v. Whitford, 86 N. C. 636, 638.

Same.—Directory Only.—The provision as to acknowledg-
ment was considered to be directory, so that a failure to
comply with it, though a misdemeanor, did not affect the
validity of the marriage. Battis v. Avery, 140 N. C. 184,
186, 52 S. E. 584.

Same.—Noncompliance Does Not Effect Marriage. — It
has been held that an entry of the acknowledgment is not
essential to the consummation of the marriage, and that a
marriage constituted by operation of the act can not be
avoided by a failure to obtain an acknowledgment thereto.

State v. Adams, 65 N. C. 537, 539; State v. Whit-
ford, 86 N. C. 636, 639.

Art. 2. Marriage License.

§ 81-6. Solemnization without license unlawful.

—No minister or officer shall perform a ceremo-
ny of marriage between any two persons, or
shall declare them to be man and wife, until there
is delivered to him a license for the marriage of the
persons in which the marriage is intended to
take place, or by his lawful deputy. (Rev., s.
2086; Code, s. 1813; 1871-2, c. 193, s. 4; C. S. 2498.)

Actual Delivery Required.—This section requires an ac-
tual delivery, and constructive delivery will not suffice.
So performance of the ceremony by a justice after a tele-
phone conversation with the applicant is not sufficient
for purposes of this section. Wooley v. Bruton, 184 N. C. 438, 114 S. E. 628.

Marriage without License Void.—A marriage per-
curto will not invalidate a marriage other-
wise good. State v. Parker, 106 N. C. 711, 11 S. E. 517; Mag-
nett v. Roberts, 112 N. C. 71, 16 S. E. 919; Wooley v. Bru-
ton, 184 N. C. 438, 114 S. E. 628.

Effect of Illegal License.—A marriage is not invali-
d because solemnized under an illegal license. Maggett v. Rob-
erts, 112 N. C. 71, 16 S. E. 919; Wooley v. Bruton, 184 N. C.
438, 114 S. E. 628.

Same.—Officer Penalized.—The only effect of marrying a
couple without a legal license is to subject the officer or
minister to the penalty of $200 prescribed by the next sec-
tion. State v. Parker, 106 N. C. 711, 11 S. E. 517; State v.
Robbins, 28 N. C. 23; Maggett v. Roberts, 112 N. C. 71, 74,
16 S. E. 919.

§ 81-7. Penalty for solemnizing without license.

—Every minister or officer who marries any
couple without a license being first delivered to
him, as required by law, or after the expiration of
such license, or who fails to return such license
and under whose custody and control he or she
is, is delivered to him, and such written consent
shall be filed and preserved by the register.
When it appears to the register of deeds that it
is probable there is a legal impediment to the
marriage of any person for whom a license is ap-
plied, he has power to administer to the person
so applying an oath touching the legal capacity
of said parties to contract a marriage. (Rev., s.
2088; Code, s. 1814; 1887, c. 331; 1871-2, c. 193,
s. 5; C. S. 2500.)

Cross Reference.—As to penalty for issuing license unlaw-
ful, see § 51-7.

Editor's Note.—Section 51-17 which provides the penalty
for violation of the provisions of this section should be read
along with this section and the annotations under the two
sections should be considered together.

The two sections are in pari materia and should be con-
strued together. Joyner v. Harris, 157 N. C. 295, 297, 72 S.
490: Bowdler v. Waugh.—Where an infant resides, or, if he or she resides at a school, of the
person by whom said infant was placed at school, and under whose custody and control he or she
is, delivered to him, and such written consent
shall be filed and preserved by the register.

§ 81-9. Health certificates required of applicants for licenses.

—No license to marry shall be issued by the register of deeds of any county to a
male or female applicant therefor except upon the following conditions: The said applicant shall
present to the register of deeds a certificate executed
within thirty days from the date of presenta-
tion showing that, by the usual methods of exami-
nation made by a regularly licensed physician, no
evidence of any venereal disease in the infectious
or communicable stage was found. Such certifi-
cate shall be accompanied by the original report
from a laboratory approved by the state board of
Health for the Wassermann or any other approved test of this
nature is negative, such tests to have been made
within thirty days of the time application for li-
cense is made.

Furthermore, such certificate shall state that, by
the usual methods of examination made by a
regularly licensed physician, no evidence of tuber-
culosi in the infectious or communicable stage was found.

And, furthermore, such certificate shall state that,
by the usual methods of examination made by a
regularly licensed physician, the applicant was
found to be not subject to epileptic attacks, an
§ 51-10 CH. 51. MARRIAGE—LICENSE

§ 51-10. Exceptions to foregoing section.—Exceptions to the above section are permissible only under the conditions hereinafter named:

When the medical history and physical examination of either applicant shows syphilis to be present, or when the laboratory test for syphilis is positive, and provided both applicants are informed that syphilitic infection is present, certificate may be issued and license granted only in the following instances: (1) When the applicant with syphilis has been under continuous weekly treatment with adequate dosage of standard arsenical and bismuth preparation given by a regularly licensed physician for a period of one year, and when such applicant also signs an agreement to continue such treatment until cured or probated. It is specified that the condition stipulated in subparagraph one above may be waived in instances in which the female applicant is pregnant and it is necessary to protect the legitimacy of the offspring. In such a case the certificate may be granted and license issued provided the applicant with syphilis signs an agreement to take adequate, approved treatment until cured or probated. (2) When the female applicant is past the childbearing age, and provided the applicant with syphilis signs an agreement to take adequate treatment until cured or probated. (1939, c. 314, s. 2.)

§ 51-11. Who may execute certificate; form; filing copy with department of health.—Such certificate, upon the basis of which license to marry is granted, shall be executed by any reputable physician licensed to practice in the state of North Carolina, whose duty it shall be to examine such applicants and to issue such certificate in conformity with the requirements of §§ 51-9 to 51-14. If applicants are unable to pay for such examination, certificate without charge may be obtained from the local health officer or county physician.

Such certificate form shall be designed by the state board of health and shall be obtained by the register of deeds from the state board of health upon request.

Every examining physician under the provision of §§ 51-9 to 51-14 shall make and immediately file with the department of health of North Carolina a true copy of such certificate. (1939, c. 314, s. 3.)

§ 51-12. Eugenic sterilization for persons adjudged of unsound mind, etc.—If either applicant has been adjudged by a court of competent jurisdiction as being an idiot, imbecile, mental defective, subject to epileptic attacks, or of unsound mind, unless the applicant previously adjudged of unsound mind has been adjudged of sound mind by a court of competent jurisdiction, upon the recommendation of one or more practicing physicians who specialize in psychiatry, license to marry shall be granted only after eugenic sterilization has been performed on the applicant in accordance with state laws governing eugenic sterilization. (1939, c. 314, s. 3; 1943, c. 641.)

The 1943 amendment inserted the provision relating to being adjudged of sound mind.

§ 51-13. Penalty for violation.—Any violation of §§ 51-9 to 51-14, or any part thereof, by any person charged herein with the responsibility of its enforcement shall be declared a misdemeanor and shall be punishable by a fine of fifty dollars ($50.00) or imprisonment for thirty days, or both. (1939, c. 314, s. 3.)

§ 51-14. Compliance with requirement by residents who marry outside of state.—Residents of the state who are married outside of North Carolina, shall, within sixty days after they return to said state, file with the register of deeds of the county in which they live, a certificate showing that they have conformed to the requirements of the examination required by §§ 51-9 to 51-14 for those who are married in the state. (1939, c. 314, s. 2.)

§ 51-15. Obtaining license by false representation—misdemeanor.—If any person shall obtain a marriage license for the marriage of persons under the age of eighteen years by misrepresentation or false pretenses, he shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding fifty dollars, or imprisoned not exceeding thirty days, or both, at the discretion of the court. (Rev., s. 3371; 1885, c. 346; C. S. 2501.)

Cross Reference.—As to false pretenses generally, see § 14-100 et seq.

§ 51-16. Form of license.—License shall be in the following or some equivalent form:

To any ordained minister of any religious denomination, minister authorized by his church, or to any justice of the peace for........county: A. B. having applied to me for a license for the marriage of C. D. (the name of the man to be written in full) of (here state his residence), aged........years (race, as the case may be), the son of (here state the father and mother, if known; state whether they are living or dead, and their residence, if known; if any of these facts are not known, so state), and E. F. (write the name of the woman in full) of (here state her residence), aged........years (race, as the case may be), the daughter of (here state names and residences of the parents, if known, as is required above with respect to the man). (If either of the parties is under eighteen years of age, the license shall here contain the following:) And the written consent of G. H., father (or mother, etc., as the case may be) to the proposed marriage having been filed with me, and there being no legal impediment to the said marriage known to me, you are hereby authorized, at any time within sixty days from the date hereof, to celebrate the proposed marriage at any place within the said county where the license is required, within sixty days after you shall have celebrated such marriage, to return this license to me at my office with your signature subscribed to the certificate under this license, and with the blanks therein filled according to the facts, under
penalty of forfeiting two hundred dollars to the use of any person who shall sue for the same.

Issued this ... day of ... 19... L. M.,

Register of Deeds of ... County

Every register of deeds shall designate in every marriage license issued the race of the person proposing to marry by inserting in the blank after the word "race" the words "white," "colored" or "Indian," as the case may be. The certificate shall be filled up and signed by the minister or officer celebrating the marriage, and also be signed by one or more witnesses present at the marriage, who shall add to their names their place of residence, as follows:

... and

... N. C. are ordained and authorized minister of (here state to what religious denomination, or justice of the peace, as the case may be), united in matrimony (here name the parties), the parties licensed above, on the ... day of ...

... at the house of P. R., in (here name the town, if any, the township and county), according to law.

Witness present at the marriage: ... N. O. S. T., of (here give residence).

(Rev., 2089; Code, s. 1815; 1899, c. 541. ss. 1, 2; 1871-2, c. 193. s. 6; 1909, c. 704, s. 3; 1917, c. 38; C. S. 2502.)

Local Modification.—Bladen: 1941, c. 95.

License Not Issued Until Filled Out.—A blank marriage license, though signed by the register of deeds, is not issued until filled up and handed to the person who is to be married, or to some one for him, and, if at the time of such issuance the register has become functus officio, the failure to record it does not render him liable to the penalty imposed by sections 51-18 and 51-19, for failure to record the substance of each marriage license issued. Maggett v. Roberts, 112 N. C. 71, 16 S. E. 919.

§ 51-17. Penalty for issuing license unlawfully.

Every register of deeds who knowingly or without reasonable inquiry, personally or by deputy, issues a license for the marriage of any two persons to which there is any lawful impediment, or where either of the persons is under the age of eighteen years, without the consent required by law, shall forfeit and pay two hundred dollars to any parent, guardian, or other person standing in loco parentis, who sues for the same. (Rev., s. 2090; Code, s. 1816; 1895, c. 387; 1901, c. 722; R. C., c. 68, s. 13; 1871-2, c. 193, s. 7; C. S. 2503.)

I. IN GENERAL.

Editor's Note.—In connection with this section, see § 51-8 and the editor's note thereto.

Object of Section.—This section is a wise and beneficent one, the object being to protect the parties themselves, and the community as well, from hasty and ill-advised marriages, made without the consent of their parents or guardians or those having properly the care over them. Julian v. Daniels, 175 N. C. 346, 350, 91 S. E. 1024.

It would seem that "reasonable inquiry" involves at least an inquiry made of, or information furnished by, some person known to the register to be reliable, or, if unknown, identical and reliable, by some person known to the register. Trolinger v. Boroughs, 133 N. C. 312, 317, 45 S. E. 662; Furr v. Johnson, 140 N. C. 157, 52 S. E. 664; Joyner v. Harris, 157 N. C. 295, 298, 72 S. E. 917.

Same—Register Not Required to Examine Witnesses.—Section 51-8 does not require that the register shall make inquiry by examination of the witnesses in such cases under oath, but merely declares that he shall have "the power to examine as issuing a marriage license the register should not be excused upon a less degree of care. Trolinger v. Boroughs, 133 N. C. 312, 317, 45 S. E. 662; Furr v. Johnson, 140 N. C. 157, 52 S. E. 664; Joyner v. Harris, 157 N. C. 295, 298, 72 S. E. 917.

II. DUTIES OF REGISTER.

Duty Highly Important.—To all persons who believe that the welfare of human society depends largely upon the family relation, and that the contract of marriage should be defended by the establishment just laws for the purpose of guarding against legal impediments and to prevent the marriage of those under a certain age, when the parties are presumed to be of sound mind, the duty of each register of deeds, the officer in our State charged with the duty of issuing marriage licenses, seems most important and most solemn. That officer must exercise his duties carefully and conscientiously, and not as a mere matter of form. Trolinger v. Boroughs, 133 N. C. 312, 315, 45 S. E. 662; Agent v. Willis, 124 N. C. 29, 32 S. E. 322; Julian v. Daniels, 175 N. C. 346, 350, 91 S. E. 1024.

Duty Not Delegated.—A register of deeds can not delegate to another the duty of making the required reasonable inquiry into the legal competency of persons applying for a license to marry. Cole v. Lewis, 91 N. C. 21, 24.

Delivery to Third Party Prohibited.—This section prohibits the register from permitting the completed license to pass from the office and beyond his control into the hands of any person, except to the person to whom the register has issued a license. Cole v. Lewis, 91 N. C. 21.

Inquiry by Deputy Will Not Excuse Register.—If a party to a marriage is under the age authorized by law, the register can not excuse himself from the duty of making the reasonable inquiry required by law or agent made proper inquiry, if he did not make the inquiry himself. The trust is personal to him. Maggett v. Roberts, 112 N. C. 71, 16 S. E. 919.

III. DUTY REQUIRED.

Reasonable Inquiry.—The register violating these requirements is not liable to the penalty when he has made reasonable inquiry and has been deceived, without laches on his part. Agent v. Willis, 124 N. C. 29, 32 S. E. 322; Cole v. Laws, 104 N. C. 681, 665, 10 S. E. 172; Williams v. Hodges, 101 N. C. 300, 303, 7 S. E. 786; Laney v. Mackey, 144 N. C. 630, 633, 57 S. E. 386; Gray v. Lents, 173 N. C. 346, 91 S. E. 1024.

Same—Not a Mere Formality.—The requirement of reasonable inquiry is not merely a formal matter, which is met by taking the oaths of the husband or other parties unknown to the register, but it is expressive of a sound principle of public policy designed to protect immature persons from hasty and ill-advised marriages, made without the consent of their parents or guardians or those having properly the care over them. Julian v. Daniels, 175 N. C. 346, 350, 91 S. E. 1024.

Same—What Required.—By reasonable inquiry is meant such inquiry as renders it probable that no impediment to the marriage exists. Bowles v. Dickson, 99 N. C. 690, 69 S. E. 479.


Same—Register Not Required to Examine Witnesses.—Section 51-8 does not require that the register shall make inquiry by examination of the witnesses in such cases under oath, but merely declares that he shall have "the power to do so." His using, or failing to use, such discretionary power is merely a circumstance to be considered by the jury. Furr v. Johnson, 140 N. C. 157, 52 S. E. 664; Joyner v. Harris, 157 N. C. 295, 298, 72 S. E. 917.

Same—Sworn Statement of Stranger Insufficient.—It is not sufficient that he takes the sworn statement of the parties or their friends not known to him. Snipes v. Trotter, 142 N. C. 102, 150 S. E. 619, citing Gray v. Lents, 173 N. C. 346, 91 S. E. 1024.

Same—Question for Jury.—See "Feeding and Practice," this note.

Illustrations of Reasonable Inquiry.—When a man of good character and reliable applied for a license, and produced to the register a written statement purporting to give the age and residence of the parents, and the person producing the statement said it was true, though no name was signed to it, it was held that the register had made such inquiry as was required of him, and was not liable for the penalty. Bowles...
Register Not Indictable.—The issuing of a marriage license is not an indictable offense, unless the illegal act be done mala fide. State v. Snuggs, 85 N. C. 542.

Consent by a register of deeds in violation of the section is not an action for a penalty, against a register of deeds and the sureties, if brought in the wrong county, it is for the amount of the bond ($10,000) to be discharged upon payment of $200, and the Superior Court has jurisdiction. Joyner v. Roberts, 114 N. C. 377, 116 S. E. 511. Where the question should be submitted to the jury, and a judgment as of nonsuit thereon is erroneously entered. Lemmons v. Sigman, 181 N. C. 238, 106 S. E. 764.

Reasonable Inquiry Question of Law When Facts Admitted.—If the facts are admitted, it is the duty of the court to instruct the jury whether they are sufficient to constitute reasonable inquiry; if they are in controversy, it is the duty of the court to instruct the jury that certain facts to be determined from the evidence do or do not constitute reasonable inquiry. Spencer v. Saunders, 159 N. C. 183, 126 S. E. 430.

Evidence.—In a civil suit against a register evidence of a statement made by the husband in a criminal action is not admissible. Snipes v. Wood, 179 N. C. 249, 102 S. E. 619.

Proof of the officer's failure to administer the oath to the applicant for a marriage license is admissible to show a lack of reasonable inquiry. Laney v. Mackey, 144 N. C. 570, 52 S. E. 664; Trolinger v. Boroughs, 133 N. C. 533, 45 S. E. 662; Snipes v. Wood, 179 N. C. 549, 95 S. E. 907.

Same—Instructions to Jury.—If the facts are admitted, it is the duty of the court to instruct the jury whether they are sufficient to constitute reasonable inquiry; if they are in controversy, it is the duty of the court to instruct the jury that certain facts to be determined from the evidence do or do not constitute reasonable inquiry. Joyner v. Roberts, 114 N. C. 389, 19 S. E. 648; Trolinger v. Boroughs, 133 N. C. 533, 45 S. E. 662; Snipes v. Wood, 179 N. C. 549, 95 S. E. 907.

Presumption as to Time of Issuance.—The presumption is that a marriage license, signed by a register of deeds, was issued during his term of office, unless the contrary is on the party asserting it. Maggett v. Roberts, 112 N. C. 71, 16 S. E. 919.

Burden of Proof.—If the burden of proof is upon the plaintiff to show that the officer issued the license when he knew of the impediment to the marriage, or that it was forbidden by law, when he had not made reasonable inquiry. Furr v. Johnson, 157 N. C. 525, 52 S. E. 664; Trolinger v. Boroughs, 133 N. C. 312, 45 S. E. 662; Joyner v. Harris, 157 N. C. 295, 298, 72 S. E. 970.

Question of Consent to Reasonable Inquiry. —Where there is a conflict of evidence, whether there has been "reasonable inquiry" to be submitted to the jury upon all the evidence under proper instructions. Joyner v. Roberts, 114 N. C. 389, 19 S. E. 648; Trolinger v. Boroughs, 133 N. C. 533, 45 S. E. 662; Snipes v. Wood, 179 N. C. 549, 95 S. E. 907.

Same—No Evidence.—In a civil suit against a register evidence of a statement made by the husband in a criminal action is not admissible. Snipes v. Wood, 179 N. C. 249, 102 S. E. 619.

§ 51-18. Record of licenses and returns; original filed.—Every register of deeds shall keep a book (which shall be furnished on demand by the board of county commissioners of his county) on the first page of which shall be written or printed:

Record of marriage licenses and of returns thereto, for the county of ___________, from the ______ day of ___________, 19__, to the ______ day of ___________, 19__, both inclusive.

In said book shall be entered alphabetically, according to the names of the proposed husbands, the substance of each marriage license and the return thereon, as follows. The book shall be divided by lines with columns, each of which shall be properly headed, and in the first of two columns beginning on the left, shall be put the date of issue of the license; in the second, the name in full of the intended husband, with his residence; in the third, his age; in the fourth, his race and color; in the fifth, the name in full of the intended wife, with her residence; in the sixth, her age; in the seventh, her race and color; in the eighth, the name and title of the minister or officer who celebrated the marriage; in the ninth, the day of the celebration; in the tenth, the place of the celebration; in the
eleventh, the names of all or at least three of the witnesses who signed the return as present at the celebration. The original license and return thereto shall be filed and preserved. (Rev. s. 2091; Code, s. 1815; 1809, c. 541, s. 3; 1871-2, c. 193, s. 9; C. S. 2504.)

§ 51-19. Penalty for failure to record.—Any register of deeds who fails to record, in the manner above prescribed, the substance of any marriage license issued by him, or who fails to record, in the manner above prescribed, the substance of any return made thereon, within ten days after such return made, shall forfeit and pay two hundred dollars to any person who sues for the same. (Rev., s. 2092; Code, s. 1819; 1871-2, c. 193, s. 10; C. S. 2505.)

Legislature May Relieve.—An act of the Legislature relieving the register from the penalty for failure to record passed after an action was brought to recover the penalty, but before judgment, is constitutional. Bray v. Williams, 137 N. C. 387, 49 S. E. 887.

Chapter 52. Married Women.

Art. 1. Powers and Liabilities of Married Women.

Sec. 52-1. Property of married woman secured to her.
52-2. Capacity to contract.
52-3. Capacity to draw checks.
52-4. Conveyance or lease of wife's land requires husband's joinder.
52-5. Separation by divorce or deed; husband non compos.
52-6. Abandonment by husband.
52-7. Husband cannot convey, etc., wife's land without her consent; not liable for his debts.
52-8. Capacity to make will.
52-9. May insure husband's life.
52-10. Earnings and damages from personal injury are wife's property.
52-11. [Repealed.]
52-12. Contracts of wife with husband affecting corpus or income of estate.
52-13. Contracts between husband and wife generally; releases.

Art. 1. Powers and Liabilities of Married Women.

§ 52-1. Property of married woman secured to her.—The real and personal property of any female in this state, acquired before marriage, and all property, real and personal, to which she may, after marriage, become in any manner entitled, shall be and remain the sole and separate estate of the female, and shall not be liable for any debts, obligations or engagements of her husband, and may be devised and bequeathed, and, with the written assent of her husband, conveyed by her as if she were unmarried. (Rev., s. 2093; Const., Art. X, s. 6; C. S. 2506.)

Cross References.—See also the North Carolina Constitution, Article X, section 6. As to conveyances by husband and wife, see § 39-9 et seq. As to capacity to dispose of property by will, see § 52-10. As to curtesy, see § 52-16. As to dower, see § 30-4 et seq.

Editor's Note.—For a discussion of the history of this legislation and of many of the earlier cases construing it, see Ball v. Patrun, 140 N. C. 83, 52 S. E. 410. For a discussion of the early law regarding married women's contracts, see the notes under the following section. It will be noted that this section is identical with the constitution, art. 10, sec. 6 and the annotations under that section should be referred to.

Common Law Rules.—At common law, marriage was an absolute gift to the husband of all the personal property of the wife in possession, and the same became his property instantly on the marriage; and it was a qualified gift of all the personal property adversely held, and all the choses in action of the wife, which became the husband's absolutely upon his election of the same into possession, during the coverture, with the right in case the wife die to administer on her estate, and in that character to collect, and after payment of her debts to hold the surplus to his own use, without obligation to distribute to any one. O'Connor v. Harris, 81 N. C. 279, 282.

It was also competent to the husband having choses in action "jure mariti" to assign the same for value, or as a security for his debts, and the assignment availed to pass the right to the assignee to collect and have the proceeds as his absolute property, if collected during coverture, just as the husband might have done if he had kept and
reduced it into possession himself. O'Connor v. Harris, 81 N. C. 279, 282.

When Provision Took Effect.—The Constitution of 1868, Article X, section 8, provided that it shall take effect for purchases and for real estate held after the adoption thereof as required by law, is a sufficient written assent to make the deed valid. Freeman v. Lide, 176 N. C. 434, 435, 97 S. E. 402, and cases cited.

Power of Legislature.—The Legislature may abolish the exception in favor of the wife when she holds a claim against her husband, the statute of limitation will run against a note thus made in favor of her. courier v. Ballard, 174 N. C. 16, 17, 93 S. E. 385.

Conveyances of Personalty.—A married woman has the absolute power to dispose of her personalty by will, and she can convey it with the written assent of her husband; which does not restrict her freedom in the disposition of her personalty, as conveyances apply only to realty. Everett v. Ballard, 174 N. C. 16, 17, 93 S. E. 385.


§ 52-2. Capacity to contract.—Subject to the provisions of § 52-12, regulating contracts of wife with husband affecting corpus or income of estate, every married woman is authorized to contract in the same manner and with the same effect as if she were unmarried, although in the Constitution or by any statute. Vann v. Edwards, 135 N. C. 661, 47 S. E. 784; Dail, 170 N. C. 406, 409, 87 S. E. 126.

Conveyances of PERSONALTY.—A married woman has the absolute power to dispose of her personalty by will, and she can convey it with the written assent of her husband; which does not restrict her freedom in the disposition of her personalty, as conveyances apply only to realty. Everett v. Ballard, 174 N. C. 16, 17, 93 S. E. 385.
privacy examination as to the execution of the same taken and certified as now required by law. (Rev., s. 2094; Code, s. 1826; 1871-2, c. 193, s. 17; 1911, c. 109; C. S. 2507.)

I. IN GENERAL.

Section Constitutional.—This section is constitutional and valid. Warren v. Dial, 170 N. C. 406, 87 S. E. 126.

The effect of this section is to take married women out of the classification which the law recognized, prior to its enactment, and to make them, with respect to capacity to contract, sui juris. This section is held to mean what it plainly says, that, except as to contracts with her husband, in which the forms required by sec. 52-12, must still be observed, and except in conveyances of her real estate, in which case her privy examination must still be taken and her husband's written consent had, a married woman can now make any "all contracts so far as to affect her real and personal property, in the same manner and to the same effect as if she were unmarried." Warren v. Dial, 170 N. C. 406, 87 S. E. 126; Lipinsky v. Revell, 167 N. C. 508, 83 S. E. 820; Everett v. Ballard, 174 N. C. 16, 18, 93 S. E. 385.

The effect of this section is to take married women out of the classification which the law recognized, prior to its enactment, and to make them, with respect to capacity to contract, sui juris. This section is held to mean what it plainly says, that, except as to contracts with her husband, in which the forms required by sec. 52-12, must still be observed, and except in conveyances of her real estate, in which case her privy examination must still be taken and her husband's written consent had, a married woman can now make any "all contracts so far as to affect her real and personal property, in the same manner and to the same effect as if she were unmarried." Warren v. Dial, 170 N. C. 406, 87 S. E. 126; Lipinsky v. Revell, 167 N. C. 508, 83 S. E. 820; Everett v. Ballard, 174 N. C. 16, 18, 93 S. E. 385.

II. LIABILITIES INCURRED.

Liable for Breach of Contract.—When the Legislature authorized a married woman "to contract and deal so as to affect her real and personal property in the same manner, and with the same effect, as if she were unmarried," it authorized contracts for breach of which they would be personally liable as if they had remained unmarried. Everett v. Ballard, 174 N. C. 16, 18, 93 S. E. 385.

Same—Contract to Convey Realty.—On a breach of a married woman's contract to convey her land, she may be held liable in damages as if she had remained unmarried. Everett v. Ballard, 174 N. C. 16, 18, 93 S. E. 385.

Same-No Specific Performance.—This section means that when a married woman makes an executory contract to convey land and her privy examination is not taken she can only be held in damages, and that specific performance may not, as formerly, be enforced. Warren v. Dial, 170 N. C. 406, 87 S. E. 126.

Where Husband Is Alien.—A married woman whose husband is an alien and never visited or resided in the United States is personally liable on her contracts. Levi v. Marsha, 156 N. C. 591, 72 S. E. 832.

Liable When Partner or Surety.—Since the passage of the Martin Act, a wife has been held liable jointly and severally on every contract or obligation in which the husband was a partner or surety. Bristol Grocery Co. v. Bails, 177 N. C. 298, 299, 98 S. E. 832.

A wife by becoming surety on the obligations of her husband creates a direct and separate liability to the creditor of the husband which makes her personally responsible, under this section, without requiring the statutory formalities.

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ties necessary to the validity of certain contracts made directly between the wife and her husband. Royal v. Southerland, 168 N. C. 405, 84 S. E. 708.

Assessments on Stock.—In Robinson v.Torrentine, 59 Fed. 554, construing the former provisions of this section, it was held that the purchase of stock by a married woman was not a "contract" within the terms of the section and that she was not liable upon an assessment although the stock was purchased without the written consent of her husband.

Husband Still LIABLE for Funeral Expenses.—The common-law rule that the husband is liable for the funeral expenses of his deceased wife and for "necessaries" during their married life is not affected by this section, when there is nothing to show an express promise to pay on her part, or an agreement or articles on her part evidencing circumstances as to make her exclusively or primarily liable according to the equitable principles of indebitatus assumpsit. Bowen v. Daugherty, 168 N. C. 242, 84 S. E. 265.

THE ACTION FOR BREACH.

Inability to Get Husband's Consent Immortal.—The rule that a married woman is liable in damages for failure to specifically perform her contract to convey her lands under the Martin Act may not be successfully defeated upon the ground that she may be unable to get the consent of her husband to the conveyance, in the absence of any bad faith. Warren v. Dail, 170 N. C. 406, 87 S. E. 125.

Wife May Claim Personal Property Exemption.—Under the provisions of Article X, section 1 of our Constitution, and of this section, the wife may claim her personal property exemption from the assets of a partnership with her husband when the validity of the partnership contract is not questioned and there has been a conveyance, a lease, or a chattel real, to run for more than three years, though the deed was held to the other therefrom. Bristol Grocery Co. v. Bails, 277 N. C. 181, 129 S. E. 2d 268.

Estoppel of Wife.—As to the doctrine of title by estoppel applying to a married woman under the provisions of this section, who has joined with her husband in a deed to his lands with warranty, the wife's interest not appearing on the face of the instrument, but which title the wife afterwards acquired, Quære? Builders, etc., Co. v. Joyner, 182 N. C. 518, 169 S. E. 259.

Judgment Enforced by Execution.—In Royal v. Southerland, 168 N. C. 405, 81 S. E. 708, it was held that under this section a judgment could be rendered against a wife upon her obligation as surety to her husband. Thrash v. Ould, 172 N. C. 726, 730, 90 S. E. 915.

Where Specific Performance May Be Declined.—In Royal v. Southerland, 168 N. C. 405, 81 S. E. 708, it was held that under this section a judgment could be rendered against a married woman upon her contracts and enforced by execution, contrary to the provisions of the Martin Act where same are not regulated by the Martin Act and her husband was charged her property with payment thereof. Thrash v. Ould, 172 N. C. 726, 730, 90 S. E. 915.

Where Specific Performance May Be Declined.—Since the wife's contract was executory and not complete, she and her husband, and she is liable in damages for a breach thereof. The same may be decreed where the husband has subscribed his name under seal to her deed. Joiner v. Firemen's Ins. Co., 6 P. Supp. 101.

§ 52-3. Capacity to draw checks.—Bank deposits made by or in the name of a married woman shall be paid only to her or on her order, and her receipt or acquittance shall be valid in law to fully discharge the bank from any and all liability on account thereof. (Rev. c. 2095; 1891, c. 221; 1893, c. 344; C. S. 2552.)

§ 52-4. Conveyance or lease of wife's land requires husband's joinder.—No lease or agreement for a lease or sublease or assignment by any married woman of her lands or tenements, or chattels real, to run for more than three years, or to bere the duration more than six months after its execution, or any conveyance of any freehold estate in her real property, shall be valid, unless the same be executed by her and her husband, and proved or acknowledged by them, and her free consent thereto appear on her examination separate from her husband, as is now or may hereafter be required by law in the probate of deeds of

females covert. (Rev. c. 2096; Code, c. 1831; 1871-2, c. 193, s. 26; C. S. 2508.)

Cross References.—As to the formalities necessary in married woman's conveyances, see § 39-7 et seq. As to exceptions, see §§ 35-12, 52-5, and 52-6. As to title to swamp lands reclaimed vested in board of education by written instrument without privacy examination of fema covert, see § 151-81.

Written Assent of Husband Required.—The power of a married woman to convey her property is regulated by the Constitution, Art. X, sec. 6, and must be exercised by the written assent of her husband. Walton v. Bristol, 125 N. C. 419, 34 S. E. 544; Stallings v. Walker, 176 N. C. 321, 97 S. E. 25; Kilpatrick v. Kilpatrick, 176 N. C. 123, 96 S. E. 6.

Same—How Expressed.—Her assent need not be by deed, for he has nothing to convey; and his joining in with her in the instrument is sufficient. Jones v. Craigmiles, 114 N. C. 613, 19 S. E. 638, and cases there cited. His signing the instrument merely as a witness is a sufficient "written assent." Jennings v. Hinton, 126 N. C. 48, 35 S. E. 187. A letter of agreement is sufficient. Brinkley v. Brinkley, 126 N. C. 393, 35 S. E. 631; Stallings v. Walker, 176 N. C. 321, 324, 97 S. E. 25.

Husband's Indorsement Does Not Validate Deed. — The written assent of the husband indorsed on the deed does not meet with the constitutional and statutory requirements necessary for her to make a valid conveyance. Council v. Prine, 158 N. C. 152, 71 S. E. 494; Jackson v. Beard, 163 N. C. 105, 107, 78 S. E. 6.

Privy Examination Required.—In order to convey a married woman's separate real estate or fix a charge upon it, her privy examination is required. Council v. Bridgen, 153 N. C. 445, 69 S. E. 494; Jackson v. Beard, 162 N. C. 105, 107, 78 S. E. 6.

Deed Made in Foreign State.—A deed executed by a married woman in another state, according to the laws of such state, for realty in this State, without privacy examination of the wife, as required by section 39-7, is void. Smith v. Ingram, 130 N. C. 100, 40 S. E. 984.

Conveyance as Executrix—It is not necessary that a married woman should be privily examined as to the execution of a former husband, and when she was a feme sole. Darden v. Ing. v. Neuse, etc., Steamboat Co., 107 N. C. 437, 12 S. E. 46.

Action for Damages for Breach.—A married woman may be held in damages for the breach of her contract in the lease of her separate lands for more than three years, although her husband has not joined therein or given her written consent thereto. Miles v. Walker, 179 N. C. 479, 102 S. E. 884.

The opinion in this case draws the distinction between valid for specific performance, or void under the provisions of the Martin Act, and where the husband was not joined in the conveyance as required by the section, and the judgment is void. (Rev. c. 2095; 1891, c. 221; 1893, c. 344; C. S. 2552.)

Cross References.—As to alternative method by which wife of lunatic may convey real estate, see § 35-12.

Editor's Note on Separation.—Since separation agreements have been rare in this State, and, for a long period of time, they were declared absolutely void in North Carolina, as they were in England. This was the conclusion reached in Collins v. Collins, 112 N. C. 410, 16 Sou. 292. It was based upon the intention expressed in the Code to regard man and wife as one, upon the decisions of the English courts regarding the marital bond as inseparable, and upon the general grounds of public policy in preserving the marriage bond.

After the case of Collins v. Collins, supra, decided in 1866, and before the cases involving separation agreements, decided twenty years later, Sparks v. Sparks (1886) 94 N.
C. 527, the legislature had enacted, in furtherance of the constitutional provisions guaranteeing married women's rights, this section.

In the Spinks case, supra, on page 532 the court says: "The legislative provision, perhaps, in furtherance of the constitutional provision, by which the property of the woman, on her marriage, is secured to her as separate estate, implies a possible legal separation of the parties, by voluntary or judicial agreements, and defines her condition and rights resulting therefrom."

Later in Smith v. King, (1890) 107 N. C. 271, 12 S. E. 57, the court held that the separation deeds are not regarded with favor in North Carolina. In that case the deed had been rescinded by a subsequent cohabitation, and therefore the court did not decide what the effect of that deed would have been in such cases.

In the case of Cram (1895) 116 N. C. 288, 21 S. E. 197, there is an intimation that separation deeds are not looked upon with favor.

The leading case in North Carolina, Archboll v. Archbell, 158 N. C. 408, 74 S. E. 327, was decided in 1912. Although the separation deed in that case was held to be void because of an invalid certificate of the probate officer, Justice Hoke said, that due to the "distinctive recognition of deeds of this character...we are constrained to hold that public policy with us is no longer peremptory on this question. The existence of the conditions under which these deeds are not void as a matter of law."

From these decisions it clearly appears that separation deeds are looked upon with favor. In North Carolina, there is no direct decision which would show them necessary certain conditions. However, there is general agreement as to requisites in practically all jurisdictions. As stated in Rathbone, 199 N. C. 368, 154 S. E. 631, supra, these requisites are as follows: (1) That there must be a separation already existing or immediately to follow the execution of the deed; (2) that the separation deed must be made for an adequate reason, of such a kind that it is necessary for the health or happiness of one or the other; (3) that it must be reasonable and fair to the wife, considered in the condition of the parties. In addition, the separation deed must conform to the statutory requirements, concerning deeds between husband and wife. See 2 N. C. L. R. 193, 194.

Section 52-7 Constitutional.—This section is a valid exercise of the legislative power. Lancaster v. Lancaster, 178 N. C. 22, 23, 100 S. E. 120.

When Husband's Assent Necessary.——The husband's assent is required when either by reason of mental infirmity or incapacity he is unable to give assent, or by his conduct in abandoning his wife or maliciously turning her out of doors he has practically emancipated her, for in both cases she must be looked upon as a separate party, or in the case of Lancaster v. Lancaster, 178 N. C. 22, 23, 100 S. E. 120.

This section has been referred to in a number of cases as an exception to the constitutional provision which requires the assent of the husband, though not directly construed. In that case the wife became a feme sole for the purpose of contracting, and might acquire and transfer property. Hall v. Walker, 118 N. C. 376, 31 S. E. 6.

An action to recover possession of land may be sustained against a married woman alone, whose husband is an alien, resides abroad, or has abandoned his wife. Finley v. Saunders, 98 N. C. 482, 4 S. E. 516.

Where Husband Fugitive from Justice.—In an action against a married woman where the husband is a nonresident and a fugitive from justice, the husband is not a necessary party. Heath, etc., v. Morgan, 117 N. C. 594, 23 S. E. 489.

Departure from State Not Required.—This section does not require the husband to leave the State to enable the wife to use her property for her support. Vandover v. Humphrey, 119 N. C. 65, 51 S. E. 893.

Abandonment Sufficient.—Abandonment of the wife by the husband is sufficient for her to execute a valid conveyance of her lands without his joinder. Bachelor v. Norris, 166 N. C. 506, 152 S. E. 839; Pardon v. Paschal, 142 N. C. 538, 55 S. E. 365; Campbell v. Campbell, 221 N. C. 257, 20 S. E. (2d) 41; Nichols v. York, 219 N. C. 265, 13 S. E. (2d) 555.

Same.—Tort Actions.—Under a reasonable construction of the Constitution and this section, a wife abandoned by her husband for the term of his own life or any less term of years, except by and with the consent of his wife, may maintain an action in tort against a third person. Brown v. Brown, 121 N. C. 8, 27 S. E. 998.

Same.—Wife Need Not Wait Six Months.—Under this section a wife is not required to wait six months (the time required to elapse before entitling her to bring an action for divorce) before she is permitted to make contracts. Vandover v. Humphrey, 119 N. C. 65, 51 S. E. 893.

Abandonment Amounts to a Separation.—An action to recover possession of land may be sustained against a woman who has abandoned her husband for the term of his own life or any less term of years, except by and with the consent of his wife. Keys v. Tuten, 199 N. C. 368, 154 S. E. 631.


§ 52-6. Abandonment by husband. — Every woman whose husband abandons her, or maliciously turns her out of doors, shall be deemed a free trader, so far as to be competent to contract and be contracted with, and to bind her separate property, but the liability of her husband for her reasonable support shall not thereby be impaired. She may also convey her personal estate and her real estate without the assent of her husband.

(Rrev., s. 2117; Code, s. 1832; 1871-2, c. 193, s. 24; C. S. 2530.)

Section Constitutional.—This section was held constitutionally valid in Cram, supra, 116 N. C. 288. Brown v. Brown, 121 N. C. 8, 27 S. E. 998; 38 L. R. A. 242; Finger v. Hunter, 130 N. C. 529, 531, 41 S. E. 890.

There is no constitutional inhibition on the Legislature declaring what the consequences shall be when a husband has become a free trader, and notwithstanding the provisions of Article X, § 6, to the effect that a married woman may convey her separate realty with the written consent of her husband, the section is valid and it may be held, in such cases § 52-4, requiring the execution of her deed by her husband and her separate examination taken, does not apply. Keys v. Tuten, 199 N. C. 368, 154 S. E. 631.

When Husband is an Alien.——When a husband is an alien, it was held that when the husband became an alien the wife became a feme sole for the purpose of contracting, and might acquire and transfer property. Hall v. Walker, 118 N. C. 376, 31 S. E. 6.

An action to recover possession of land may be sustained against a married woman alone, whose husband is an alien, resides abroad, or has abandoned his wife. Finley v. Saunders, 98 N. C. 482, 4 S. E. 516.

Where Husband Fugitive from Justice.—In an action against a married woman where the husband is a nonresident and a fugitive from justice, the husband is not a necessary party. Heath, etc., v. Morgan, 117 N. C. 594, 23 S. E. 489.

Departure from State Not Required.—This section does not require the husband to leave the State to enable the wife to use her property for her support. Vandover v. Humphrey, 119 N. C. 65, 51 S. E. 893.

Abandonment Sufficient.—Abandonment of the wife by the husband is sufficient for her to execute a valid conveyance of her lands without his joinder. Bachelor v. Norris, 166 N. C. 506, 152 S. E. 839; Pardon v. Paschal, 142 N. C. 538, 55 S. E. 365; Campbell v. Campbell, 221 N. C. 257, 20 S. E. (2d) 41; Nichols v. York, 219 N. C. 265, 13 S. E. (2d) 555.

Same.—Tort Actions.—Under a reasonable construction of the Constitution and this section, a wife abandoned by her husband for the term of his own life or any less term of years, except by and with the consent of his wife, may maintain an action in tort against a third person. Brown v. Brown, 121 N. C. 8, 27 S. E. 998.

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fected by deed and privy examination, according to the rules required by law for the sale of lands belonging to feimes covert. And no interest of the husband whatever in such real estate shall be subject to sale to satisfy any execution obtained against him; and every such sale, is hereby declared null and void. (Rev. s. 2097; Code, s. 1840; R. C., c. 56: 1848; c. 41; C. S. 2510.)

Editor's Note.—See 8 N. C. Law Rev. 476.

Formerly Husband Could Lease and Convey.—At common law the husband, upon the marriage, was seized in right of a freehold interest in her lands during their joint lives. After the birth of issue he was seized of an estate in his own right, called tenancy by the curtesy initiative. Coke Lit., 67 A. This estate, if he survived his wife, was called tenancy by the curtesy initiate, and inured to his benefit for life. Either as tenant by marital right or as tenant by curtesy initiative, the husband was entitled to the rents and profits and might lease or convey, a fee simple might be sold under execution against him. Taylor v. Taylor, 112 N. C. 134, 135, 16 S. E. 1019.

Former Right to Rents and Profits.—Where a man was married, and the land was acquired by his wife before the adoption of the Constitution of 1868, and the act called the "Marriage Act," he was a tenant by the curtesy initiative, notwithstanding the registration of this section, without joining his wife as a party. Wilson v. Arentz, 64 N. C. 431. And where he had by her several living children, and that she acquired the property. Taylor v. Taylor, 112 N. C. 670. And if entitled to the possession, he had a right to the rents and profits, etc. Morris v. Morris, 94 N. C. 613, 618.

In General.—This section expressly provides that a husband shall not have power to dispose of his wife's land for his own life or any less term of years without her assent, nor can the same be subject to sale to satisfy any execution obtained against him. Bruce v. Nicholson, 109 N. C. 202, 206, 13 S. E. 790.

Purpose and Effect of Section.—Neither this section nor the Constitution of 1868 abolished tenancy by the curtesy initiate, but since the passage of this section such tenancy consists of a right which the husband cannot assert against the wife as an independent interest in the husband's real estate. The right in the husband's land which the husband is entitled to have under the Constitution of 1868 is the right of his wife of a freehold interest in her lands belonging to femes covert. And no interest be recovered by her suing alone, and such earnings or recovery shall be her sole and separate use, and she may dispose of the same and receive the whole of the purchase money. Tonde v. Downs, 69 N. C. 280. The purchase money is active or passive. Freeman v. Lide, supra.

Same—Tenancy by Curtesy Limited.—It has been decided that neither this section nor the Constitution of 1868 destroyed such tenancy, although the husband was stripped almost of all the legal right to dispose of the law rights therein during the coverture. Walker v. Long, 109 N. C. 510, 14 S. E. 299; Taylor v. Taylor, 112 N. C. 134, 137, 16 S. E. 1019. The wife is no longer the tenant by the curtesy initiate, stripped of its common law attributes till there only remains the husband the earnings of his wife and the proceeds of her separate estate. Hallyburton v. Slagle, 132 N. C. 947, 44 S. E. 655; Freeman v. Lide, 176 N. C. 434, 97 S. E. 403; Tiddy v. Graves, 126 N. C. 620, 36 S. E. 127. And she can so devise her separate estate whether the trust active or passive. Freeman v. Lide, supra.

§ 52-8. Capacity to make will.—Every married woman has power to devise and bequeath her real and personal estate as if she were a free sole; and her will shall be proved as is required of other wills. (Rev,. s. 2098; Code, s. 1839; 1871-2, c. 193, s. 31; C. S. 2511.)

Cross Reference.—See also, § 31-2.

May Defeat Curtesy by Will.—Since the Constitution of 1868 a married woman may by will deprive her husband of curtesy in her separate estate. Hallyburton v. Slagle, 132 N. C. 947, 44 S. E. 655; Freeman v. Lide, 176 N. C. 434, 97 S. E. 403; Tiddy v. Graves, 126 N. C. 620, 36 S. E. 127. And she can so devise her separate estate whether the trust active or passive. Freeman v. Lide, supra.

§ 52-9. May insure husband's life.—Any fee covert in her own name, or in the name of a trustee with his assent, may convey or assign her curtesy in her separate estate. Hallyburton v. Slagle, 132 N. C. 947, 44 S. E. 655; Freeman v. Lide, 176 N. C. 434, 97 S. E. 403; Tiddy v. Graves, 126 N. C. 620, 36 S. E. 127. And she can so devise her separate estate whether the trust active or passive. Freeman v. Lide, supra.

Cross Reference.—As to right of husband to insure life for the benefit of wife and children, see the North Carolina Constitution, Article X, section 7.

§ 52-10. Earnings and damages from personal injury are wife's property.—The earnings of a married woman by virtue of any contract for her personal service, and any damages for personal injuries, or other tort sustained by her, can be recovered by her suing alone, and such earnings or recovery shall be her sole and separate property as fully as if she had remained unmarried (1913, c. 108, § 1, C. S. 2512.)

Editor's Note.—In the concurring opinion in Patterson v. Franklin, 168 N. C. 75, 79, 84 S. E. 18, Clark, C. J. states that this section was passed as a result of the decision in Price v. Charlotte Electric Co., 160 N. C. 450, 76 S. E. 502. The same is also mentioned in Kirkpatrick v. Crutchfield, 178 N. C. 348, 352, 100 S. E. 602.

Former Provisions.—The law formerly prevailing allowed the husband to dispose of his wife's land and the rents and profits, in the State, before the adoption of the present constitution. Walker v. Long, 109 N. C. 510, 311, 14 S. E. 299. But since the passage of the section the husband cannot maintain an action in his wife's name to recover title or possession obtained against him by the curtesy initiate, but the wife can maintain such action, either by joining her husband or suing alone. Walker v. Long, 109 N. C. 510, 311, 14 S. E. 299; Thompson v. Wiggins, 110 N. C. 398, 14 S. E. 301.

Same—Where Husband Conveys Land to Wife.—A conveyance of land from husband to wife shall pass the legal estate of the husband, but the vesting of the same is defeasable by the clause in title to declare title and recover possession. Walker v. Long, 109 N. C. 510, 14 S. E. 299.

Statute of Limitations Not Applicable.—A tenant by the curtesy initiative has not such estate in the land of his wife that will put in operation the statute of limitations against either the husband or wife in favor of one claiming title by adverse possession. Jones v. Coffey, 109 N. C. 515, 14 S. E. 84.

Husband Can Surrender Curtesy.—Since the section was enacted a husband has the right to surrender his estate as provided by the curtesy initiative, with the assent of his wife, who, with the assent of her husband may sell the same and receive the whole of the purchase money. Teague v. Downs, 69 N. C. 280. The husband can surrender his curtesy in his separate estate. Hallyburton v. Slagle, 132 N. C. 947, 44 S. E. 655; Freeman v. Lide, 176 N. C. 434, 97 S. E. 403; Tiddy v. Graves, 126 N. C. 620, 36 S. E. 127. And the purchase money is active or passive. Freeman v. Lide, supra.

Cross Reference.—As to right of husband to insure life for the benefit of wife and children, see the North Carolina Constitution, Article X, section 7.
In General.—This section and C. S. § 545 give to a married woman the fullest and most untrammeled power to bring actions, even against her husband to recover damages she has sustained by reason of negligence to her, or to recover her separate property. She may bring actions, even against her husband and in all cases against her husband and in all cases to recover for negligent injury is not limited to residents of this state, and a nonresident wife may maintain an action here against her nonresident husband on a tort action. Brown v. Brown, 124 N. C. 19, 32 S. E. 320. In every case, however, the recovery was allowed only where there was an intentional invasion. The right of the wife to recover in North Carolina for a direct and intentional invasion is clearly settled. Id. See also, § 545.

Effect on Rights of Husband.—By virtue of the statutes giving married women separate property rights and the right to sue her husband, she has been given the right to sue her husband in his business, or out of the amount for services, the husband may not recover the separate earnings of a married woman belong to her, and she is entitled to any recovery as her separate property. Brown v. Brown, 124 N. C. 19, 32 S. E. 320. The wife has a right to sue her husband and can recover when there has been an intentional and direct invasion or breach of the marital relations. Crowell v. Crowell, 180 N. C. 516, 105 S. E. 206; Crowell v. Crowell, 181 N. C. 66, 106 S. E. 149.

Nonresident Wife Has Right of Action for Husband's Tort.—The right of a married woman to maintain an action against her husband for a tort committed by him is clearly settled. Crowell v. Crowell, 181 N. C. 66, 106 S. E. 149. Where there was an intentional invasion. The right of the wife to recover in North Carolina for a direct and intentional invasion is clearly settled. Id. See also, § 545.

Joinder of Husband Unnecessary.—Since the passage of § 50-12, 182 N. C. 9, 13, 108 S. E. 318, the court said: "It follows therefore (from this section) that the husband cannot sue his wife for tortious injuries inflicted on her. The law has never authorized the wife to maintain such tort actions sustained by the husband.

Husband and Wife Employed Together.—Since the passage of the Martin Act, section 52-2, and this section, the separate earnings of a married woman belong to her, and she may sue and recover them alone; and where the evidence tends only to establish the fact that the employer was to pay a husband and wife each a certain and different amount for services, the husband may not recover the whole upon the theory that the amount he was to receive was augmented by what she was to receive for her separate services. Croom v. Goldsboro Lumber Co., 182 N. C. 217, 108 S. E. 735.

Services Rendered to Husband.—For wife to recover for services rendered to her husband in his business, or outside of his domestic duties, while living together under the marital relation, there must be some promise on his part to pay for them; and the relation of marriage, nothing else appearing, negatives an implied promise on his part to do so. Dorsett v. Dorsett, 183 N. C. 340, 108 S. E. 723.


§ 52-12: Contracts of wife with husband affecting corpus or income of estate.—No contract between a husband and wife made during coverture shall be valid to affect or change any part of the real estate of the wife, or the accruing income thereof for a longer time than three years next ensuing the making of such contract, or to impair or change the body or capital of the personal estate of the wife, or the accruing income thereof, for a longer time than three years next ensuing the making of such contract, unless such contract is in writing, and is duly proved as is required for conveyances of land; and upon the examination of the wife separate and apart from her husband, as is now or may hereafter be required by law in the probate of deeds of femes covert it shall appear to the satisfaction of such officer that the wife freely executed such contract, and freely consented thereto at the time of her separate examination, and that the same is not unreasonable or injurious to her. The certificate of the officer shall state his conclusions, and shall be conclusive of the facts therein stated. But the same may be impeached for fraud as other judgments may be. (Rev. s. 2107; Code s. 1835; 1871-2, c. 195, s. 27; C. S. 2515.)

I. In General.

II. Transactions Included.

III. The Effect on Rights of Husband.

IV. Effect of Non-Compliance.

Cross References.

See also, § 52-2 and notes. As to conveyances by husband and wife, see 39-7 et seq. As to separation agreement, see §§ 52-5, 52-13 and notes.

I. IN GENERAL.

Editor's Note.—All transactions of the wife with her husband in regard to her separate property were held void at common law. Sims v. Ray, 96 N. C. 87, 2 S. E. 443. This was because at common law the husband and wife were deemed one person, as a conduit, in order to pass the title to property from one to the other. Sydnor v. Boyd, 119 N. C. 481, 86 S. E. 543.

Section Passed to Protect Wife.—This section was passed to protect the wife from the influence and control which the husband is presumed to have over her by reason of her being the wife. Sims v. Ray, 96 N. C. 87, 2 S. E. 443. The law presumes that contracts between husband and wife affecting her real estate are executed under the influence and coercion of the husband, and to rebut this presumption under the contract valid, an officer of the law must examine the contract, and be satisfied that she is doing what is reasonable and not hurtful to her, and so certify, otherwise the contract may be impeached for fraud as other judgments may be. Keen v. Vann, 154 N. C. 311, 319, 70 S. E. 747; Caldwell v. Blount, 193 N. C. 560, 562, 137 S. E. 578.

The purpose of this section was to prevent frauds by the husband upon the wife, and to give validity to transactions, invalid at common law, between husband and wife, of the nature described, provided they are executed with the prescribed formality. Sims v. Ray, 96 N. C. 87, 2 S. E. 443; Long v. Rankin, 108 N. C. 338, 12 S. E. 987; Stout v. Perry, 152 N. C. 312, 313, 67 S. E. 757.

Section Constitutional.—This section has been held to be constitutional and valid in Sims v. Ray, 96 N. C. 87, 2 S. E. 443; Long v. Rankin, 108 N. C. 338, 12 S. E. 987; Kearney v. Hutton, 154 N. C. 317, 319, 70 S. E. 747; Butler v. Butler, 169 N. C. 584, 586, 86 S. E. 507.

Strict Construction.—This section is an enabling statute and must be strictly construed. Caldwell v. Blount, 193 N. C. 560, 562, 137 S. E. 578.

It is necessary that it should affirmatively appear that the provisions of this section have been strictly complied with. Sims v. Ray, 96 N. C. 87, 2 S. E. 443; Butler v. Butler, 169 N. C. 584, 586, 86 S. E. 507.

Same—Requirements Necessary.—No deed from a wife to her husband, conveying her land to him, is valid, unless the officer examines the deed and finds that she has executed the same, as required by statute, shall also state in his certificate his conclusions that said deed is not unreasonable or injurious to her. The statute requires that both conclusions, that the deed is reasonable and not hurtful or injurious to the wife, shall be stated by the officer in his certificate attached or annexed to the deed. Caldwell v. Blount, 193 N. C. 560, 562, 137 S. E. 578.

Section Does Not Apply to Concession of Judgment in
Favor of Creditors.—A judgment by confession in favor of creditors against a husband and wife is valid and the private examination of the wife is not necessary under this section, which applies only to contracts between husband and wife. Davis v. Cockman, 211 N. C. 609, 191 S. E. 322.

II. TRANSACTIONS INCLUDED.

Parol Transfer for Less Than Three Years Valid.—A wife can upon a fair consideration give land by parol to the husband for a period less than three years under this section. Wells v. Batts, 112 N. C. 283, 289, 17 S. E. 417.

Section Applies to Contracts Only.—An examination of this section discloses that the words "electrically conveyed" do not apply to conveyances; indeed, the word "contract" is used five times. The object of the Legislature was clearly to prevent the wife from making any contract with her husband whereby she should incur a liability which in the future might prove a burden or charge upon it, or cause a change or impairment of her income or personality. Rea v. Rea, 156 N. C. 539, 531, 72 S. E. 573.

If this section extended to conveyances, it would be a violation of that provision of the Constitution by adding the requirement that some third party, a magistrate or other official, must give his written approval before she can do what the Constitution guarantees that she may do "with the approval of her husband." Concurring opinion Clark, C. J., in Frisbee v. Cole, 179 N. C. 469, 475, 102 S. E. 890.

Same—Conveyance of Land by Wife.—Where the conveyance was to the husband and wife by entirety, it is not a transfer of the wife's interest in the lands, and it is certified that he had assented thereto at that time, the objection to the probate of the husband that it was not open to inquiry in a collateral attack is not well taken. Davis v. Bass, 188 N. C. 200, 124 S. E. 566; Garner v. Horner, 191 N. C. 539, 540, 132 S. E. 309.

Notes Payable to Husband and Wife Jointly.—Where the wife has conveyed her lands with her husband's written consent, and with the consent of all parties takes a mortgage back on the same day and as a part of the same transaction, as to the part given in part payment of the purchase price, payable to herself and husband jointly, it is not evidence that she made him an unqualified gift, either of her separate property or of her interest in the lands, and though conveyed at her request creates a resulting trust in the lands in favor of the husband. Deese v. Deese, 176 N. C. 267, 195 S. E. 252; Cornell v. Brown, 205 N. C. 6, 169 S. E. 818.

Conveyance by Entirety.—When land is purchased by the wife with money belonging to her separate estate, with consent of the husband and wife by entirety, it is not a gift by the wife of all of her interest in the property, and though thus conveyed at her request creates a resulting trust in the lands in favor of the husband. Deese v. Deese, 176 N. C. 267, 195 S. E. 252.

Deeds of separation, though not favored by law, are under certain circumstances recognized by this section and §§ 52-5 and 52-13, when signed in conformity thereto, Taylor v. Taylor, 197 N. C. 197, 148 S. E. 171. See also Brown v. Brown, 205 N. C. 54, 169 S. E. 818.

Consent Judgment Must Conform.—A consent judgment, that transfers the wife's title in her separate property to her husband, must be in conformity with this section. Ellis v. Ellis, 193 N. C. 216, 136 S. E. 350.

Applicable to Wife's Interest in Estates by Entireties.—During the continuance of the joint lives of the husband and wife, who have acquired an estate by intestate, the wife's interest in the same is subject to the provisions of this section; and where the estate has been conveyed to one in trust for them both, and the officer in taking the acknowledgment of the deed, the wife has failed to make the certificate required by this section, requiring him, as a prerequisite to its validity, to certify that the instrument was not unreasonable or injurious to her, the instrument itself is void, and the husband may, if by or otherwise, dispose of her interests. Davis v. Bass, 188 N. C. 200, 124 S. E. 566.

Deed by husband and wife conveying lands held by them both in fee simple, which is incompetent, and benefit of the husband is a conveyance of land by a wife to her husband, is void, and operates as an estoppel by deed to the husband and does not operate as an estoppel by deed to her during her life or her heirs at law after her death. Capps v. Massey, 199 N. C. 196, 154 S. E. 55.

III. THE CERTIFICATE.

Certificate Must Be Annexed to Deed.—It has been uniformly held that a deed of a wife, conveying land described therein to her husband, is void, unless there is attached or annexed to said deed the certificate of the probating officer as required by this section which is applicable only to contracts between husband and wife, and it is not required that such agreement be executed in accord with this section. Coward v. Coward, 216 N. C. 596, 6 S. E. 2d 573.

Certificate Must Show Deed Not Unreasonable and Injurious.—A conveyance of land by a wife to her husband is void when the acknowledgment fails to comply with this section, and the acknowledgment is fatally defective if the probating officer failed to certify that, at the time of its execution and the wife's privy examination, the deed is not unreasonable or injurious to her. Fisher v. Fisher, 217 N. C. 70, 6 S. E. (2d) 812.

Certificate Conclusively Presumed to Be True.—This section only requires the certification of the probating officer of a deed to lands from a wife to her husband shall state his conclusions that the contract or deed "is not unreasonable or injurious to her," and it will be conclusively presumed that it upon such a certification, and when the requirements have been followed, the action of the officer taking the probate is not open to inquiry in a collateral attack in impeachment of it, except "for fraud, as other judgments may be so attacked." Frisbee v. Cole, 179 N. C. 469, 102 S. E. 890.

Amendment of Defective Certificate.—Where the certificate required by this section is defective, it cannot be subsequently amended so as to render a deed valid, at least after the death of the wife. Best v. Utley, 189 N. C. 356, 127 S. E. 337.

Same—Evidence.—Where the defendants allege that certain of the requirements were observed by the officer but omitted by mistake from his certificate, testimony of the wife and the probate officer as to what transpired at the time is competent in rebuttal of the plaintiff's evidence, if he had introduced any, and immaterial if he did not so. Anderson v. Anderson, 177 N. C. 401, 99 S. E. 106.

Evidence is not admissible to show that the facts stated in the certificate are not true. Best v. Utley, 189 N. C. 356, 127 S. E. 337.

Defective Acknowledgment Not Cured by Prior Separation Agreement.—An agreement by husband and wife to pool their respective lands and to pool their respective debts, and where the conveyance of the wife's interest in land to her husband is not cured by a prior deed of separation properly executed. Fisher v. Fisher, 217 N. C. 70, 6 S. E. (2d) 812.

Parol Transfer for Less Than Three Years Valid.—A deed by husband and wife conveying lands held by them both in fee simple, which is incompetent, and benefit of the husband is a conveyance of land by a wife to her husband, is void, and operates as an estoppel by deed to the husband and does not operate as an estoppel by deed to her during her life or her heirs at law after her death. Capps v. Massey, 199 N. C. 196, 154 S. E. 55.

IV. EFFECT OF NONCOMPLIANCE.


Where the husband has conveyed to his wife his title to lands held by them both by the entirety, the certificate of the probate officer that the instrument was not unreasonable or injurious to her, does not give the husband a right to convey the property, and if the certificate is void, the probate of the deed is void, and does not operate as an estoppel by deed to her during her life or her heirs at law after her death. Capps v. Massey, 199 N. C. 196, 154 S. E. 55.
The failure of the certificate of a deed to lands from a wife to her husband to state that the conveyance was “not unreasonable or injurious to her” renders the instrument void. Farmers Bank v. McCullers, 201 N. C. 440, 160 S. E. 494.

Same—Partial Omission.—The deed of a wife to her husband, duly acknowledged and with private examination provided for, was held invalid in Singleton v. Cherms, 188 N. C. 402, 84 S. E. 698, by the unanimous opinion of the court, because of the fact that the officer taking the probate failed to certify that the making of the deed was not unreasonable or injurious to the wife. Butler v. Butler, 169 N. C. 584, 586, 86 S. E. 507.

Same—Oral Declarations Incompetent.—Oral declarations or statements of any kind of a wife to her husband are not competent evidence as to her dealings with third parties with respect to the husband's property, as recited in a deed to him. Hall v. Clackamas County, 239 Or. 86, 399 P. (2d) 207, 209, 210.

Under Void Deed Husband Takes Only Curtesy.—Where the husband has had children by the wife of her first marriage, and he has received an invalid deed from her of her separate lands, after her death he has only an estate for life therein as tenant by the curtesy, and under foreclosure proceedings may be held to be adverse to the heir for that estate. Waddell v. Gough, 195 N. C. 456, 143 S. E. 602.

Defective Paper Good as Color of Title.—A paper writing void for failure of compliance with this section, as good as color of title. Renford v. Price, 178 N. C. 441, 100 S. E. 591.

Cross References.—See also, §§ 52-5, 52-12, and notes thereto. As to renouncement of rights of dower and curtesy by minors, see § 30-10.

§ 52-14. Wife's antenuptial contracts and torts.—The liability of a femme sole for any debts owing, or contracts made or damages incurred by her before her marriage shall not be impaired or altered by such marriage. No man by marriage shall incur any liability for any debts owing, or contracts made, or for wrongs done by his wife before the marriage. (Rev., ss. 2101, 2106; Code, ss. 1822, 1823; 1871-2, c. 193, ss. 13, 14; C. S. 5151.)

Justice Has Jurisdiction.—A justice of the peace has jurisdiction to decide whether or not a wife is liable on a debt contracted prior to her marriage. Hodges v. Hill, 105 N. C. 130, 10 S. E. 956; Neville v. Pope, 95 N. C. 346; Beville v. Cox, 190 N. C. 265, 13 S. E. 590, and the justice also has jurisdiction where the action is on a contract made or a wrong done by her before the marriage. Neville v. Pope, 95 N. C. 346.

Money Lent to Husband Recoverable.—In a suit brought by a wife against the administrator of her deceased husband for money "advanced and lent" to him during the coverture, where the marriage took place after the adoption of the Code of 1881, 1888, it was held that the character of the wife's liability was that of an ordinary contract liability, and that it was never inconsistent with public policy, and was, therefore, valid. George v. High, 83 N. C. 99.

§ 52-15. For wife's torts, husband not liable.—No husband shall be liable for damages accruing from any tort committed by his wife, or for any costs or fines incurred in any criminal proceeding against her. (Rev., s. 2105; Code, s. 1821; 1871-2, c. 193, s. 25; 1921, c. 102; C. S. 2518.)

Editor's Note.—The present section, abolishing the husband's liability for the torts of his wife, was substituted for the former section, abolishing the wife's liability, by chapter 84, section 2105, general assembly, 1921. At common law the husband was liable for the tort of his wife, although committed without his knowledge or consent.
consent and in his absence, and although living separate at the time, on the ground that "as her legal existence was incorporated in that of her husband, she could not be sued alone.

The rights of the husband in his wife's property have been so cut down by the Constitution, by statutes, and by pronouncements of the court, that his estate by curtesy initiate is of little value. See 11 N. C. Law Rev. 273.

Negligence of Clerk in Wife's Store.—The husband living with his wife is jointly liable with her for damages resulting from an injury received by a customer through the negligence of a clerk in her store, if she is liable therefor. Brittingham v. Stadler, 151 N. C. 299, 66 S. E. 128.

Upon Death of Wife Action Abated.—Where husband and wife are jointly sued for the wrong of the wife and the wife dies, the action abates. Roberts v. Lisenbee, 86 N. C. 135.

§ 52-16. Estate by the curtesy.—Every man who has married or shall marry a woman, and by her has issue born alive, shall, after her death intestate as to the lands, tenements and hereditaments hereinafter mentioned, be entitled to an estate as tenant by the curtesy during his life, in all the lands, tenements and hereditaments whereby his said wife was beneficially seized in dower during the coverture, wherein the said issue was capable of inheriting the said seizin was of a legal or of an equitable estate; except that when the wife has obtained a divorce a mensa et thoros, and is not living with her husband at her death, or if the husband has abandoned his wife, or has maliciously turned her out of doors, and they are not living together at her death, he shall not be tenant by the curtesy of her lands, tenements and hereditaments. (Rev., s. 2103; Code, s. 1838; 1871-2, c. 193, s. 30; C. S. 2519.)

Cross References.—As to divorce a mensa et thoros and grounds therefor, see § 50-7. As to dower, see § 104 et seq.

This section retains curtesy consummate in practically its common law form, but the rights of the husband in his wife's property have been so cut down by the Constitution, by statutes, and by pronouncements of the court, that his estate by curtesy initiate is of little value. See 11 N. C. Law Rev. 273.

When court finds that a wife died intestate seized in fee of certain lands, and left her husband surviving and a child by such husband, the court is entitled to an estate by the curtesy in the lands. Stockton v. Maney, 212 N. C. 211, 193 S. E. 137.

Actual Seizure Necessary at Common Law.—At the common law, it was essential that the wife, or the husband in the right of the wife, should have seizin in dower—that is, actual seizin—actual possession of the estate, to entitle the husband as tenant by the curtesy. Nixon v. Williams, 95 N. C. 663.

Incidents of Common Law Curtesy Initiate Draastically Limited.—The common law estate of the husband as tenant by the curtesy in the lands of his wife was abolished by sec. 6, Art. X, of the Constitution, and now, by virtue of that provision, passed in pursuance thereof, while the husband has an interest in the right to enter upon and occupy the land with the wife, he has no estate therein until her death. Walker v. Long, 109 N. C. 510, 14 S. E. 292.

When Right Attaches.—After a child of the marriage has been born alive and capable of inheriting, the husband is tenant by curtesy initiate in his wife's lands, and as such has a valuable right. Jackson v. Beard, 162 N. C. 105, 78 S. E. 343.

Husband Has a Freehold Interest.—A husband has, by the curtesy initiate, a freehold interest, but not an estate, in the property. Thompson v. Wiggins, 109 N. C. 508, 510, 14 S. E. 301.

A Bare Right of Occupancy.—The only right attaching to tenancy by the curtesy initiate in the wife's real estate is the bare right of joint occupancy with the wife with the right of ingress and egress. Thompson v. Wiggins, 109 N. C. 508, 14 S. E. 301.

A tenant by curtesy has an insurable interest in buildings and structures on the lands. Stockton v. Maney, 212 N. C. 211, 193 S. E. 137.

Nothing else appearing, a policy of fire insurance which a tenant by the curtesy procures to be issued to him, insures only his interest in the dwelling insured, and upon its destruction by fire, the life tenant is entitled to the entire proceeds of the policy, and the remainderman has no interest in other property bought by the life tenant with the proceeds thereof. Id.

Curtesy Consummate Is Not Changed.—Tenancy by the curtesy consummate, remains as at common law. The husband may sell such interest, Long v. Graeber, 64 N. C. 431. And it is liable to sale under execution against him after his wife's death. McCaskill v. McCormac, 99 N. C. 548, 6 S. E. 423; Thompson v. Wiggins, 109 N. C. 508, 509, 14 S. E. 301.

Husband a Necessary Party.—A husband, tenant by curtesy, has an interest in his wife's land and is a necessary party to a suit concerning it. Jackson v. Beard, 162 N. C. 105, 78 S. E. 6; McGlinnery v. Miller, 90 N. C. 219.

Joiner of Necessary Husband.—It was formerly held that when the husband, being a minor, joins in the deed to lands of his wife, the conveyance is voidable, subject to his affrimmance or ratification when he becomes of age; and after his death has been disproved in apt time by him, the conveyance, requiring his valid or statutory consent, is void. Jackson v. Beard, 162 N. C. 105, 78 S. E. 6. However, in view of § 30-10, a minor spouse is now empowered to join in a conveyance of either curtesy or dower or to consent to a conveyance of real property with the same effect as though of age.

Effect of Divorce a Mensa.—Where a wife has obtained a divorce a mensa et thoro, whatever rights the husband had in her lands are suspended until a reconciliation shall be effected, or until by her death he may become tenant by the curtesy consummate, and therefore she is entitled to recover from him the possession and use of her lands. Taylor v. Taylor, 112 N. C. 134, 16 S. E. 109.

Applied in Caseley v. West, 210 N. C. 240, 186 S. E. 324.

§ 52-17: Repealed by Session Laws 1943, c. 543.

§ 52-18: Repealed by Session Laws 1943, c. 543.


§ 52-19. Divorce a vinculo and felonious slaying a bar.—When a marriage is dissolved a vinculo, the parties respectively, or when either party is convicted of the felonious slaying of the other or of being accessory before the fact of such felonious slaying, the party convicted, shall thereby lose all his or her right to an estate by the curtesy, or dower, and all right to any year's provision or distributive share in the personal property of the other, and all right to administer on the estate of the other, and every right and estate in the real or personal estate of the other party, which by settlement before or after marriage was settled upon such party in consideration of the marriage only. (Rev., s. 2109; Code, s. 1843; 1871-2, c. 193, s. 42; C. S. 2522.)

Cross References.—As to absolute divorce, see § 50-5. See also § 58-10.

Editor's Note.—In the case of Owens v. Owens, 100 N. C. 250, 6 S. E. 794, a wife who murdered her husband was held to be entitled to her right of dower irrespective of her [354]
crime. The Legislature the following year adopted this section.

§ 52-20. MARRIED WOMEN—FREE TRADERS

Application to Estates by Entitlements.—This and the following section deal with the rights of husband and wife growing out of the marriage relation, such as dower, curtesy, and the like. The application of the preceding section to lands held by them in entiety in trust for heirs at law until his death, subject to his right of management and the use of the rents and profits for his own life. As this section deals with sole ownership, it is not necessary to determine whether the provision of this section, in reference to the dower of the husband or wife, which property rights in her estate here were terminated from his date. Arrington v. Arrington, 102 N. C. 491, 9 S. E. 200.

Husband's Rights Terminated by Divorce.—Personal choises in action which belong to the wife, reduced into possession of the husband in the manner prescribed by the Constitution, without his privy examination. Council v. Pridgen, 153 N. C. 491, 514, 9 S. E. 200.

Effect of Valid Foreign Divorce.—Where a wife who had resides here, bona fide removed to Illinois, and instituted an action for divorce in one of the courts of that state and the husband, in that state, appeared by attorney and defended the action, there was held that he was bound by a decree for divorce on a verdict rendered in that action, and that his property rights in her estate here were terminated from its date. Arrington v. Arrington, 102 N. C. 491, 9 S. E. 200.

When a spouse is beneficiary, the effect of a subsequent divorce on his rights to take might be controlled by this section. See 12 N. C. Law Rev. 376.

When Homicide Is Admitted.—The provisions of this section do not affect the conviction of a criminal offense where it is admitted that the homicide had been committed. Parker v. Potter, 200 N. C. 348, 349, 157 S. E. 63.

§ 52-21. Wife's elopement or divorce a mensa et bar.—If a married woman elopes with an adulterer, or willfully and without just cause abandons her husband and refuses to live with him, and is not living with her husband at his death, or if a divorce from bed and board is granted on the application of the husband, she shall thereby lose all right to dower in the lands and tenements of her husband, and also all right and estate in the property of her husband, as if she were unmarried, and the husband, if there has been no condonation at the time of the conveyance, shall thereafter be barred of all claim and right to curtesy in such real property. (Rev., s. 2111; Code, s. 1845; 1863, c. 153, s. 4; 1871-2, c. 193, s. 45; C. S. 2524.)

Cross References.—As to divorce by curtesy and forfeiture, see § 52-20. Possibility of Condonation Recognized.—This section recognizes the possibilities of condonation and the resumption of the marriage relation. Joyner v. Joyner, 151 N. C. 181, 183, 65 S. E. 896.

Art. 3. Free Traders.

§ 52-22. Requisites of writing to make her free trader.—Every married woman of the age of twenty-one years or upwards, with the consent of her husband, may become a free trader in the manner following:

1. By antenuptial contract, proved and registered, as hereinafter required; or,

2. By her and her husband signing a writing in the following or some equivalent form:

A. B., of the age of twenty-one years or upwards, wife of C. D., of the county, with his consent, testified by his signature hereto, enters herself as a free trader from the date of the registration hereof.

(Signed)

A. B.

C. D.

Witness: E. F.

Registered this day of , 19 .

The said writing may be proved by the subscribing witness or acknowledged by the parties before any officer authorized to take the probable of deeds, and shall be filed and registered in the office of the register of deeds for the county in which the woman proposes to have her principal or only place of business. (Rev., s. 2112; Code, s. 1871-2, c. 193, ss. 18, 19; C. S. 2525.)

Effect of Martin Act.—That the Martin Act practically constitutes a married woman a free trader, see under section 52-2, analysis line, "Powers Conferred," catchline, "Specifically Makes Free Trader."
§ 52-23. Writing effective from registration.—
From the time of the registration of the writing mentioned in § 52-22, the married woman therein mentioned shall be a free trader, and authorized to contract and deal as if she were a feme sole. (Rev., s. 2113; Code, s. 1828; 1871-2, c. 193, s. 20; C. S. 2526.)

Cross Reference.—As to Martin § 52-2 et seq. and annotations.

Section Does Not Include Conveyance.—The words “free-trader,” “contract” and “deal,” refer to contracts and trades in some business enterprises, and are restricted under this section to the dealings of the wife as a free-trader with reference to her contracts in the pursuit of the business she is engaged in; and the word “deal,” taken in its legal significance, does not enlarge this meaning so as to confer upon a married woman power to convey her real estate. Council v. Pridgen, 153 N. C. 443, 69 S. E. 404.

Justice Has Jurisdiction.—A justice of the peace has jurisdiction of an action against a married woman in regard to liabilities incurred by her while she is a free trader. Hodges v. Hill, 105 N. C. 130, 131, 10 S. E. 916; Neville v. Pope, 95 N. C. 346.

§ 52-24. Certified copy as evidence.—A copy of such writing, duly proved and registered and certified by the register of the county in which the same is registered, is admissible in evidence as certified copies of registered deeds are or may be allowed to be. (Rev., s. 2114; Code, s. 1829; 1871-2, c. 193, s. 21; C. S. 2527.)

Evidence of Being Free Trader.—Where it is averred, and not denied, that a married woman is a free trader, and the judgment fastens no personal liability upon her it was held that she was bound by the judgment. Roseman v. Roseman, 127 N. C. 494, 497, 37 S. E. 518. In this case Montgomery, J. dissented holding that the only evidence competent to prove that a married woman is a free trader is the registered writing or a duly certified copy.

§ 52-25. Revocation by entry on record and publication.—The right of a married woman to act as a free trader may be ended at any time by an entry by her, or by her attorney, in the margin of the registration of the writing above mentioned, to the effect that from the date of such marginal entry she ceases so to act, and by publication to that effect weekly for three weeks in some newspaper published in the county in which she had her principal or only place of business, or if there is none so published, then in any other convenient newspaper. But such entry and publication shall not impair any liabilities incurred previously thereto, nor prevent such married woman from becoming liable afterwards to any person whom she may fraudulently induce to deal with her as a free trader. (Rev., s. 2115; Code, s. 1830; 1871-2, c. 193, s. 22; C. S. 2528.)
### Division X. Corporations and Associations.

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Chapter 53. Banks.

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The term "bank" shall be construed to mean any corporation, partnership, firm, or individual receiving, soliciting, or accepting money or its equivalent on deposit as a business: Provided, however, this definition shall not be construed to include building and loan associations, Morris plan companies, industrial banks or trust companies not receiving money on deposit. The term "surplus" means a fund created pursuant to the provisions of this chapter by a bank...
The Act of 1921 substituted "commissioner of banks" for "corporation commission" in the last sentence of this section.

The definition of "insolvency" of a bank as set forth in this section is correct. State v. Shipman, 222 N. C. 218, 163 S. E. 657.

Art. 2. Creation.

§ 53-2. How incorporated. — Any number of persons, not less than five, who may be desirous of forming a company and engaging in the business of establishing, maintaining, and operating banks of discount and deposit to be known as commercial banks, or engaging in the business of establishing, maintaining, and operating offices of loan and deposits to be known as savings banks, or of establishing, maintaining, and operating banks having departments for both classes of business, or operating banks engaged in doing a trust, fiduciary, and surety business, shall be incorporated in the manner following and in no other way; that is to say, such persons shall, by a certificate of incorporation under their hands and seals set forth:

1. The name of the corporation; no name shall be used already in use by another existing corporation organized under the laws of this state or of the congress, or so nearly similar thereto as to lead to uncertainty or confusion.

2. The location of its principal office in this state.

3. The nature of its business, whether that of a commercial bank, savings bank, trust company, or a combination of two or more or all of such classes of business.

4. The amount of its authorized capital stock which shall be one thousand shares of ten dollars each, twenty-five thousand to fifty or one hundred dollars each; the amount of capital stock with which it will commence business, which shall not be less than twenty-five thousand dollars in cities or towns of three thousand population or less; nor less than thirty thousand dollars in cities and towns whose population exceeds three thousand, but does not exceed ten thousand; nor less than fifty thousand dollars in cities and towns whose population exceeds ten thousand but does not exceed twenty-five thousand; nor less than one hundred thousand dollars in cities and towns having a population of more than twenty-five thousand; the population to be ascertained by the last preceding national census: Provided, that this subsection shall not apply to banks organized and doing business prior to its adoption. Provided, further, that fractional shares may be issued for the purpose of complying with the requirements of § 53-88.

5. The names and postoffice addresses of subscribers for stock, and the number of shares subscribed by each; the aggregate of such subscriptions shall be the amount of the capital with which the company will commence business.

6. Period, if any, limited for the duration of the company. (1921, c. 4, s. 2; 1927, c. 47, s. 2; 1939, c. 73, s. 1; C. S. 217(a).)

Cross References.—As to incorporation of a general corporation, see § 55-2 et seq. As to power to issue non par stock, see §§ 55-2 et seq. As to payment of interest on non par stock, see § 55-73 et seq.

Editor's Notes.—With the exception of a few changes which will be pointed out, this section is a substantial restatement of chapter 5 of the Consolidated Statutes.

Editor's Note.—In 1921 the legislature passed an act which was intended to supplement the provisions of chapter five of the Consolidated Statutes by enlarging the corporation commission's powers of supervision over banks and making special regulations for the business of banking. This statute did not supersede or repeal any of chapter five of the Consolidated Statutes except those provisions which are in conflict with or repugnant to it. Mr. Justice Adams, in speaking of the effect of the national act on state law have been placed under the sections of this chapter, and, in many cases, comparisons have been made. It should be borne in mind that in many instances this act is a copy of the National Banking Act and that in such cases the constructions of the National Act by the courts of the United States are persuasive authority as to the proper construction of this act in such cases.

There is no section in the prior law which corresponds to this section although various terms are defined here and there throughout the law.
the approval of the corporation commission. This requirement has not been done away with, but an entire section providing for the establishment of branches has been inserted (sec. 53-62) so that such a provision in this section would be in accordance with the statutes.

The next change in the provision as to the amount each share of stock should represent; in raising the authorized so to do by the commissioner of banks. However the latter part of this section makes a radical departure from the provisions of the prior section. Formerly it was the duty of the secretary of state to record the certificate in the corporation book in his office if the certificate was in accordance with law, and then, upon the payment of the required fees, it became his duty to issue two certified copies of the certificate of incorporation and probate, one to be filed in the office of the clerk of the superior court and the other in the office of the corporation commission (now the commissioner of banks). Under this law, the corporation commission was necessary to inquire into the facts and circumstances connected with the formation of the proposed corporation and pass upon the bona fide character thereof. His power was limited to inspecting the certificate to ascertain if it complied with the requirements of the law. Nor did the corporation commission have power to refuse to issue certified copies of the certificate of incorporation and probate, one of which shall forthwith be recorded in the office of the clerk of the superior court of the county in which the same is recorded, or by one of which shall be recorded in the book to be known as the record of incorporations, which is copied in the corporation book in the office of the commissioner of banks, and thereupon issue and record such certificate of incorporation. But the commissioner of banks may refuse to so certify to the secretary of state, if upon examination and investigation he has reason to believe that the proposed corporation is likely to mislead the public as to its character or purpose; or if the name of the proposed corporation is likely to be confusingly similar to that of any other corporation. The editor's note under the preceding section, the proposed corporation becomes a corporate entity.

The Act of 1929 inserted in paragraph four the words: "ten, twenty, twenty-five." The prior provision requiring that if more than one copy of the certificate of incorporation be issued, the certificate must describe the different classes and state the terms upon which each was created, was not inserted in this section.

The word "corporation" appearing in the sixth subsection of the prior section was changed to the word "company" as used in this section.


§ 53-3. Certificate of incorporation; how signed, proved, and filed.—The certificate of incorporation shall be signed by the original incorporators or a majority of them, and shall be proved or acknowledged before an officer duly authorized under the laws of the state to take proof or acknowledgment of deeds, and shall be filed in the office of the secretary of the state. The secretary of state shall forthwith transmit to the commissioner of banks a copy of said certificate of incorporation, and shall not issue or record the same until duly authorized so to do by the commissioner of banks as hereinafter provided. (1921, c. 4, s. 3; 1931, c. 245; see C. S. 217(b)).

Editor's Note.—The first sentence of this section is identical in meaning with the first part of C. S. sec. 217.

Duty of Commissioner.—This section was complete in every respect when it left the hands of the legislature and the duty imposed upon and the discretion vested in the commissioner of banks bears only upon the question whether certain conditions exist justifying the creation of the proposed bank and that the plan and procedure laid down in the statute. His action and the certificate issued thereon merely constitute the prescribed procedure to determine whether the franchise applied for was granted under the law. (Pue v. Hood, 222 N. C. 310, 314, 22 S. E. (2d) 896.)

§ 53-5. Certificate of incorporation, when certified.—Upon receipt of such certificate from the commissioner of banks, the secretary of state shall, if said certificate of incorporation be in accordance with law, cause the same to be recorded in his office in a book to be kept for that purpose, and known as the corporation book, and he shall, upon the payment of the organization tax and fees, certify under his official seal two copies of the said certificate of incorporation and probates, one of which shall forthwith be recorded in the office of the clerk of the superior court of the county where the principal office of said corporation in this state shall or is to be located, in a book to be known as the record of incorporations, and the other certified copy shall be filed in the office of the commissioner of banks, and thereupon the said persons shall be a body politic and corporate under the name stated in such certificate. The said certificate of incorporation, or a copy thereof, duly certified by the secretary of state or the clerk of the superior court of the county in which the same is recorded, or by the commissioner of banks, under their respective seals, shall be evidence in all courts and places.
and shall, in all judicial proceedings, be deemed prima facie evidence of the complete organization and the incorporation of the company purporting thereby to have been established. The charter of any bank which fails to complete its organization and open for business to the public within six months after the date of filing its certificate of incorporation with the secretary of state shall be void: Provided, however, the commissioner of banks may for cause extend the limitation herein imposed. (1921, c. 4, s. 5; 1931, c. 243, s. 5; C. S. 217(d).)

Editor's Note. — With the exception of the requirement that they await the commission before issuing the certified copies, and the last sentence and the proviso which were added by the present act, this section is identical with the similar provisions of C. S. sec. 217. The Act of 1931 substituted "commissioner of banks" for "corporation commission" formerly appearing in this section.

Who May Take Advantage of Defect in Organization. — A defect in the organization of a bank because of a failure to begin business within the specified time can be taken advantage of only by a direct proceeding by the state for the dissolution thereof. — (1921, c. 4, s. 6; 1927, c. 243, s. 5; C. S. 217(e).)

This section was decided under the law prior to this section.

The remaining part of the section is new with the act. The last sentence and the proviso which were added by the present act, this section is identical with the similar provisions of C. S. sec. 217(h). The Act of 1931 substituted "commissioner of banks" for "corporation commission" formerly appearing in this section.

§ 53-6. Payment of capital stock. — The capital stock of every bank shall be fully paid in, in cash, before it shall be authorized by the commissioner of banks to commence business and the full payment in cash of the capital stock shall be certified to the commissioner of banks under oath by the president and cashier of the said bank. Provided, that the stock sold by any bank in process of organization, or for an increase of the capital stock, shall be accounted for to the bank in the full amount paid for the same. No commission or fee shall be allowed on any such stock for acting as a corporation for selling such stock. The commissioner of banks shall refuse authority to commence business to any bank if commissions or fees have been paid, or have been contracted to be paid by it, or by any one in its behalf, to any person, association, or corporation for securing subscriptions for or selling stock in such bank. (1921, c. 4, s. 6; 1927, c. 17, s. 3; 1931, c. 213, s. 5; C. S. 217(e).)

Cross Reference. — As to the similar provision relating to industrial banks, see § 53-140.

Editor's Note. — The corresponding section of the former law, C. S. sec. 218, was confined to the subject-matter now contained in this section. However it was provided that at least one half of the capital stock which should not be less than $5,000 should be paid in. The section also contained provisions regulating the payment of the balance. While the $5,000 provision was not inserted in this section as re-enacted in 1921, the requirement that only one-half of the capital stock need be paid in was not changed until the 1927 amendment, and this was the only change made by the amendment. Prior to the 1927 enactment the section, and this applies to the prior law as well, contained provisions regulating the payment of the balance of the capital stock. There is no occasion to refer to these sections since the 1927 amendment, and the board by which they were there changed by it. C. S. sec. 218 was clearly superseded, being in conflict with the present law.

The remaining part of the section is new with the act of 1921 and is intended to prevent a payment of commissions to the promoters for the sale of stock, or an impairment of capital by reserving a part of the sum paid in as compensation for the sale of stock. This section requires that the full amount for which the stock was sold shall be accounted for to the bank, and the following sentences specifically provides that no commissions shall be paid for the sale of stock. The authority to commence business is denied if the provisions are violated. The Act of 1931 substituted "commissioner of banks" for "corporation commission" formerly appearing in this section.

§ 53-7. Statement filed before beginning business. — Before such company shall begin the business of banking, banking and trust, fiduciary, or surety business, there shall be filed with the commissioner of banks a statement under oath by the president or cashier, containing the names of all the directors and officers, with the date of their election or appointment, term of office, residence, and postoffice address of each, the amount of capital stock of which each is the owner in good faith and the amount of money paid in on account of the capital stock. Nothing shall be received in payment of capital stock but money. (1921, c. 4, s. 7; 1931, c. 243, s. 5; C. S. 217(f).)

Editor's Note. — This section is identical in meaning with the former section as amended by the Act of 1927, c. 243, s. 7. The Act of 1931 substituted "commissioner of banks" for "corporation commission" formerly appearing in this section.

§ 53-8. Authorized to begin business. — Upon filing of such statement, the commissioner of banks shall examine into its affairs, ascertain especially the amount of money paid in on account of its capital, the name and place of residence of each director, the amount of capital stock of which each is the owner in good faith, and whether such corporation has complied with all the provisions of law required to entitle it to engage in business. If upon such examination it appears to the commissioner of banks that it is lawfully entitled to commence the business of banking, banking and trust, fiduciary, or surety business, he shall give to such corporation a certificate signed by the commissioner of banks, that such corporation has complied with all the provisions of law required to be complied with, before commencing the business of banking, and that such corporation is authorized to commence business. (1921, c. 4, s. 8; 1931, c. 243, s. 7; C. S. 217(g.).)

Editor's Note. — This section covers the same subject-matter as the latter part of section 219 of the Consolidated Statutes. The last sentence and the proviso which were added by the present act, this section is identical in meaning with the former section as amended by the Act of 1927. The Act of 1931 substituted "commissioner of banks" for "corporation commission" or "commission" wherever these words appeared in this section.

§ 53-9. Transactions preliminary to beginning business. — No such corporation shall transact any business except such as is incidental and necessarily preliminary to its organization until it has been authorized to do so by the commissioner of banks. (1921, c. 4, s. 9; 1931, c. 243, s. 5; C. S. 217(h.).)
§ 53-10. Increase of capital stock. — A corporation doing business under the provisions of this chapter may increase its capital stock as provided by law for other corporations upon a vote in favor of the increase of two-thirds in interest of each class of stockholders in its voting powers. (1921, c. 4, s. 10; C. S. 217(j).)

Cross Reference.—As to the manner of increasing the capital stock of corporations generally, see § 55-31.

Editor's Note. — While there was no express provision in the prior law which corresponds to this section, section 236 of the Consolidated Statutes provided that the general corporation law so far as applicable and not inconsistent with the banking laws should apply to banks, and it is probable that under that section the capital stock could be increased just as it is under this section.

§ 53-11. Decrease of capital stock. — A corporation doing business under the provisions of this chapter may reduce its capital stock in the manner provided for other corporations upon a vote in favor of the decrease of two-thirds in interest of each class of stockholders with voting powers: Provided, that no bank shall reduce its capital stock to an amount less than the minimum required by law. Such reduction shall not be valid or warrant the cancellation of stock certificates until it has been approved by the commissioner of banks. Such approval shall not be given except upon a finding by the commissioner of banks that the security of existing creditors of the corporation will not be impaired. (1921, c. 4, s. 11; 1931, c. 243, s. 5; C. S. 217(j).)

Cross Reference.—As to manner of decreasing stock of corporations generally, see § 35-56.

Editor's Note. — While there was no corresponding section in the prior law, it is very probable that a bank could decrease its stock under the provisions of sec. 236 of the Consolidated Statutes which made applicable all the general corporation law which was not in conflict with the banking laws.

The Act of 1931 substituted “commissioner of banks” for “corporation commission” formerly appearing in this section.

§ 53-12. Consolidation of banks. — A bank may consolidate with or transfer its assets and liabilities to another bank. Before such consolidation or transfer shall become effective, each bank concerned in such consolidation or transfer shall file, or cause to be filed, with the commissioner of banks, certified copies of all proceedings had by its directors and stockholders, which said stockholders' proceedings shall set forth that holders of at least two-thirds of the stock voted in the affirmative on the proposition of consolidation or transfer shall be based upon such examination. No such consolidation or transfer shall be made without the consent of the commissioner of banks. The expense of such examination shall be paid by such banks. Notice of such consolidation or transfer shall be published for four weeks before or after the same is to become effective, at the discretion of the commissioner of banks, in a newspaper published in a city, town, or county in which each of said banks is located, and a certified copy thereof shall be filed with the commissioner of banks. In case of either transfer or consolidation the rights of creditors shall be preserved unimpaired, and the respective companies deemed to be in existence to preserve such rights for a period of three years. (1921, c. 4, s. 12; 1931, c. 243, s. 5; C. S. 217(k).)

Cross References.—As to merger of corporations generally, see § 55-165 et seq. As to liquidation of banks, see § 53-20 and notes thereto.

Editor's Note.—The Act of 1931 substituted “commissioner of banks” for “corporation commission” formerly appearing in this section.

Presumption of Approval by Corporation Commission.—Where under the provisions of this section a State bank under jurisdiction of the Corporation Commission has transferred its assets to another State bank, the latter assuming the former's liabilities under a consolidation agreement, it will be presumed that the Corporation Commission had knowledge of the transaction coming within the scope of its duties, and had approved of the transaction as the statute requires. Corporation Commission v. Stockholders, 199 N. C. 586, 155 S. E. 445.

§ 53-13. Consolidated banks deemed one bank. —In case of consolidation when the agreement of consolidation is made, and a duly certified copy thereof is filed with the secretary of state, together with a certified copy of the approval of the commissioner of banks to such consolidation, the banks, parties thereto, shall be held to be one company, possessed of the rights, privileges, powers, and franchises of the several companies, but subject to all the provisions of law under which it is created. The directors and other officers named in the agreement of consolidation shall serve until the first annual meeting for election of officers and directors, the date for which shall be named in the agreement. On filing such agreement, all and singular, the property and rights of every kind of the several companies shall thereby be transferred and vested in such new company, and be as fully its property as they were of the companies parties to the agreement. (1921, c. 4, s. 13; 1931, c. 243, s. 5; C. S. 217(j).)

Cross References.—As to substitution of consolidated bank as executor or trustee under will, see § 31-19. As to fiduciary powers and liabilities of merged banks, see § 53-12. See note to § 53-12.

Editor's Note.—The Act of 1931 substituted “commissioner of banks” for “corporation commission” formerly appearing in this section.

§ 53-14. Reorganization. — Whenever any bank under the laws of this state or of the United States is authorized to dissolve, and shall have taken the necessary steps to effect dissolution, it shall be lawful for a majority of the directors of such bank, upon authority in writing of the owners of two-thirds of its capital stock, with the approval of the commissioner of banks, to execute articles of incorporation as provided in this chapter, which articles, in addition to the requirements of law, shall further set forth the authority derived from the stockholders of such national bank or state bank, and
§ 53-15. Consolidation of state banks or trust companies with national banking associations.—Any bank or trust company incorporated under the laws of North Carolina may be consolidated with any national banking association, or associations, under the charter of such national banking association or under a new charter issued to such consolidated association, upon such terms and conditions as may be lawfully agreed upon, provided that the laws of North Carolina governing the consolidation of State banks shall be first complied with as to the consolidation of such bank or trust company. When such consolidation shall have been effected and approved, as provided by law, the right, franchises and interests of such bank or trust company so consolidated with the national banking association, or national banking associations, in and to every species of property, real, personal and mixed, and choses in action thereto belonging, shall be deemed to be transferred to and vested in such national banking association into which it is consolidated, without any deed or other transfer, and the said consolidated national banking association shall hold and enjoy the same and all the rights of property, franchises and interests, including the right of succession as trustee, executor, administrator, or in any other fiduciary capacity, in the same manner, and to the same extent, as was held and enjoyed by such bank or trust company so consolidated. In case of such consolidation the rights of creditors of such bank or trust company shall be preserved unimpaired and all lawful debts and liabilities of such bank or trust company shall be deemed to have been assumed by such consolidated national banking association. (1929, c. 148, s. 1.)

§ 53-16. Consolidation of state banks or trust companies with national banking associations.—Banking corporations, with the approval of the commissioner of banks, and in conformity with such requirements and regulations as the state banking commissioner may prescribe, and insurance corporations, with the approval of the insurance commissioner, and in conformity with such requirements and regulations as he may prescribe, may merge and consolidate under the provisions of §§ 55-165 through 55-170. (1925, c. 77, s. 2; 1931, c. 243, s. 5; 1939, c. 91, s. 2; 1943, c. 450, s. 2.)

Editor's Note. — The Act of 1931 substituted "commissioner of banks" for "corporation commission" formerly appearing in this section.

§ 53-17. Fiduciary powers and liabilities of banks or trust companies merging or transferring assets and liabilities.—Whenever any bank or trust company, organized under the laws of North Carolina or the Acts of Congress, and doing business in this state, shall consolidate or merge with or shall sell to and transfer its assets and liabilities to any other bank or trust company doing business in this state, as provided by the laws of North Carolina or the Acts of Congress, all the other existing fiduciary rights, powers, duties and liabilities of such consolidating or merging or transferring bank or banks and/or trust companies, including the rights, powers, duties and liabilities as executor, administrator, guardian, trustee, and/or any other fiduciary capacity, whether under appointment by order of court, will, deed, or other instrument, shall, upon the effective date of such consolidation or merger or sale and transfer, vest in, devolve upon, and thereafter be performed by, the transferee bank or the consolidated or merged bank or trust company, and such latter bank or trust company shall be deemed to have all the rights and powers of the transferring bank or trust company. (1931, c. 207; 1941, c. 80.)

Cross Reference.—As to powers and liabilities of merged corporations generally, see §§ 55-169, 55-170 and 55-172.

Editor's Note. — The 1941 amendment added the provisions relating to sale and transfer of assets and liabilities. For comment on this amendment, see 19 N. C. L. Rev. 437. See also, 9 N. C. L. Rev. 396. A distinction is drawn between "consolidation" and "merger." See Braak v. Hobbs, 210 N. C. 328, 186 S. E. 500.

Consolidated Bank Succeeds to Power as Trustee under Deed of Trust.—A bank, created as a result of a consolidation of several state banks, may properly exercise the power of sale contained in a deed of trust in which one of its constituent banks was named trustee, upon default by the trustor, since under this section, the consolidated bank succeeds to such power. Braak v. Hobbs, 210 N. C. 379, 186 S. E. 500.

This section, although in form an independent statute, is in reality an amendment of chapter 77, Public Laws of North Carolina, 1925, and is therefore applicable in the instant case, although the deed of trust involved was executed prior to its enactment. Braak v. Hobbs, 210 N. C. 379, 384, 186 S. E. 500. See Bateman v. Sterrett, 201 N. C. 195, 195 S. E. 14.

Art. 3. Dissolution and Liquidation.

§ 53-18. Voluntary liquidation.—A bank may go into voluntary liquidation and be closed, and may surrender its charter and franchise as a corporation of this state by the affirmative votes of its stockholders owning two-thirds of its stock, such vote to be taken at a meeting of the stockholders duly called by resolution of the board of directors, written notice of which, stating the purpose of the meeting, shall be mailed to each stockholder, or in case of his death, to his legal representative or heirs at law, addressed to his last known residence ten days previous to the date of said meeting. Whenever stockholders shall by such vote at a meeting regularly called for the purpose, notice of which shall be given as herein provided, decide to liquidate such bank, a certified copy of all proceedings of the meeting at which said action shall have been taken, verified by the oath of the president and cashier, shall be transmitted to the commissioner of banks for his
approval. If the commissioner of banks shall approve the same, he shall issue to the said bank, under his seal, a permit for such purpose. No such permit shall be issued by the commissioner of banks until said commissioner of banks shall be satisfied that provision has been made by such bank to satisfy and pay off all depositors and all creditors of such bank. If not so satisfied, the commissioner of banks shall refuse to issue a permit, and shall be authorized to take possession of said bank and its assets and business, and hold the same and liquidate said bank in the manner provided in this chapter. When the commissioner of banks shall approve the voluntary liquidation of a bank, the directors of said bank shall cause to be published in a newspaper in the city, town, or county in which such bank is located, a notice that the bank is closing up its affairs and going into liquidation, and notify its depositors and creditors to present their claims for payment. When any bank shall be in process of voluntary liquidation, it shall be subject to examination by the commissioner of banks, and shall furnish such reports from time to time as may be called for by the commissioner of banks. All unclaimed deposits and dividends remaining in the hands of such bank shall be subject to the provisions of this chapter as hereinafter provided. Whenever the commissioner of banks shall approve it, any bank may sell and transfer to any other bank, either State bank or national bank, all of its assets of every kind upon such terms as may be agreed upon and approved by the commissioner of banks and by two-thirds vote of its board of directors. A certified copy of the minutes of any meeting at which such action is taken, under the oath of the president and cashier, together with a copy of the contract of sale and transfer, shall be filed with the commissioner of banks. Whenever voluntary liquidation shall be approved by the commissioner of banks or the sale and transfer of the assets of any bank shall be approved by the commissioner of banks, a certified copy of such approval under seal of the commissioner of banks, filed in the office of the secretary of state, shall authorize the cancellation of the charter of such bank, subject, however, to its continued existence, as provided by this chapter and the general law relative to corporations. (1921, c. 4, s. 15; 1927, c. 47, s. 4; 1929, c. 73; 1931, c. 243, s. 5; C. S. 218(a.).)

Cross Reference.—As to voluntary dissolution of corporations generally, see § 55-121 et seq.

Editor's Note.—For article discussing the statutory changes made in the North Carolina banking law, see 11 N. C. Rev. 194, 247.

While there was no specific provision in the prior banking law which corresponded to this section, dissolution was probably effected under sec. 55-121 et seq. the general corporation law, by virtue of C. S. 216, providing that where applicable and not inconsistent with the banking laws the general corporation law should apply.

The 1927 amendment added the last four sentences to this section.

It has been the policy of the legislature to continue the corporate existence upon a dissolution for a period of three years for the purpose of winding up the affairs of the corporation and to bring and defend suits. See sec. 55-112. The provisions of this section are in keeping with this general policy.

The Act of 1931 substituted "commissioner of banks" for "corporation commission" formerly appearing in this section.

When Receiver Has Title to Assets. — Upon the appointment of a receiver under the statute, whether voluntary or by act of the Commission, the title to all of its assets vests in the receiver to be administered for the benefit of its depositors, etc., alike, and where the directors are individually sued for having published false statements as to its solvency, and in the bank's report to the Corporation Commission, without alleging any damage peculiar to himself therefrom, as distinguished from a loss among the creditors generally, the action is maintainable only by the receiver or upon his refusal to institute action upon application. Douglass v. Dawson, 190 N. C. 458, 130 S. E. 195. This case is not applicable to a suit by a depositor for damage or loss incurred because of a violation of § 53-112. Bayne v. Powell, 192 N. C. 389, 391, 118 S. E. 118.

Enforcement of Statutory Liability of Stockholders by Bank Purchasing Another Bank for Purpose of Liquidation. — Under the provisions of this section, either a state or national bank may purchase the assets of another bank, including the statutory liability of the stockholders of the selling bank, upon such terms as are agreed upon and approved by the Commissioner of Banks, and suit on the statutory liability of the stockholders of the selling bank may be instituted in the name of the purchasing bank to the use of the selling bank within three years from the date of the transfer, and § 52-39 does not repeal this section, as amended, and is inapplicable when the liquidation is under its provisions, and the amendment (the act of 1927) is not applicable when the act of 1921 was not repealed by the act of 1927. Peoples Bank and Trust Co. v. Roseower, 199 N. C. 653, 155 S. E. 500.

Approval of Stockholders Not Necessary for Sale to Bank. — For a valid sale of assets to another bank the approval of the stockholders of the selling bank is not required by this section and the section is not invalid for that reason. Peoples' Sav. Bank v. Earley, 204 N. C. 297, 299, 168 S. E. 225.

Cited in In re Lafayette Bank, etc., Co., 198 N. C. 787, 787, 153 S. E. 452.

§ 53-19. Commissioner of banks may take charge, when. — The commissioner of banks may forthwith take possession of the business and property of any bank to which this chapter is applicable whenever it shall appear that such bank:

1. Has violated its charter or any laws applicable thereto;
2. Is conducting its business in an unauthorized or unsafe manner;
3. Is in an unsafe or unsound condition to transact its business;
4. Has an impairment of its capital stock;
5. Has refused to pay its depositors in accordance with the terms on which such depositors were received, or has refused to pay its holders of certificates of indebtedness or investment in accordance with the terms upon which such certificates of indebtedness or investment were sold;
6. Has become otherwise insolvent;
7. Has neglected or refused to comply with the terms of a duly issued lawful order of the commissioner of banks;
8. Has refused, upon proper demand, to submit its records, affairs, and concerns for inspection and examination to a duly appointed or authorized examiner of the commissioner of banks;
9. Its officers have refused to be examined upon oath regarding its affairs;
10. Has made a voluntary assignment of its assets to trustees;

Such banks may resume business as provided in § 53-37. (1911, c. 25, ss. 4; 1921, c. 4, ss. 16; 1931, c. 243, s. 5; C. S. 218(b), 242.)

Editor's Note. — There was no section in the prior law which corresponded to this section. It was true however that the bank examiner could take possession where so
authorized by the corporation commission and hold it un-
til a receiver could be appointed. See C. S. sec. 253.
The Act of 1931 substituted "commissioner of banks' for "corporation commission" formerly appearing in this

section.

See 3 N. C. Law Rev. 79, discussing this section.

Commissioner May Be Restrained from Taking Control
of Assets of Reorganized Bank Where Assets Insufficient to
Pay Claims.—Where a banking corporation, organized and
doing business under the laws of this State, and for that
reason subject to the jurisdiction of the Commissioner of
Banks, has transferred its business and conveyed all its as-
tets to another banking corporation, also organized and
doing business under the laws of this State, in consid-
eration of the agreement of the latter corporation to
fully and discharge the claims of all the depositors and
other creditors of the former corporation, and the Com-
missioner of Banks had consented to such transfer, assign-
ment and conveyance (section 53.12. Corporation Commis-
sion v. Stockholders, 199 N. C. 586, 155 S. E. 445), but
thereafter, before the latter corporation has fully performed
its agreement with the former corporation, files notice that
he has taken into his possession the former corporation,
under the provisions of this section, for purposes of liquid-
ation, the said former corporation, its depositors, and stock-
holders may restrain the Commissioner of Banks from tak-
ing into his possession the assets of the former corporation,
which are then in the possession of the latter corporation,
unserstanding that such assets are sufficient in value for
the payment in full of the claims of the current depositors
and other creditors. Pending the trial of the issue involving
the value of said assets, the Commissioner of Banks may also
be restrained from levying and assessing liens or charges
for "corporation commission" formerly appearing in this

section.

Presumption Exists That Bank Compiled with Prere-
quities before Resuming Operation.—See People's Bank v.
Fidelity, etc., Co., 4 F. Supp. 379, 382.

§ 53-20. Liquidation of banks.—(1) When Com-
misioner of Banks to Take Possession.—When-
ever any State bank shall neglect or refuse for a period
of sixty days to make a report to the commissioner of
banks, as he may demand, or shall, after demand under seal of the commissioner of
banks fail, neglect or refuse to comply with any
of the rules, regulations or requirements of the state banking commission, or the provisions of the
banking law, or if at any time the commis-

sioner of banks shall find a bank subject
to the supervision of the commissioner of
banks, in an insolvent, unsafe or unsound condition to transact the business for which it was
organized, or in an unsafe, or unsound condition to continue its business, or if such institution
shall neglect or refuse to correct any irregular-
ity which may be called to the attention of the president, cashier or board of directors, by the commissioner of banks, or any of his as-
sistants; then, in either of such events, the com-
misioner of banks, or any duly authorized agent of the commissioner of banks appointed under
seal of the commissioner of banks, shall forthwith
take possession of such bank, and all of its assets and business and shall retain possession thereof
until such bank shall be authorized by the commissioner of banks to resume business, or its af-
airs shall be fully liquidated as herein provided, or possession thereof shall have been surrendered
under order of a judge of the Superior Court un-
der the provisions of this section.

(2) Directors May Act.—Any bank may place
its assets and business under the control of the commissioner of banks for liquidation by resolu-
tion of a majority of its directors upon notice to the
said commissioner of banks, and, upon taking possession of said bank, the commissioner of banks,
or duly appointed agent, shall retain possession

thereof until such bank shall be authorized by the commissioner of banks to resume business or until
the affairs of said bank shall be fully liquidated as


therein provided, and no bank shall make any gen-
eral assignment for the benefit of its creditors save
and except by surrendering possession of its assets
to the commissioner of banks, as herein provided.
Whenever any bank for any reason shall suspend operations for any length of time, said
bank shall, immediately upon such suspension of
operations, be deemed in the possession of the
commissioner of banks and subject to liquida-
tion hereunder.

(3) Notice of Seizure to Court Bar to Attach-
ment, etc.; Transfers Void. When the commis-

sioner of banks, or duly appointed agent, shall take
possession of any bank under paragraph (1) or
(2) hereof he shall, within forty-eight hours, file with the Clerk of the Superior Court in the county where said bank is located, a notice of
his action which shall state the reason therefor:
and such notice shall be deemed the equivalent of a summary or complaint against said bank in an
action in the Superior Court whereby such bank shall not be necessary to make service thereof,
and the taking possession of any bank shall there
upon date from the time when such authority was
exercised and from and after such time all as-
sets and property of such bank, of whatever
nature shall be deemed to be in possession of the
commissioner of banks, and the exercise of such authority shall operate as a bar to any at-
tachment, or other legal proceeding, against such
bank or its assets and, after such exercise of
authority, no lien shall be acquired, in any man-
ner binding or affecting any of the assets of such
bank and every transfer or assignment made
thereby to such bank, or by its authority, of the
whole or any part of its assets, shall be null and
void; and the commissioner of banks shall be
substituted in place of the bank in all actions in the State or Federal Courts, pending at the time
of the exercise of such authority.

(4) Notice to Banks; Corporation and Persons
Holding Assets; Liens Not to Accrue.—On tak-
ing possession of the assets and business of any
bank, the commissioner of banks, or duly ap-
pointed agent, shall forthwith give notice, by mail or
otherwise, of such action to all banks or other persons or corporations holding, or having in
possession, any assets of such bank. No bank or other person or corporation shall have a lien or
charge for any payment, advance or clearance
made, or liability incurred against any of the as-
sets of such bank after possession has been taken
as provided under this section, except as herein-
above provided.

(5) Permission to Resume Business.—After the
commissioner of banks has taken possession of
any bank, such bank may resume business as pro-
vided in § 53-37.

(6) Remedy by Bank for Seizure; Answer to
Notice; Injunction, etc., Appeal.—Whenever any
bank, of whose assets and business the commis-

sioner of banks has taken possession as aforesaid, except where possession is taken under
paragraph (2) hereof, shall deem itself aggrieved
thereby, it may, at any time within ten (10) days after the filing of the notice with the clerk
of the Superior Court, file an answer to said notice and may also upon notice to the commissioner of banks, apply to the resident or the presiding judge of the district for an injunction to enjoin further proceedings by the said commissioner of banks, and the said judge may cite the said commissioner of banks to show cause within ten days thereafter why further proceedings should not be enjoined, and after hearing the allegations and proof of the parties with respect to the condition of said bank, may dismiss such application for injunction or may enjoin further proceedings under this section by the commissioner of banks. If the judge shall enjoin further action of the commissioner of banks and permit the reopening of the bank, he shall have authority to require of the bank such surety bond as he may deem necessary to insure its solvency, payable to the commissioner of banks for the sole benefit of the general creditors of the bank, and upon such terms as said judge may deem proper. Either party shall have the right to appeal to the Supreme Court as in other actions.

(7) Collection of Debts and Claims; Sale or Compromise of Debts, Claims; Commissioner Succeeds to All Property of Bank.—Upon taking possession of the assets and business of any bank by the commissioner of banks, the commissioner of banks, or the duly appointed agent, is authorized to collect all money due such bank, and to do such other acts as are necessary to conserve its assets and property, and shall proceed to liquidate the affairs thereof, as hereinafter provided. The commissioner of banks, or the duly appointed agent, shall collect all debts due and claims belonging to such bank, by suit, if necessary; and, by motion in the pending action, and upon authority of an order of the presiding or resident judge of the district may sell, compromise or compound any bad or doubtful debt or claim, and may upon such order, sell the real and personal property of such bank on such terms as the order may provide or direct, except that, where the sale is made under power contained in any mortgage or lien bond or other paper wherein the title is retained for sale and the terms of sale set out, sale may be made under said authority only on possession or actual possession of such property, under this section, the commissioner of banks and/or the duly appointed agent shall have the possession and the right to the possession of all the property, assets, choses in action, rights and privileges of the said bank, including the right to resign the trust or exercise the power in all mortgages, deeds of trust, and all other papers executed to secure the payment of money in any form in which the said bank shall have been named as trustee and/or pledgee, and such property rights and privileges shall vest in the said commissioner and/or duly appointed liquidating agent absolutely, for the purpose of liquidating, and sales and conveyance of the same, together with any and all other incidental rights, privileges, and powers necessary and convenient for the enjoyment of the right of conveyance and sale and for the exercise of the same. Upon the motion made, the bank or any person interested, may be heard, but the judge hearing the motion shall enter his order as in his discretion will best serve the parties interested.

The powers granted by the second preceding sentence shall be in addition to and not in derogation of any existing acts ratified at the 1931 session of the General Assembly.

The officers and directors of any bank, or any bank that is in liquidation as provided by law, shall not hereafter exercise any powers herein declared to be vested in the North Carolina commissioner of banks, and/or the duly appointed liquidating agent.

(8) Bond of Commissioner of Banks; Surety; Condition; Minimum Penalty.—Upon taking possession of any bank, the commissioner of banks, or the duly appointed agent, shall execute and file in bond payable to the State of North Carolina, with some surety company as surety thereon, with the clerk of the Superior Court of the county where the bank is located, conditioned upon the faithful performance of all duties imposed by reason of the liquidation of such bank by the said commissioner of banks, or the duly appointed agent, or any agent or assistant assisting in the liquidation of the said bank, the penal sum of said bond to be fixed by order of the commissioner of banks, which in no case shall be less than five thousand ($5,000) dollars. Any person interested, by motion in the pending action, shall be heard by the resident or presiding judge as to the sufficiency of the bond; the judge hearing the motion may thereupon fix the bond; provided, that where such bank under this section is taken possession of by the commissioner of banks, he may, in his discretion with the approval of the state banking commission, appoint as his agent with the powers, duties and responsibilities of such agent under this section, the Federal Deposit Insurance Corporation or any corporation or agency established under and by virtue of the laws of the United States of America which is established for the purposes for which the said Federal Deposit Insurance Corporation was created under the banking act of one thousand nine hundred and thirty-three enacted by congress; and provided further that such appointment may be made when and only when the liabilities of such bank to its depositors are insured by said corporation or agency, either in whole or in part. In the event of such appointment such corporation or agency, with the approval of the commissioner of banks, may serve as such agent without giving the bond required under all other circumstances in this subsection.

(9) Inventory Necessary.—Within thirty days after the filing of the notice of the taking possession of any bank in the office of the clerk of the Superior Court, the commissioner of banks, or the duly appointed agent, shall make and state an inventory of the assets and liabilities of the said bank, and shall file one copy thereof with the clerk of the Superior Court in the pending action and shall keep one copy on file in the said bank. Such inventory shall be open for inspection during the usual banking hours, provided, that nothing herein shall require said bank to remain open unnecessarily.

(10) Notice and Time for Filing Claims; Copies Mailed.—Notice shall be given by advertisement for four weeks in a newspaper published in said county; if no newspaper is published in said county, then in some newspaper having a general circulation in said county, calling on all persons who may have claims against the bank to
present the same to the commissioner of banks at the office of the bank, and within the time to be specified in the notice, not less, however, than ninety (90) days from the date of the first publication. A copy of this notice shall be mailed to all persons whose names appear as creditors upon the books of the bank. Affidavit by the commissioner of banks, or agent mailing the notice, to the effect that said notice was mailed shall be conclusive evidence thereof.

(11) Power to Reject Claims; Notice; Affidavit of Service; Action on Claim.—If the commissioner of banks, or the duly appointed agent, doubts the justice and validity of any claim or deposit, he may reject the same and serve notice of such rejection upon the claimant or depositor, either personally or by registered mail, and an affidavit of the service of such notice shall be filed in the office of the Clerk of the Superior Court in the pending action, and shall be conclusive evidence of such notice. Any action or suit upon such claim so rejected must be brought by the claimant against the commissioner of banks in the proper court of the county in which the bank is located within ninety days after such service, or the same shall be barred. Objections to any claim or deposit not rejected by the commissioner of banks, or the duly appointed agent, may be made by any person interested by filing such objection in the pending action and by serving a copy thereof on the commissioner of banks, or duly appointed agent, and the commissioner of banks or duly appointed agent, after investigation, shall either allow such objection and reject the claim or deposit, or disallow the objection. If the objection is not allowed and the claim or deposit not rejected, the commissioner of banks or the duly appointed agent, shall file a notice to this effect in the pending action; and within ten days thereafter, the person filing objection by motion in the pending action, and specifying any claims or deposits which have been rejected by him, and shall file one copy in the office of the clerk of the superior court in the pending action, and shall keep one copy on file with the inventory in the office of the bank for examination. Any indebtedness against any bank which has been established or recognized as a valid liability of said bank before it went into liquidation, for which no claimant has filed claim, and/or any liability for which claim has been filed and disapproved, shall be listed in the office of the clerk of the superior court of the county in which the bank is located, by the liquidating agent, and the dividends accruing thereon shall be paid into the said office and shall be held for a period of three months after said liquidation is completed, and shall then be paid to the escheator of the University of North Carolina. Any claim which may be presented after the expiration of the time fixed for the presentation of claims, and for which final notice hereinafter provided shall, if allowed, share pro rata in the distribution only of those assets of the bank in the hands of the commissioner of banks, and undistributed at the time the claim is presented: Provided, that when it is made to appear to the judge of the superior court, resident or presiding in the county, that the claim could not have been filed within said period, said judge may permit those creditors or depositors who subsequently file their claim to share as other creditors.

(13) Declaration of Dividends; Order of Preference in Distribution.—At any time after the expiration of the date fixed by the commissioner of banks, or the duly appointed agent, for the presentation of claims against the bank, and from time to time thereafter, the commissioner of banks, out of the funds in his hands, after the payment of expenses and priorities, may declare and pay dividends to the depositors and other creditors of such bank in the order now or hereafter provided by law; and a dividend shall be declared when and as often as the funds on hand subject to the payment of dividends shall be sufficient to pay ten (10) per centum of all claims entitled to share in such dividends. In paying dividends and calculating the same, all disputed claims and deposits shall be taken into account, but no dividend shall be paid upon such disputed claims and deposits until the same shall have been finally determined. The following shall be the order and preference in the distribution of the assets of any bank liquidated hereunder: (1) Taxes and fees due the commissioner of banks for examination or other services; (2) wages and salaries due officers and employees of the bank, for a period of not more than four months; (3) expenses of liquidation; (4) certified checks and cashier's checks in the hands of a third party as a holder for value and amounts due on collections made and unremitted for or for which final actual payment has not been made by the bank; (5) amounts due creditors other than stockholders. The word "asset" used herein shall not be deemed to include bailments or other property to which such bank has no title. Provided, that when any bank, or any officer, clerk, or agent thereof, receives by mail, express or otherwise, a check, bill of exchange, order to remit, note, or draft for collection, with request that remittance be made therefor, the charging of such item to the account of the drawer, acceptor, indorser, or maker thereof, or of collecting any such item from any bank or other party, and failing to remit therefor, or the non-payment of a check sent in payment therefor, shall create a lien in favor of the owner of such item on the assets of such bank making the collection, and shall attach from the date of the charge, entry or collection of any such funds. A statement of all dividends paid shall be filed in the office of the clerk of the Superior Court in the pending action, and said statement shall show the expenses deducted and the disputed claims and deposits considered in determining said dividend.

(14) Deposit of Funds Collected.—All funds
collected by the commissioner of banks, in liquidating any bank, shall be deposited from time to time in such bank or banks as may be selected by him, and shall be subject to the check of the commissioner of banks. The payment of interest on the net-average of such sums on deposit shall be controlled by the governor and council of state, who shall have full power and authority to determine for what periods of time payment of interest on such deposits shall or shall not be required, and to fix the rate of interest to be paid thereon.

(18) Employment of Local Attorneys; Expert Accountants and Other Experts; Compensation.—The commissioner of banks, for the purpose of liquidating banks as herein provided, shall employ such liquidating agents, competent local attorneys, accountants and clerks as may be necessary to properly liquidate and distribute the assets of said bank, and shall fix the compensation for all such agents, attorneys, accountants and clerks, and shall pay the same out of the funds derived from the liquidation of the assets of said bank: Provided, that all expenditure for the purpose herein provided shall be approved by the resident or presiding judge in the pending action at such time as the same may be reported, and such charges shall be a proper charge and lien on the assets of such bank until paid.

(16) Unclaimed Dividends Held in Trust.—The unclaimed dividends remaining in the hands of the commissioner of banks for six months after the order for final distributions shall be held in trust for the several depositors and creditors of the liquidated bank; and the money so held by him shall be paid over to the persons respectively entitled thereto as and when satisfactory evidence of their right to the same is furnished. In case of doubtful or conflicting claims the commissioner of banks shall have authority to apply to the superior court of the county, by motion in the pending action, for an order from the resident or presiding judge of the superior court directing the payment of the moneys so claimed. When issues of fact are raised by said motion, the same may, upon request of any claimant, be submitted to the jury for determination as other issues of fact are determined. The interest earned on the unclaimed dividend so held shall be applied toward defraying the expenses incurred in the distribution of such unclaimed dividends. The balance of interest, if any, shall be deposited and held as other funds of the banking department to the credit of the commissioner of banks.

(17) Report by Commissioner of Banks. — If the assets of any bank when fully collected by the commissioner of banks are not more than sufficient to pay the depositors and creditors of said bank, the commissioner of banks after he shall have fully distributed as herein provided the sums so collected, then he shall cause to be filed in the office of the Clerk of the Superior Court in the pending action a full and complete report of all his transactions in said liquidation; and the filing of such report shall act as a full and complete discharge of the commissioner of banks from all further liabilities by reason of the liquidation of the bank.

(18) Action by Commissioner of Banks after Full Settlement.—Whenever the commissioner of banks shall have paid all the expenses of liquidation and shall have paid to each and every depositor and creditor of such bank, whose claims shall have been duly proven and allowed, the full amount of such claims, and shall have made proper provision for unclaimed and unpaid deposits and disputed claims and deposits, and shall have in hand other assets of said bank, he shall call a meeting of the stockholders of said bank by giving notice thereof by publication once a week for four weeks in a newspaper published in said county, or if no newspaper is published in said county, then in a newspaper having general circulation in said county, and by mailing a copy of such notice to each stockholder addressed to him at his address as the same shall appear upon the books of the bank; Affidavit of the officer mailing the notice herein required and of the printer as to the publication shall be conclusive evidence of notice hereunder. At such meeting any stockholders may be represented by proxy and the stockholders shall elect, by a majority vote of the stock present, an agent or agents who shall be authorized to receive from the commissioner of banks all the assets of said bank, then remaining in his hands; and the commissioner of banks shall cause to be transferred and delivered to the said agent, or agents, all such assets of said bank. The commissioner of banks shall thereupon cause to be filed in the office of the clerk of the superior court in the pending actions a full and complete report of all his transactions, showing the assets of said bank so transferred, together with the name of such agent or agents receiving for the same; and the filing of such report shall act as a full and complete discharge of the commissioner of banks from all further liabilities by reason of the liquidation of the bank. Such agent, or agents, shall convert the assets coming into his hands, or their hands, into cash, and shall make distribution to the stockholders of said bank as herein provided. Said agent, or agents, shall file semi-annually a report of all transactions with the superior court of the county in which the bank is located, and with the commissioner of banks, and shall be allowed for such services such fees not in excess of five per cent, as may be fixed by the court. In case of death, removal or refusal to act, of any agent or agents elected by the stockholders, the commissioner of banks shall, upon report of such action on the part of such agent or agents to the superior court of the county in which the bank is located, turn over to said superior court for the stockholders of said bank, all the remaining assets of the bank, file his report and be discharged from any and all further liability to the stockholders as herein provided. Said assets, when turned over to the superior court hereunder, shall remain in the hands of the superior court until such time as, by order of Court or by action of the stockholders, distribution shall be provided for.

(19) Annual Report of Commissioner of Banks; Items in Report of: Publication.—The commissioner of banks shall file, as a part of his annual report to the governor, a list of the names of the banks so taken possession of and liquidated; and the commissioner of banks shall, from
time to time, compile and make available for public inspection, reports showing the condition of each and all the banks so taken possession of; and the annual report of the commissioner of banks shall show the sum of unclaimed and unpaid deposits, with respect to each bank and shall show all depositories of all sums coming into the hands of the commissioner of banks under the provisions of this section.

(20) Compensation of Commissioner of Banks. — The commissioner of banks, for his services rendered in connection with the liquidation of banks hereunder, shall be entitled to actual expenses incurred in connection with the liquidation of each bank, including therein a reasonable sum for the time of the bank examiners and other agents of the commissioner of banks, which expenses shall be a prior lien on the assets of such bank so liquidated until paid in full; and the commissioner of banks shall have authority to prescribe reasonable rules and regulations for fixing such expenses.

(21) Exclusive Methods of Liquidation. — No bank shall be liquidated under the banking act or the industrial banking act, and under the supervision of the commissioner of banks, shall be liquidated in any other way or manner than that provided herein.

(22) Application of Act. — The applicable provisions of this section as enacted by chapter 113 of the Public Laws of 1927 shall apply to all banks which on March 7, 1927, have suspended operations or are in the process of liquidation but for which no permanent receiver has been appointed by the court.

(23) Liquidation by Commissioner of Banks of All Banks in Receivership Required. — On and after the first day of January, one thousand nine hundred and thirty-six, the provisions of this section shall apply to all banks included in the definition or classification of banking institutions under this chapter, and/or any amendment thereto, which at said time shall be in receivership in the State courts and the said banks shall be liquidated exclusively in accordance with the provisions of this section and by said banking commissioner.

The liquidation of said banks shall be made strictly in accordance with the terms of this section and the words "competent local attorneys," as set forth in subsection sixteen of this section shall be defined to be any attorney or attorneys resident of the county in which the bank is being liquidated.

(1921, c. 4, s. 17; 1927, c. 113; 1931, c. 245, s. 5, cc. 385, 405; 1933, c. 175, s. 2, c. 546; 1933, c. 81, s. 4, c. 251, s. 1, c. 277; 1939, c. 91; C. S. 215-6(c)).

Local Modification. — Buncombe: 1933, c. 27; Rutherford: 1910, c. 502. Cross References. — See Editor's Note to § 53-18. As to conditions under which closed banks may re-open, see § 53-37. As to escheats generally, see § 116-20 et seq.

Editor's Note. — Prior to the 1927 amendment, the Supreme Court held in Litchfield v. Roper, 192 N. C. 202, 205, 134 S. E. 651, that this section did not supersede or repeal the provisions of C. S. section 240, but that it was not intended to apply to said section and should be construed in conjunction with it. Prior to this amendment the superior court had exclusive jurisdiction over the affairs of an insolvent bank incorporated under the laws of this state. See Trust Co. v. Leggett, 191 N. C. 362, 131 S. E. 752. It was therefore the duty of the court to ascertain the amount of liability and assess the stockholders. By virtue of the amendment these duties, and all the others formerly performed by the court as well, were devolved upon the corporation commission.

Prior to the amendment it was held that a justice of the peace had no jurisdiction over an action of the receiver to collect an overpayment of dividends to a stockholder, where the bank was not in receivership and not under the control of any existing act ratified at this session of the General Assembly.

Chapter 243 substituted "commissioner of banks" for "corporation commissioner" and "chief state bank examiner," formerly appearing in this section.

By c. 546 of Public Laws 1933 subsection (12) of this section was amended to provide for the addition of any existing act ratified at this session of the General Assembly provisionally enacted in any other way or manner than that provided herein.

The provisions at the end of subsection (8) of this section was added by the 1925 amendment. The act also added subsection (24) and provided that the receivers in charge of the assets of said bank. Braswell v. Citizens Nat. Bank, 197 N. C. 229, 233, 148 S. E. 236.

The words "or otherwise" in subsection 13 of this section claims against the estate of an insolvent bank for amounts due on collection made and unremitted for, or for which final actual payment has not been made to the bank, in the set-off of the bank's claim to the estate of said bank. Braswell v. Citizens Nat. Bank, 197 N. C. 229, 233, 148 S. E. 236.

Preferences. — It will be noted that under subsection 13 of this section claims against the estate of an insolvent bank amounts due on collection made and unremitted for, or for which final actual payment has not been made to the bank, in the set-off of the bank's claim to the estate of said bank. Braswell v. Citizens Nat. Bank, 197 N. C. 229, 233, 148 S. E. 236.

The words "or otherwise" in subsection 13 of this section, as to any mode of transportation analogous to those specified in the statute, meaning any mode of transportation analogous to those specified in the statute, requiring "remitting" or "crediting" an attorney to the payee of the check. Morecock v. Hood, 202 N. C. 321, 162 S. E. 739.

Where a check was purchased from a bank, which a few days later became insolvent and the bank on which the check was purchased was in receivership, the purchaser could not claim a preference under this section. The transaction was that of debtor and creditor. If it were otherwise in every transaction involving the relationship of a debtor and creditor, where the debt has been put into liquidation on account of insolvency, it would be claimed a preference—thus destroying the well recognized maxim that a transaction is that of debtor and creditor. If it were otherwise in every transaction involving the relationship of a debtor and creditor, where the debt has been put into liquidation on account of insolvency, it would be claimed a preference. — Taylor v. Everett, 188 N. C. 247, 124 S. E. 316.

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cashier's check or a certified check creates the relation of debtor and creditor between the bank and the purchaser, and that the purchaser is not entitled to a preference over other general creditors of the bank from which it was purchased.

Where a depositor drew a draft on his local bank against a general deposit and the payee forwarded the draft to the drawer bank for collection and it was returned with notice that the drawer had failed to return the draft within twenty-four hours after its receipt by mail implied an acceptance under the provisions of sections 25-143 and 25-144, such acceptance did not ipso facto create a preference. Lamb v. Hood, 205 N. C. 409, 410, 171 S. E. 351.

Where a national bank received a draft for a collection and remitted for the collection of the draft a draft drawn on the local bank, the transaction not coming within the provisions of this subdivision as to filing claims was inapplicable to the action, and further, that even if the subdivision were applicable it would be inequitable for defendant to set up the defense since defendant's agent had told plaintiff that claims need not be filed. Bright v. Hood, 214 N. C. 410, 199 S. E. 630.

Personal Liability of Directors as Asset.—The right of action by the receivership or by the corporation (or agent) in case of insolvency for loss or depreciation of the bank's assets, due to their wilful or negligent failure to perform their official duties, is one enforceable for the benefit of the bank rather than for the benefit of the creditors. The receiver has sued the shareholders of its stock for their additional or personal liability, the defendants, setting up this defense as an asset of the bank, are entitled to have the transaction power of court only in matters which are not provided by the statute. The Commissioner v. Merchants Bank, etc., Co., 193 N. C. 314, 136 S. E. 568.

Purchase Price of Sale of Insolvent Bank's Property Must Be Paid to Corporation Commission. —Where the Corporation Commission takes possession of the assets of a corporation which has failed, it is a statutory receiver and it is required by statute to collect the assets of the bank and to distribute them to the creditors and depositors, and the court having jurisdiction is without power to authorize the sale of an insolvent bank's property in bulk to purchasers under an agreement that the purchasers organize another bank and pay to it the purchase price for distribution to the creditors and depositors and thus relieve the Commission of its duty to collect and distribute the assets. As to whether the court might authorize the sale of the assets in bulk is not decided, though it would seem that under the circumstances provided for in this order as in his discretion will best serve the parties interested he has the power to authorize a sale in bulk, and it would not be reviewable on appeal except on the ground of fraud or mistake. Hill v. Smathers, 173 N. C. 642, 648, 92 S. E. 607.

The term "assets" is broad enough to cover anything which is now or may be available to pay creditors, but as usually understood it refers to the tangible property of the bank, and their liability is determined beforehand upon insolvency. It does not include rights and property which do not belong to the corporation, and the current of opinion is that the statutory liability is not for the benefit of the corporation, but is an additional security for creditors. Hill v. Smathers, 173 N. C. 642, 648, 92 S. E. 607.

"Creditors" and "Claimants"—Subd. 10.—In regard to bonds left for safe-keeping in the bank, it was held that the bank was a trustee of an express trust and plaintiffs were not "creditors" or "claimants" as contemplated by this subdivision. The provisions of this subdivision as to filing claims was inapplicable to the action, and further, that even if the subdivision were applicable it would be inequitable for defendant to set up the defense since defendant's agent had told plaintiff that claims need not be filed. Bright v. Hood, 214 N. C. 410, 199 S. E. 630.

An action on a note by the Commissioner of Banks, etc., Co., 209 N. C. 307, 184 S. E. 51.

The commissioner of banks acts as receiver under inherent power of court only in matters which are not provided for by the corporation acts and his powers and duties in the case of an insolvent bank's assets, due to their wilful or negligent failure to perform their official duties, is one enforceable for the benefit of the corporation, but is an additional security for creditors. Hill v. Smathers, 173 N. C. 642, 648, 92 S. E. 607.

The "assets" defined. C. S. sections 259 and 240, providing for the assessment of the stockholders, were a recognition of the distinction between ordinary assets of the corporation and the statutory liability, and was substantively a legislative construction that the former does not include the latter. Hill v. Smathers, 173 N. C. 642, 648, 92 S. E. 607.
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The manifest purpose of subdivision (13) is to place the out of town holder of a check or draft on a footing as favorable as the one occupied by the local depositor. The local depositor can present his check and get the cash. If the holder of the check or draft takes the same through the mails by charging it to the account of its customer, it is the bank's duty, under this statute, to remit the proceeds to the owner, and the owner has a lien thereon. The statute provides that the agency to collect is coupled with an authority in the owner of the draft; thereafter they are not the property of the bank, and the general creditors have no right to partition therein. Royal Mfg. Co. v. Spradlin, 6 F. Supp. 98, 100.

This subdivision clearly supersedes the law as declared by the supreme court in Corporation Comm. v. Merchant's, etc., Bank, 137 N. C. 697, 50 S. E. 308, and similar decisions. The statute embodies what was declared to be the manifest purpose of subdivision (13) is to place the out of town holder of a check or draft on a footing as favorable as the one occupied by the local depositor. The statute provides that the agency to collect is coupled with an authority in the owner of the draft; thereafter they are not the property of the bank, and the general creditors have no right to partition therein. Royal Mfg. Co. v. Spradlin, 6 F. Supp. 98, 100.

The lien provided in subdivision (13) is in no wise contingent upon the insolvency of the bank. It attaches, in all cases, "from the date of the charge, entry or collection of any such funds." The lien exists before insolvency and subsequent insolvency of the bank cannot nullify it. Royal Mfg. Co. v. Spradlin, 6 F. Supp. 98, 101.

The proviso in subdivision (13) does not create a preference; it creates a statutory lien. The legislature used the word "lien" in the proviso in subdivision (13) to avoid usage, but it used the word "lien" advisedly and to make it apply without regard to preferences.

Upon collection, the agency to collect is coupled with an authority in the owner of the draft for collection. Where a certificate of deposit sent to the insolvent collecting bank was in use, a lien exists in the agency to collect is coupled with an authority in the owner of the draft for the balance due upon the clearance, which was ultimately collected in cash. If a bank accepts anything other than cash in payment of a note or draft, it is held to have accepted a chattel reversion, under the rules of the common law, liable as a debtor for the amount of the instrument, the reason for the rule being that, as the instrument is payable only in cash, the collecting bank by accepting something other than cash assumes the risk incident to such method of collection and is estopped to deny payment. Citizens Nat. Bank v. Fidelity, etc., Co., 86 F. (2d) 4, 6, citing Cleve v. Craven Chemical Co., 18 F. (2d) 711, 713, 52 A. L. R. 980; Federal Reserve Bank v. Malloy, 264 U. S. 160, 44 S. Ct. 296, 68 L. Ed. 677, 66 L. Ed. 126, 1 A. L. R. 126.

The agency to collect is coupled with an authority in the collecting bank to use the proceeds for its own purposes; and where the collecting bank, in accordance with the usual custom of the business, makes such dispositions, it chooses to accept as money's worth and thereupon becomes liable as a debtor for the amount of the collection, there is no reason to hold that the trust relationship is extended to the creditors. Citizens Nat. Bank v. Fidelity, etc., Co., 86 F. (2d) 4, 6.


§ 53-21. Sale of stocks of defunct banks validated.—All private sales of stocks in resident corporations, joint stock companies and limited partnerships, made prior to March 20, 1935, by the commissioner of banks or a duly appointed agent in the course of the liquidation of a defunct bank, where such sale was made by and with the approval of a liquidation board duly selected by the creditors and stockholders of such bank and upon authority of an order of the presiding or resident judge of the district in which the principal office of such bank was located, are hereby in all respects validated, ratified and confirmed. (1935, c. 113.)

§ 53-22. Statute relating to receivers applicable to insolvent banks.—Article thirteen, chapter fifty-five relating to receivers, when not inconsistent with the provisions of § 53-20, shall apply to the liquidation of insolvent banks. (1921, c. 4, s. 19; 1923, c. 148, s. 4; 1931, c. 215; C. S. 218(e).)

Editor's Note.—The 1931 amendment rewrote the section. Effect in General.—This section serves to confer upon the Commissioner of Banks possession and the right to possess all private sales of stocks in resident corporations, joint stock companies and limited partnerships, made prior to March 20, 1935, by the commissioner of banks or a duly appointed agent in the course of the liquidation of a defunct bank, where such sale was made by and with the approval of a liquidation board duly selected by the creditors and stockholders of such bank and upon authority of an order of the presiding or resident judge of the district in which the principal office of such bank was located, are hereby in all respects validated, ratified and confirmed. (1935, c. 113.)

§ 53-23. Books, records, etc., disposition of.—All books, papers, and records of a bank which has been finally liquidated shall be deposited by the receiver in the office of the clerk of the superior court for the county in which the office of such bank is located, or in such other place as in his judgment will provide for the proper safekeeping and protection of such books, papers, and records. The books, papers, and records herein referred to shall be held subject to the orders of the commissioner of banks and the clerk of the superior court for the county in which such bank was located. (1921, c. 4, s. 20; 1931, c. 243, s. 5; C. S. 218(f).)

Editor's Note.—The Act of 1931 substituted "commissioner of banks" for "corporation commission" formerly appearing in this section.

§ 53-24. Destruction of records of liquidated insolvent banks.—After the expiration of ten years from the date of filing in the office of the clerk of the superior court of a final order approving the liquidation by the banking department of any insolvent bank and the delivery to the clerk or into his custody of the records of such bank, the said records may be destroyed by the clerk of the superior court holding said records by burning the same in the presence of the register of deeds and the sheriff of said county, who shall join with the clerk in the execution of a certificate as to the destruction of said records. The certificate shall be filed by the clerk in the court records of the liquidation of the bank whose records are thus destroyed.

After ten years from the date of filing by the commissioner of banks of a final report of liquidation of any insolvent bank, the said commissioner, by
and with the consent of the state banking commission or its successor, may destroy by burning the records of any insolvent bank held in the department of the commissioner of banks in connection with the liquidation of such bank: Provided, that in connection with any unpaid dividends the commissioner of banks shall preserve the deposit ledger or other evidence of indebtedness of the bank with reference to the unpaid dividend until the dividend shall have been paid.

Nothing in this section shall be construed to authorize the destruction by the clerk of the superior court of any county or shall the commissioner of banks of any of the formal records of liquidation, or shall the commissioner of banks have authority under this section to destroy any of the records made in his office with reference to the liquidation of any insolvent bank. (1939, c. 91, s. 1; 1939, c. 135.)

§ 53-25. Trust terminated on insolvency of trustee bank.—Whenever any bank or trust company created under the laws of this State, which has heretofore been, or shall hereafter be, appointed trustee in any indenture, deed of trust or other instrument of like character, executed to secure the payment of any bonds, notes or other evidences of indebtedness, has been or shall be, by reason of insolvency, or for any other cause provided by law, taken over for liquidation by the commissioner of banks of this State or by any other legally constituted authority, the powers and duties of such bank or trust company as trustee in any such instrument shall, upon the entry of an order of the Clerk of the superior court appointing a successor trustee, upon a petition as hereinafter provided, immediately cease and determine. (1931, c. 250, s. 1.)

§ 53-26. Petition for new trustee; service upon parties interested.—In all cases of such insolvent and liquidation mentioned in § 53-25, the clerk of the superior court of any county in which such indenture, deed of trust or other instrument of like character is recorded shall, upon the verified petition of any person interested in any such trust, either as trustee, beneficiary or otherwise, which interest shall be set out in said petition, enter an order directing service on all interested parties either personally or by the publication in some newspaper published in the county, or in some ad-joining county if no newspaper is published in the county where such application is made, of a notice directed to all persons concerned, commanding and requiring all persons having any interest in said trust, to be and appear at his office at a day designated in said order and notice, not less than thirty days from the date thereof, and show cause why a new trustee shall not be appointed. (1931, c. 250, s. 2.)

§ 53-27. Publication and contents of notice.—Such notice shall be published in the manner required by law for service of summons by publication, and shall set forth the names of the parties to the indenture, deed of trust or other such instrument, the date thereof, and the place or places where the same is recorded. (1931, c. 250, s. 3.)

§ 53-28. Appointment where no objection made.—If, upon the day fixed in said notice, no person shall appear and object to the appointment of a substitute trustee, the clerk shall, upon such terms as he deems advisable to the best interest of all parties, appoint some competent person, or corporation authorized to act as such, substituted trustee, who shall be vested with and shall exercise all the powers conferred upon the trustee named in said instrument. (1931, c. 250, s. 4.)

§ 53-29. Hearing where objection made; appeal from order.—If objection shall be made to the appointment of a new trustee, the clerk shall hear and determine the matter, and from his decision an appeal may be prosecuted as in case of special proceedings generally. (1931, c. 250, s. 5.)

§ 53-30. Registration of final order.—The final order of appointment of such new trustees shall be certified by the clerk of the superior court in which such order is entered and shall be recorded in the office of the register of deeds in the county or counties in which the instrument under which such appointment has been made is recorded, and a minute of the same shall be entered by the register of deeds on the margin of the record where said original instrument is recorded. (1931, c. 250, s. 6.)

§ 53-31. Petition and order applicable to all instruments involved.—The petition and the order appointing such new trustee may include and relate and apply to any number of indentures, deeds of trust or other instruments, wherein the same trustee is named. (1931, c. 250, s. 7.)

§ 53-32. Additional remedy.—Sections 53-25 to 53-31 shall be in addition to and not in substitution for any other remedy provided by law. (1931, c. 250, s. 8.)

Editor's Note.—As the remedy provided is cumulative, the statute should be read in connection with §§ 45-10 to 45-16. 9 N. C. Law Rev. 403.

§ 53-33. Validation of acts of officers of insolvent banks as trustees in deeds of trust.—Whenever any state bank, prior to January first, one thousand nine hundred and thirty-one, shall have become insolvent and its assets and business been placed in the hands of the corporation commission or taken control of by the corporation commission for liquidation, and the board of directors of said bank shall have thereafter by resolution authorized or directed the officers of said bank or some of them to perform or exercise in the name of the bank as trustee any power or duty of such bank as trustee under any deed in trust recorded in this State, the performance or exercise of such power or duty heretofore or hereafter by any officer or officers so authorized shall be effective and binding on all parties so concerned as the act of such bank as trustee as aforesaid, to the same extent and in the same manner as if such bank had not become insolvent and its assets and business had not been placed in the hands of the corporation commission or taken control of by the corporation commission for liquidation. (1931, c. 403.)

§ 53-34. Validation of sales by corporation commission under mortgages, etc., giving banks power of sale.—Whenever it appears that either the North Carolina corporation commission, the chief state bank examiner, or any liquidating agent ap-
pointed pursuant to the provisions of § 53-20, has undertaken to exercise the power of sale set up in any mortgage, deed of trust, or other written instrument for the security of the payment of money in which any bank then in liquidation was named trustee, the said acts including the acts of resigning as trustee in the mortgage, deed of trust, or other instrument. (1931, c. 132.)

Editor's Note.—This section, which validates sales by the commission and its representatives in the course of liquidation of insolvent banks, when the power of sale was originally granted to such a bank before the state took it over, appears to have been intended to overcome the effect of the case of Mitchell v. Shuford, 200 N. C. 321, 156 S. E. 513, which held that the commission had no such authority. In view, however, of this case, and of Booth v. Hairston, 193 N. C. 278, 156 S. E. 879; s. c., 195 N. C. 814, S. E. 490, doubt is cast upon the constitutionality of the validating act. Upon the rehearing of the latter case, Justice Brogden said: "... but the power to cure the commission and its representatives in the course of liquidation of insolvent banks, when the power of sale was granted to the bank named as trustee in the mortgage, deed of trust, or other instrument, the said acts including the acts of resigning as trustee, are hereby validated and declared to be of the same force and effect as if done by the bank named as trustee in the mortgage, deed of trust, or other instrument. (1931, c. 132.)"

§ 53-35. CH, 58. Foreclosures and executions of deeds by commissioner of bank, validated.—Whereas, the commissioner of banks, created by chapter two hundred forty-three of the Public Laws of 1931, was given general supervision over the banks of this state; and whereas, the commissioner of banks, under authority of chapter three hundred and eighty-five of the Public Laws of 1931, succeeded to all the property of banks in liquidation, including fiduciary powers under the mortgages and deeds of trust; and whereas, the commissioner of banks, in his own name and in the name of a number of conservators or liquidating agents of banks in the process of liquidation under his supervision, has foreclosed a large number of deeds of trust in which such banks were the named trustee, and has executed under the powers contained therein a large number of trustee's deeds under authority thereof: Now, therefore,

All the deeds and acts of the commissioner of banks and/or conservators or liquidating agents of such banks in the process of liquidation, as in the preamble to this section described, are hereby in all respects ratified, validated and confirmed.

This section shall not effect litigation pending April 3, 1939. (1939, c. 368.)

§ 53-36. Commissioner to report to secretary of state certain matters relative to liquidation of closed banks; publication. The commissioner of banks of the state of North Carolina shall on or before the first day of June, 1933, and on the first day of January and July of each year thereafter file with the secretary of the state of North Carolina a report showing all banks under liquidation in the state of North Carolina, and the names of any and all auditors together with the amounts paid to them for auditing each of said banks, and the names of any and all attorneys employed in connection with the liquidation of said banks together with the amount paid or contracted to be paid to each of said attorneys. If any attorney has been employed on a fee contingent upon recovery said report must state in substance that the attorney has been employed on a fee contingent upon recovery.

Within five days from the receipt of said report the secretary of the state of North Carolina shall cause same to be published one time in some newspaper published in each county in which a bank or banks are under liquidation, if there be a newspaper published in said county. If not, the secretary of the state of North Carolina shall cause a copy of said report to be posted at the courthouse door in said county. (1933, c. 483.)

Art. 4. Reopening of Closed Banks.

§ 53-37. Conditions under which banks may reopen.—Whenever the commissioner of banks has taken in possession any bank, such bank may, with the approval of the commission or the chief state bank examiner, or liquidating agent appointed as aforesaid, resume business upon such terms and conditions as may be approved by the state banking commission. When such banks have been taken in possession under the provisions of § 53-20, paragraphs one or two, such conditions shall be fully stated in writing and a copy thereof shall be filed with the clerk of the superior court in the action required to be commenced in such cases against said bank under the provisions of § 53-20, paragraph three: Provided, however, no bank or banking institution which has been taken in possession by the commissioner of banks under the state banking laws shall be reopened to receive deposits or for the transaction of a banking business unless and until:

(a) The bank has been completely restored to solvency;
(b) The capital stock, if impaired, has been entirely restored in cash;
(c) It shall clearly appear to the commissioner of banks that such bank may be reopened with safety to the public and such reopening is necessary to serve the business interests of the community.

Art. 5. Stockholders.

§ 53-38. New state banks to set up surplus fund.—The common stockholders of any bank organized after March 17, 1933, under the laws of the state of North Carolina shall pay in, in cash, a
surplus fund equal to fifty per centum of its common capital stock before the bank shall be authorized to commence business. (1933, c. 159, s. 2; 1935, c. 79, s. 1.)

Editor's Note.—For a discussion of history and scope of this section, see 11 N. C. Law Rev. 200. For an interesting article discussing the law of contracts, and referring to provisions of the instant section, see 13 N. C. Law Rev. 91. There is a question as to whether the words "stockholders" and "capital stock" ever appear in the words "stockholders" and "capital stock." § 53-40. Executors, trustees, etc., not personally liable.—Persons holding stock as executors, administrators, guardians, or trustees shall not personally be subject to any liabilities as stockholders, but the estate and funds in their hands shall be liable in like manner and to the same extent as the testator, intestate, ward, or person interested in such trust fund would be if living and competent to hold stock in his own name. (1921, c. 4, s. 23; C. S. 219(c.).)

Editor's Note.—This section is a substantial re-enactment of the latter part of C. S. sec. 237.

Extent of Section.—This provision is held to refer not only to trustees appointed by will, or by order of a court or of a judge, but to any trust relationship, however created. But the exemption is limited to cases of express and active trusts, that is, a liability on bank stock held in trust for a cestui que trust, also named in the certificate, is not liable personally as a stockholder in an action by the bank to recover judgment upon the statutory liability of stockholders. American Trust Co. v. Jenkins, 193 N. C. 761, 764, 138 S. E. 139. See § 53-42 for liability of bank trustee to trust estate as cestui que trust, etc.—By this provision an administrator, executor, trustee, etc.—By this provision an administrator, executor, etc.—By this provision an administrator, executor, guardian, or trustee is not personally liable for the statutory liability on bank stock held in their representative capacities, but such liability attaches to the estate or funds in their hands. Hood v. North Carolina Bank, etc., Co., 209 N. C. 767, 184 S. E. 51.

And where a trustee breached its duty in failing to sell bank stock, it was held the wrong was not actionable and the estate will not relieve the estate of the statutory liability to the prejudice of depositors and creditors of the bank. Id. A trust estate is liable for assessment on bank stock owned regardless of the method by which the trust is established, and where shares of bank stock are the subject of the trusts, the books of the bank in the name of "executors," the statutory liability thereon of the estate may not be defeated by alleging that the stock was held by the executors and trustees under the will for the benefit of minor, alien, or other beneficiaries, the beneficiaries of the income from the trust estate bank of age, and there being nothing on the books of the bank showing that the same were declared to be capital stock, the court held the bank was entitled to foreclose upon the capital stock. Jones v. Franklin's Estate, 209 N. C. 355, 183 S. E. 792.

Liability Attaches to Estate or Funds in Hands of Trustees, etc.—By this section an administrator, executor, guardian, or trustee is not personally liable for the statutory liability on bank stock held in their representative capacities, but such liability attaches to the estate or funds in their hands. Hood v. North Carolina Bank, etc., Co., 209 N. C. 367, 184 S. E. 51.

And where a trustee breached its duty in failing to sell bank stock, it was held the wrong was not actionable and the estate will not relieve the estate of the statutory liability to the prejudice of depositors and creditors of the bank. Id. A trust estate is liable for assessment on bank stock owned regardless of the method by which the trust is established, and where shares of bank stock are the subject of the trusts, the books of the bank in the name of "executors," the statutory liability thereon of the estate may not be defeated by alleging that the stock was held by the executors and trustees under the will for the benefit of minor, alien, or other beneficiaries, the beneficiaries of the income from the trust estate bank of age, and there being nothing on the books of the bank showing that the same were declared to be capital stock, the court held the bank was entitled to foreclose upon the capital stock, the amount due thereon to the bank with interest from the date of the sale, and the balance, if any, shall be returned to the shareholders who paid the same. § 53-42. Stock sold if subscription unpaid. — Whenever any stockholder, or his assignee, fails to pay any installment on the stock, when the same is required by law to be paid, the directors of the bank shall sell the stock of such delinquent stockholder at public or private sale, as they may deem best, having first given the delinquent stockholder twenty days notice, personally or by mail, at his last known address. If no party can be found who will pay for such stock the amount due thereon to the bank with any additional indebtedness of such stockholder to the bank, the amount previously paid shall be forfeited to the bank, and such stock shall be sold, as the directors may order, within thirty days of the time of such forfeiture, and if not sold, it shall be canceled and deducted from the capital stock of the bank. (1921, c. 4, s. 25; C. S. 219(c.).)

Cross Reference.—As to liability for unpaid stock under general corporation law, see § 55-66.

Editor's Note.—This section is a substantial re-enactment of C. S. sec. 243, the prior law, except that the sale limit allowed the directors was changed from six months to thirty days. § 53-42. impairment of capital; assessments, etc.—The commissioner of banks shall notify every bank whose capital shall have become impaired from losses or any other cause, and the surplus and undivided profits of such bank are insufficient to make good such impairment, to make the impairment good within sixty days of such notice by an assessment upon the stockholders thereof, and it shall be the duty of the officers and directors of the bank receiving such notice to immediately call a special meeting of the stockholders for the purpose of making an assessment upon its stockholders sufficient to cover the impairment of the capital, payable in cash, at which meeting such assessment shall be made: Provided, that such bank may reduce its capital to the extent of the impairment, as provided in § 53-11. If any stockholder of such bank neglects or refuses to pay such assessment as herein provided, it shall be the duty of the board of directors to cause a sufficient amount of the capital stock of such stockholder or stockholders to be sold at public auction, upon thirty days notice given by posting such notice of sale in the office of the bank and by publishing such notice in a newspaper in the place where the bank is located, and if none therein, a newspaper circulating in the county in which the bank is located, to make good the deficiency. And the balance, if any, shall be returned to the delinquent shareholder or shareholders. If any such bank shall fail to cause to be paid in such deficiency in its capital stock, three months after receiving such notice from the commissioner of banks, the commissioner of banks

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may forthwith take possession of the property and business of such bank until its affairs be finally liquidated as provided by law. A sale of stock, as provided in this section, shall effect an absolute cancellation of the outstanding certificate or certificates evidencing the stock so sold, and shall make the certificate null and void, and a new certificate shall be issued by the bank to the purchaser of such stock; but in the event the stock of any stockholder be sold as hereinbefore provided, and the said stock when sold fails to bring the amount of the assessment against said stockholder, then, and in such event, the said stockholder shall be personally liable for the difference between the said amount of assessment and the price brought by the sale of said stock.

(Ex. Sess. 1921, c. 56, s. 3; 1925, c. 117; 1931, c. 243, s. 5; C. § 219(f).)

Cross Reference.—As to the amount of reserve required, see §§ 53-50 and 53-51.

Note.—The section first appeared in the act of 1921, ch. 56, amending the act of 1921, ch. 4. Its provisions are substantially similar to the national banking act which was designed principally for the purpose of strengthening banks whose capital has become impaired. See Elon Banking, etc., v. Burk, 189 N. C. 69, 126 S. E. 163. The 1925 amendment added the last lines, beginning with the word "however," and was added to overcome the construction placed upon this section by the case cited above. See annotations following in this note.

The Act of 1921 substituted "commissioner of banks" for "corporation commission" formerly appearing in this section.

Rules of Construction.—This statute creates a new liability and provides a special remedy for its enforcement, viz., the sale of stock if the stockholder fails to pay assessment. This remedy is exclusive and actions or proceedings ordinarily available may not be resorted to. So a person acquiring stock in good faith for the difference between the price for which the stock sold and the amount of the assessment cannot be maintained. Elon Banking, etc., Co., v. Burke, 189 N. C. 69, 126 S. E. 163.

The effect of the holding that a personal action for the difference cannot be maintained was destroyed by the 1925 amendment which specifically provides for such an action, but the general rules laid down for the construction of this section remain the same.

Editor's Note.—This section first appeared in the act of Laws 1925, c. 117, amending this section, was passed to meet the decision in Elon Bkg., etc., Co. v. Burke, 189 N. C. 69, 126 S. E. 163. The Bank of Pinehurst v. Derby, 218 N. C. 653, 12 S. E. (2d) 260.

Amendatory Act of 1925 Cannot Be Given Retroactive Effect.—The act of 1925, amending this section by providing for personal liability of stockholders for the amount by which the sale of their stock failed to realize a sum sufficient to pay the assessment, provided a new remedy, and to permit the bank to maintain the action against a stockholder who purchased his stock prior to the enactment of the amendment of 1925 would violate due process of law, and would impair the obligations of the contract, and hence the act of 1925 cannot be given retroactive effect. Bank of Pinehurst v. Derby, 218 N. C. 653, 12 S. E. (2d) 260.

"Payable in Cash" Construed.—The expression "payable in cash" merely means that the account is presently due, and its payment may be presently enforced, but only by the methods the statute specifies. Elon Banking, etc., Co. v. Burke, 189 N. C. 69, 126 S. E. 163.

Art. 6. Powers and Duties.

§ 53-43. General powers.—In addition to the powers conferred by law upon private corporations, banks shall have the power:

1. To exercise by its board of directors, or duly authorized officers and agents, subject to law, all such powers as shall be necessary to carry on the business of banking by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of indebtedness, by receiving deposits, by buying and selling exchange, coin, and bullion, by loaning money on personal security or real and personal property. Such corporations at the time of making loans or discounts may take and receive interest or discounts in advance.

2. To adopt regulations for the government of the corporation not inconsistent with the constitution and laws of this state.

3. To purchase, hold, and convey real estate for the following purposes:

(a) Such as shall be necessary for the convenient transacting of its business, including furniture and fixtures, with its banking offices and other rooms or apartments to rent as a source of income, which investment shall not exceed fifty per cent of its paid-in capital stock and permanent surplus: Provided, that this provision shall not apply to any such investment made before the ninth day of March, one thousand nine hundred and twenty-one. Provided further, that the commissioner of banks may, in his discretion, authorize any bank located in a city having a population of more than ten thousand, according to the last United States census, to invest more than fifty per cent of its capital and permanent surplus in its banking houses, furniture, and fixtures.

(b) Such as is mortgaged to it in good faith by way of security for loans made or moneys due to such banks.

(c) Such as has been purchased at sales upon foreclosures of mortgages and deeds of trust held or owned by it, or on judgments or decrees obtained and rendered for debts due to it, or in settlements affecting security of such debts. All real property referred to in this subsection shall be sold by such bank within one year after it is acquired, unless, upon application by the board of directors, the commissioner of banks extends the time within which such sale shall be made. Any and all powers and privileges heretofore granted and given to any person, firm, or corporation doing a banking business in connection with a fiduciary and insurance business, or the right to deal to any extent in real estate, inconsistent with this chapter, are hereby repealed.

4. Nothing contained in this section shall be deemed to authorize banking corporations to engage in the business of dealing in investment securities, either directly or through subsidiary corporations: Provided, however, that the term "dealing in investment securities" as used herein, shall not be deemed to include the purchasing and selling of securities without recourse, solely upon order, and for the account of, customers; and provided further, that "investment securities," as used herein, means not the direct or indirect obligations of the United States, or general obligations of any state or of any political subdivision thereof, or of cities, towns, or other corporate municipalities of any state or obligations issued under authority of the Federal Farm Loan Act, as amended, or issued by the Federal Home Loan Banks or the Home Owners' Loan Corporation.

Any provision in conflict with this subsection contained in the Articles of Incorporation hereto-
fore issued to any banking corporation is hereby revoked.

5. Subject to the approval of the commissioner of banks and on the authority of its board of directors, or a majority thereof, to enter into such contracts, incur such obligations and generally do and perform any and all such acts and things whenever or in such events or circumstances as may be necessary or appropriate in order to take advantage of any and all memberships, loans, subscriptions, contracts, grants, rights or privileges, which may at any time be available or inure to banking institutions, or to their depositors, creditors, stockholders, conservators, receivers or liquidators, by virtue of those provisions of section eight of the Federal Banking Act of one thousand nine hundred and thirty-three (section twelve B of the Federal Reserve Act as amended) which establish the Federal Deposit Insurance Corporation and provide for the insurance of deposits, or of any other provisions of that or any other act or resolution of congress to aid, regulate or safeguard banking institutions and their depositors, including any amendments of the provisions of the Federal Reserve Act or of any state banking laws. Any national bank, or any other banking corporation, shall, before being permitted to make any investment in any type of security or mortgage, subscribe for and acquire any stock, debentures, or other bonds or other types of securities of the Federal Deposit Insurance Corporation and to comply with the lawful regulations and requirements from time to time issued or made by such corporation.

6. Any commercial bank, savings bank, or trust company, heretofore or hereafter organized under any general or special laws of this state and any national bank doing business in this state, shall have power, in addition to such other powers as it may have:

(a) Upon the making of a loan or discount, to deduct in advance, from the proceeds of such loan, interest at a rate not exceeding six per centum (6%) per annum upon the amount of the loan from the date thereof until the maturity of the final installment, notwithstanding that the principal amount of such loan is required to be repaid in installments: Provided, Any commercial bank may exercise and enjoy all the powers now or hereafter provided in paragraph 3 of section 53-141.

(b) Nothing in subsection 6 shall be construed as in any wise extending or increasing or decreasing the powers of commercial banks, savings banks, or trust companies or national banks to make loans or discount notes other than as herein or by other laws expressly provided.

7. Maintain separate departments and deposit in its commercial department to the credit of its trust department all uninvested fiduciary funds of cash or other, under rules and regulations of the State banking commission, all such deposits in the name of the trust department whether in consolidated deposits or for separate fiduciary accounts, by segregating and delivering to the trust department such securities as may be eligible for the investment of the sinking funds of the state of North Carolina, equal in market value to such deposits, as in any wise extending or increasing or decreasing the powers of commercial banks, savings banks, or trust companies or national banks to make loans or discount notes other than as herein or by other laws expressly provided.

8. Maintain separate departments and deposit in its commercial department to the credit of its trust department all uninvested fiduciary funds of cash or other, under rules and regulations of the state banking commission, all such deposits in the name of the trust department whether in consolidated deposits or for separate fiduciary accounts, by segregating and delivering to the trust department such securities as may be eligible for the investment of the sinking funds of the state of North Carolina, equal in market value to such deposits, as in any wise extending or increasing or decreasing the powers of commercial banks, savings banks, or trust companies or national banks to make loans or discount notes other than as herein or by other laws expressly provided. Such securities shall be held by the trust department as security for the full payment or repayment of all such deposits, and shall be kept separate and apart from other assets of the trust department. Until all of such deposits shall have been accounted for to the trust department by the individual fiduciary accounts, no creditor of the bank shall have any right to such security. When fiduciary funds are deposited by the trust department in the commercial department of the bank, the deposit thereof shall not be deemed to constitute a use of such funds in the general business of the bank and the bank in such instance shall not be liable for interest on such funds. To the extent and in the amount such deposits may be insured by the Federal Deposit Insurance Corporation, the amount of security required for such deposits by this section may be reduced.

The banking commission shall have power to make such rules and regulations as it may deem necessary for the enforcement of the provisions of the preceding paragraph, and such authority shall exist and be hereby conferred under the general authority herefore conferred upon said commission as well as by this paragraph. (1921, c. 4, s. 26; 1923, c. 148, s. 5; Ex. Sess. 1924, c. 67; 1925, c. 279; 1927, c. 47, s. 5; 1931, c. 243, s. 5; 1933, c. 303; 1935, c. 81, s. 1, c. 82; 1937, c. 154; 1941, c. 77; 1943, c. 234; C. S. 220(a)).

Cross References.—As to powers conferred upon private corporations, see § 55-26 et seq. As to form for corporate conveyances, see § 47-41. As to license of commercial banks to act in a fiduciary capacity, see § 58-114.

Editor's Note.—This section is a substantial re-enactment of C. S., sec. 220. However there are several material changes. Subsection 2 was inserted; the date beyond which investments are exempt from the section as not provided in clause (a) of subsection 3 was changed from 1903 to 1921, the second proviso permitting the commission to authorize the continuance of investments made prior to 1923 being inserted in 1924 and amended in 1925 by changing the date from 1923 to 1925, and the third proviso added by the 1927 amendment; a clause providing that real estate conveyed to a bank in satisfaction of debts previously contracted in the course of the dealings might be purchased, held and conveyed was not brought forward; and in clause (c) of subsection 3 the requirement that all real estate acquired under the subsection be sold within one year was replaced by a provision that in 1921 when the section was passed, and the 1923 amendment inserted the words "and deeds of trust held or" in the second line of the clause. Otherwise the prior law is re-enacted in this section.

The Act of 1931 substituted "commissioner of banks" for "corporation commission" formerly appearing in this section.

The amendment of 1935 changed the list of obligations excepted in paragraph four which was added by the 1933 amendment. Formerly all obligations of the state instead of "general" obligations were excepted. Obligations issued under Farm Loan Act or by Home Loan Banks and Home Owners' Loan Corporation were added to the list. Subdivision 5 was added by the 1935 amendment in its entirety.

The 1937 amendment added subsection 6.

The 1941 amendment added subsection 7. For comment on this amendment, see 19 N. C. L. Rev. 344.

Editor's Note.—As to the powers to become surety or lend credit, see § 53-42(b) of this subdivision as well as by this paragraph. (1921, c. 4, c. 81, s. 1, c. 82; 1923, c. 148, s. 5; Ex. Sess. 1924, c. 67; 1925, c. 279; 1927, c. 47, s. 5; 1931, c. 243, s. 5; 1933, c. 303; 1935, c. 81, s. 1, c. 82; 1937, c. 154; 1941, c. 77; 1943, c. 234; C. S. 220(a)).

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§ 53-44

CH. 53. BANKS—POWERS AND DUTIES

§ 53-44. Investment in bonds guaranteed by United States.—(1) Any bank, building and loan association, land and loan association, savings and loan association, trust company, title insurance company, land mortgage company, fraternal order or benevolent association, or any other corporation incorporated under the laws of this state, and operating under the supervision of the commissioner of banks, insurance commissioner, or superintendent of savings and loan associations; the state treasurer, as custodian of the assurance fund provided under the Torrens Act, or any officer charged with the investment of sinking funds of the State, any county, city, town, incorporated village, township, school district, school taxing district, or other district or political subdivision of government of the State; the North Carolina State Savings Bank, the Federal Savings and Loan Association, the Federal Land Bank, the Federal Home Loan Bank, or the Federal Loan Bank; any bank, trust company, or building and loan association, insurance company, title insurance company, land mortgage company, fraternal order or benevolent association, or any other corporation, trust company, building and loan association and insurance company, and other financial institutions, and all such guardians, executors, administrators, trustees or others acting in a fiduciary capacity in this state may invest, to the same extent that such funds may be invested in interest-bearing obligations of the United States, their funds or the moneys in their custody or possession which are eligible for investment, in bonds or notes secured by a mortgage or deed of trust issued by the federal housing administrator, in mortgages on real estate which have been accepted for insurance by the federal housing administrator, and in obligations of national mortgage associations.

(2) Insurance Companies.—All insurance companies, building and loan associations, and other financial institutions, on being approved as eligible for credit insurance by the federal housing administrator, may make such loans as are insured by the federal housing administrator.

(3) Certain Securities Made Eligible for Collateral.—Wherever, by statute of this state, collateral is required as security for the deposit of public or other funds; or deposits are required to be made with any public official or department; or an investment of capital or surplus, or a reserve or other fund, is required to be maintained, consisting of designated securities, bonds, and notes secured by a mortgage or deed of trust incurred by the federal housing administrator, all such funds, deposits and collateral shall be eligible for such purposes.

(4) Certain Securities Made Eligible for Collateral.—No law of this state prescribing the nature, amount or form of security or requiring security upon which loans or investments may be made, or prescribing or limiting the rates or time of payment of the interest any obligation may bear, or prescribing or limiting the period for which loans or investments may be made, shall be deemed to apply to loans or investments made pursuant to the foregoing section (3) of this section. (1935, cc. 71, 278; 1937, c. 333.)

Editor's Note.—The 1937 amendment made this section applicable to building and loan associations, and made other changes.

§ 53-46. Limitations on investments or securities.—The investment in any bonds or other interest-bearing securities of any one firm, individual or corporation, unless it be the interest-bearing obligations of the United States, obligations issued under authority of the Federal Farm Loan Act, as amended, or issued by the Federal Home Loan Bank, Home Owners’ Loan Corporation, state of North Carolina, or other state of the United States, or of some city, town, incorporate, county, school district, or other political subdivision of the state of North Carolina, shall at no
time be more than twenty per cent of the unimpaired capital and permanent surplus of any bank to an amount not in excess of two hundred and fifty thousand dollars; and not more than ten per cent of the unimpaired capital and permanent surplus in excess of two hundred and fifty thousand dollars:

Provided, that nothing in this section shall be construed to compel any bank to surrender or dispose of any investment in the stocks or bonds of a corporation owning the lands or buildings occupied by such bank as its banking home, if such stocks or bonds were lawfully acquired prior to February 25, 1927. (1921, c. 4, s. 27; 1927, c. 6; 1933, c. 359; 1925, c. 199; 1937, c. 186; C. S. 220(b).)

Cross References.—As to the suspension of this section, see § 53-49. As to limitation of amount of bank acceptances, see § 53-56.

Editor's Note. — There was no corresponding section in the prior law.

The 1927 amendment made radical changes in this section. The maximum investment which might be made in private securities was reduced from 25% to 10% of the unimpaired capital and permanent surplus where the amount was not in excess of $250,000, and reduced to 10% of the unimpaired capital and permanent surplus in excess of $250,000. Prior to the amendment the section fixed 20% of the capital and permanent surplus as the maximum where the capital was between $250,000 and $500,000; 15% where it was between $500,000 and $750,000; and 10% of the capital of any other state or national bank:

The last proviso in the section was also added by the 1927 amendment.

The Act of 1931 substituted "commissioner of banks" for "corporation commission" formerly appearing in this section.

By Public Laws 1933, c. 399, provisos, formerly appearing in the section, permitting restricted investments in stock or bonds of a corporation owning the building or land occupied by the bank, were omitted.

The amendment of 1935 added the words "or other state of the United States, or of some" near the beginning of this section.

The 1937 amendment inserted the words "obligations issued under authority of the Federal Farm Loan Act, as amended, or issued by the Federal Home Loan Banks, or the Home Owners' Loan Corporation."

§ 53-47. Stocks, limitations on investment in.

No bank shall make any investment in the capital stock of any other state or national bank:

Provided, that nothing herein shall be construed to prevent banks doing business under this chapter from subscribing to or purchasing, upon such terms as may be agreed upon, the capital stock of banks organized under that act of congress known as the "Edge Act" or the capital stock of central reserve banks whose capital stock exceeds one million dollars.

To constitute a central reserve bank as contemplated by this chapter, at least fifty per cent of the capital stock of such bank shall be owned by other banks. The investment of any bank in the capital stock of such central reserve bank or bank organized under the act of congress commonly known as the "Edge Act," shall at no time exceed ten per cent of the paid-in capital and permanent surplus of the bank making same.

No bank shall invest more than fifty per cent of its permanent surplus in the stocks of other corporations, firms, partnerships, or companies, unless such stock is purchased to protect the bank from loss:

Any stocks owned or hereafter acquired in excess of the limitations hereinafter imposed shall be disposed of at public or private sale within six months after all other stocks shall be acquired of the same, and if not so disposed of they shall be charged to profit and loss account, and no longer carried on the books as an asset. The limit of time in which said stocks shall be disposed of or charged off the books of the bank may be extended by the commissioner of banks if in his judgment it is for the best interest of the bank that such extension be granted. Provided that the limitations imposed in this section on the ownership of stock in or securities of corporations is suspended to the extent (and to that extent only) that any bank operating under the supervision of the commissioner of banks may subscribe for and purchase shares of stock in or debentures, bonds or other types of securities of any corporation organized under the laws of the United States of America for the purpose of insuring to depositors a part or all of their funds on deposit in banks where and to such extent as such stock or security ownership is required in order to obtain the benefits of such deposit insurance for its depositors. (1921, c. 4, s. 28; 1931, c. 243, s. 5; 1935, c. 81, s. 3; C. S. 220(c).)

Editor's Note. — There was no provision in the prior law corresponding to this section.

The Act of 1931 substituted "commissioner of banks" for "corporation commission" formerly appearing in this section.

The amendment of 1935 added the last proviso of this section relating to suspension of the limitations in case of a bank operating under the supervision of the commissioner of banks.

§ 53-48. Loans, limitations of.—The total direct and indirect liability of any person, firm or corporation, other than a municipal corporation for money borrowed, including in the liabilities of a firm, the liabilities of the several members thereof, shall at no time exceed twenty per cent of two hundred and fifty thousand dollars, or fractional part thereof, of the unimpaired capital and permanent surplus of the bank and not more than ten per cent of the excess of two hundred and fifty thousand dollars of the unimpaired capital and permanent surplus of the bank:

Provided, however, that the discount of bills of exchange drawn in good faith against actual existing values, the discount of solvent trade acceptances, or other commercial or business paper actually owned by a person, firm, or corporation negotiating the same, and any notes, secured by not less than a like face amount of bonds of the United States or state of North Carolina or certificates of indebtedness of the United States, shall not be considered as money borrowed within the meaning of this section: Provided, further, that the limitations of this section shall not apply to loans or obligations to the extent that they are secured or covered by guarantees or by commitments or agreements to take over or purchase the same, made by any federal reserve bank or by the United States or any department, board, bureau, commission or establishment of the United States, including any corporation wholly owned directly or indirectly by the United States. (1921, c. 4, s. 29; 1923, c. 148, s. 6; 1925, c. 119, s. 1; 1927, c. 47, s. 7; 1937, c. 419; 1943, c. 204; C. S. 220(d).)

Cross References.—As to the suspension of this section, see § 53-49. As to limitation of amount of bank acceptances, see § 53-56.

Editor's Note. — C. S. § 227 was the corresponding section of the prior law. The provisions have been so changed that this section could not be called a re-enactment of the prior law.

The words "or business" appearing in the first proviso of this section were inserted by the acts of 1923.
The 1935 amendment changed the percentage where the paid-in capital is $350,000 or less from 20% to 25%. It also inserted a proviso that upon the approval of two-thirds of the directors a loan could be increased to 25% but this was omitted when revised by the act of 1937. The word "solvent" was inserted in the first proviso before "trade acceptance" and before "commercial" by this amendment. The acts of 1927 repealed the old section and re-enacted it with changes. The act of 1927 limited the provision for a maximum loan of 20% where the paid-in capital was $250,000 or less; 20% between $250,000 and $500,000; 15% between $500,000 and $750,000; and 10% over $750,000. A proviso at the end of the section providing that the limitations imposed should not apply to existing loans, or to extensions or renewals of the date of the resolution. The amendment to the proviso, except as made to apply by the commission, was omitted. The 1937 amendment added the proviso at the end of the section. The 1934 act rewrote the section to include, in the last proviso; boards, departments, etc., of the United States, or corporations owned directly or indirectly by the United States.

Section Not Retroactive. — The statutory limitation upon a bank making loans to any one person or class of common interest, does not apply to loans, or extensions or renewals thereof, made under the last two terms of the statute. State v. Cooper, 190 N. C. 528, 130 S. E. 180.

Violation a Misdemeanor. — The violation of this section is a violation of sec. 53-11. A bank must act through its officers, and where they have violated the provisions of this section as to lending the bank's money, the offense is committed by the officers under the act in that the statute applies, and the offense is individually indictable therefor. State v. Cooper, 190 N. C. 528, 130 S. E. 180; State v. Davidson, 205 N. C. 735, 738, 172 S. E. 180. A construction of this section which would limit criminal liability to the bank would defeat the manifest purpose of the General Assembly. The loans prohibited can be made for the bank only by officers and directors, and to hold that the bank only is liable criminally, would result, upon its conviction, in the imposition of a fine, the only punishment that can be imposed by the court upon the corporation, thus resulting in most instances in a further depletion of the already impaired resources of the bank, and entailing further loss to depositors and stockholders, for whose protection the provisions are primarily included in the statute. State v. Cooper, 190 N. C. 528, 533, 130 S. E. 180.

An indictment charging the officer of the bank of violating sec. 53-11, and also unlawfully making loans for the bank to certain persons in excess of the maximum percentage of the capital stock and permanent surplus, in violation of this section, alleges the commission of crimes of which there are separate indictments there-of against the same person they may be consolidated and tried together by the court. State v. Cooper, 190 N. C. 528, 533, 130 S. E. 180.

Loss of Assets Must Result.—In an action against the managing officials of a bank for wrongful depletion of assets in mismanagement of the affairs of the bank in making loans in excess of the limit set forth in this section, the evidence is insufficient to be submitted to a jury, if it appears that no loss to the assets of the bank has been caused by the acts of the officials. Gordon v. Pendleton, 202 N. C. 241, 162 S. E. 546.

§ 53-49. Suspension of investment and loan limitation.—The board of directors of any bank, may by resolution duly passed at a meeting of the board, request the commissioner of banks to suspend temporarily the limitations on loans and investments as the same may apply to any particular loan or investment in excess of the limitations of §§ 53-46, 53-47, and 53-48 which the bank desires to make. Upon receipt of a duly certified copy of such resolution, the commissioner of banks may, in his discretion, suspend the limitations on loans and investments insofar as they would apply to the loan or investment which the bank desires to make: Provided, however, such loan shall be amply secured and shall be for a period not longer than one hundred and twenty days. (1921, c. 4, s. 30; 1931, c. 243, s. 5; 1933, c. 239, s. 1; C. S. 280(e)).

Editor's Note. — There was no corresponding section in the prior law.

The Act of 1931 substituted "commissioner of banks" for "corporation commission" formerly appearing in this section.

§ 53-50. Reserve. — Every bank shall at all times have on hand or on deposit with approved reserve depositories, instantly available funds in an amount equal to at least fifteen per cent of the aggregate amount of its demand deposits, and five per cent of the aggregate amount of its time deposits. But no reserve shall be required on deposits secured by a deposit of United States bonds or the bonds of the state of North Carolina. Any bank that is now or may hereafter become a member of the Federal Reserve Bank shall maintain the same reserve with respect to deposits as shall be required of other members of such Federal Reserve Bank. (1921, c. 4, s. 31; C. S. 220(f)).

Cross References.—As to effect of impaired capital upon reserve, see § 53-42. As to provisions giving authority to the Federal Reserve Bank, see § 53-43. As to failure to maintain reserve required by law, see § 53-111.

Editor's Note. — The corresponding section of the old law was C. V. sec. 53-42. With the exception of the insertion of the phrase permitting deposits with approved reserve depositories, this section, in so far as it goes, is a re-enactment of the prior law. The prior section contained a provision prohibiting a bank from making new loans or discounts, otherwise than by discounting or purchasing bills of exchange payable at sight, or make any dividends of its profits when the available funds are below the reserve required. This provision will be found as a part of sec. 222(g).

The prior section also contained definitions of time and demand deposit, available funds and cash. The first two terms were defined under Sec. 53-1 so that a repetition here is uncalled for and a definition of the last two terms is omitted from the banking laws.

"Deposits" Defined.—This section means all deposits the payment of which can be legally required within thirty days [see sec. 53-11], this reserve consisting in cash on hand, balance payable on demand due from other approved solvent banks, which have been designated depositories as hereinafter provided in this chapter. Cash includes lawful money of the United States, and exchange of any clearing house association. (Rev. c. 292; 1903, c. 275, s. 27; 1919, c. 85; 1921, c. 4, s. 32; C. S. 220(g)).

Cross Reference.—See note under § 53-71.

§ 53-51. Reserve and cash defined. Reserve shall consist of cash on hand and balances payable on demand, due from other approved solvent banks, which have been designated depositories as hereinafter provided in this chapter. Cash includes lawful money of the United States, and exchange of any clearing house association. (Rev. c. 292; 1903, c. 275, s. 27; 1919, c. 85; 1921, c. 4, s. 32; C. S. 220(g)).

Cross Reference.—See note under § 53-71.

§ 53-52. Forged check, payment of. No bank shall be liable to a depositor for payment by it of a forged check or other order to pay money unless within sixty days after the receipt of such voucher by the depositor he shall notify the bank that such check or order so paid is forged. (1921, c. 4, s. 33; C. S. 220(h)).

Editor's Note.—"This section is a substantial reenactment of C. S., sec. 231, except that formerly the depositor had six months within which to give notice of the forgery." Casabrooks v. Nat. Bank, 210 N. C. 244, 186 S. E. 362. "Arnold v. State Bank, etc., Co., 218 N. C. 433, 437, 11 S. E. (2d) 307.

The liability of the bank for payment of the forged instrument is predicated upon the presumption that it had knowledge of the genuine signature of its depositors. State Bank v. Cumberland Sav., etc., Co., 168 N. C. 605, 65 S. E. 5. The
bank assumes the responsibility of holding the depositor’s funds subject to his order and the burden is upon it, where a deposit is shown, to relieve itself of liability for the fund by proof of payment in accordance with the order of the depositor. Bank v. Thompson, 174 N. C. 349, 93 S. E. 849; Yarborough v. Trust Co., 142 N. C. 377, 55 S. E. 266.

The bank is just as liable for the payment of a forged check within the meaning of this section, when the endorsement is forged, as where the whole instrument is forged, it would seem, and this for the reason that the bank is clothed with the authority to the person designated by the depositor. Of course, if the payment is due to the negligence of the depositor, the bank would be relieved of liability. See Michie on Banks and Banking, p. 1209, 7 C. J. sec. 414, p. 696.

The general rule as to the liability of a bank upon a raised check is that it is liable for payment unless the depositor was so negligent in preparing his check that it was left incomplete or easily altered. But it should be observed in this connection that the depositor is not bound to prepare the checks so that it is impossible to alter them, and it would seem that if he used the care that an ordinary prudent man would use, the bank is liable. See Michie on Banks, pp. 1203 et seq. and 7 C. J. p. 684 sec. 413 for a collection of authorities.

The section of this section requiring a return of the voucher, giving the bank notice within a specified time of the receipt thereof, is, in keeping with the law of the majority of the states. This requirement is predicated upon the corporation’s duty of due care in handling of its business. The corporation may examine his returned checks within a reasonable time and to report any forgeries or alterations. However, in the absence of a statute similar to this one, it has often been held that the depositor owes no such duty, and that if he does and fails in it, the bank will not be relieved of payment unless it has been prejudiced by the delay. See Michie on Banks and Banking, p. 1209-1239 for full treatment. See also 7 C. J. sec. 414, p. 697.

Receipt of Statement by Bookkeeper Who Forged Checks Is Receipt by Corporation.—The receipt of a corporation’s bank statement by its bookkeeper is receipt of the statement by the corporation, and it may not recover against the bank for the payment of forged checks when notice is not given within sixty days after such receipt of the bank statement, even though the checks were forged by the bookkeeper, who destroyed them after he received the canceled checks from the bank. Greensboro Ice, etc., Co. v. Security Nat. Bank, 210 N. C. 244, 185 S. E. 362.

§ 53-53. Minor, payment of deposit in the name of.—When money is held on deposit by any state, industrial or national bank in this state in the name of a minor under fifteen years of age, it may be paid, together with the interest, if there be any interest thereon, upon receipts or checks signed by such minor and one of the minor’s parents. When money is held on deposit by any state, industrial or national bank in this state in the name of a minor fifteen years of age or upwards, it may be paid, together with the interest, if there be any interest thereon, upon receipts or checks signed by the minor. A written statement from the minor, if fifteen years of age or upward, or from one of the said minor’s parents, if the minor is under fifteen years of age, shall be conclusive evidence of the age of the minor. (1921, c. 4, s. 34; 1939, c. 84, s. 304; 1941, c. 44, 178 S. E. 831.)

Cross Reference.—As to payment of deposit in trust for minor to minor upon death of trustee, see § 53-59.

Editor’s Note.—As the corresponding section of the prior law was C. S. sec. 228.

The 1939 amendment repealed the former section and substituted the above therefor.

For comment on the 1939 amendatory act, see 17 N. C. Law 60.

This section is an exception to the general rule that contracts of an infant are voidable at the option of the infant. Coker v. Virginia-Carolina Joint-Stock Land Bank, 230 N. C. 33, 151 S. E. 481.

§ 53-54. Transactions not performed during banking hours.—Nothing in any law of this state shall in any manner whatsoever affect the validity of, or render void or voidable, the payment, certification, or acceptance of a check or other negotiable instrument or any other transaction by a bank in this state, because done or performed after regular banking hours except as herein provided. Provided, that nothing herein shall be construed to compel any bank in this state, which by law or custom is entitled to close at twelve noon on any Saturday, or for the whole or part day of any legal holiday, to keep open for the transaction of business, or to perform any of the acts or transactions aforesaid on any Saturday after such hour or on any legal holiday, except at its option. (1921, c. 4, s. 35; C. S. 229 (j).)

Editor’s Note.—The corresponding section of the prior law was C. S. sec. 234 in so far as Saturdays, Sundays and holidays are concerned. There was no similar provision in the prior law relating to transactions not performed during banking hours on other days.

§ 53-55. Commercial and business paper defined.—The term “commercial or business paper,” as used in this chapter, is hereby defined to mean a promissory note, and the term “trade acceptance” to mean a draft or bill of exchange issued or drawn for agricultural, industrial, or commercial purposes, or the proceeds of which have been used or are to be used for such purposes, but such definition shall not include notes, drafts, or bills of exchange covering merely investments, or issued or drawn for the purpose of carrying on or trading in stocks, bonds, or other investment securities, except bonds and notes of the government of the United States and state of North Carolina. (1921, c. 4, s. 36; 1923, c. 148, s. 7; 1941, c. 265; C. S. 220 (k.).)

Cross Reference.—As to promissory notes and checks, see § 53-99 et seq.

Editor’s Note.—The 1941 amendment struck out the former second sentence of this section, which sentence related to maturity.

§ 53-56. Bank acceptances defined.—Any bank doing business under this chapter may accept for payment at a future date, drafts or bills of exchange having not more than six months sight to run, drawn upon it by its customers under acceptance agreements, and which grow out of transactions involving the importation or exportation of goods; and issue letters of credit authorizing the holders thereof to draw upon it or its correspondents, provided that there is a definite bona fide contract for the shipment of goods within a specified reasonable time, and the existence of such contract is certified in the acceptance agreement; or which grow out of transactions involving the domestic shipment of goods, provided that shipping documents, conveying or securing to the accepting bank title to readily marketable goods, are attached or in the hands of an agent of the accepting bank, independent of the drawer, for his account, at the time of acceptance, or which are secured at the time of acceptance by warehouse receipts or other documents conveying or securing to the accepting bank title to readily marketable goods fully covered by insurance, the warehouse receipts or other documents to be those of a responsible warehouse, independent of the drawer, the acceptance to remain secured during the life of the acceptance unless suitable security of same character, or cash, be substituted: Provided, no bank shall accept drafts or
bills of exchange under this section to an aggregate amount at any time more than equal to the sum of its capital and permanent surplus: Provided further, that a bank shall be entitled to refuse itself foreign or domestic transaction, for any one person, firm, or corporation, to any amount at any time equal to more than twenty-five per cent of its capital and permanent surplus, unless the accepting bank is secured either by attached documents or those held for its account by its agent, independent of the drawer, or by some other actual security of the same character. Should the accepting bank purchase or discount its own acceptances, such acceptances will be considered as a direct loan to the drawer, and be subject to the limitation on loans hereinbefore provided in this chapter. The state banking commission may issue such further regulations as to such acceptances as it may deem necessary in conformity with this chapter. As used herein, the word "goods" shall be construed to mean and include goods, wares, merchandise, or agricultural products, including livestock. (1921, c. 4, s. 37; 1931, c. 414, s. 5; 1939, c. 91, s. 2; C. S. 220(1)).

Cross References.—As to limitations on investments in securities, see § 53-46; stocks, §§ 53-47; loans generally, § 53-48.

Editor's Note.—The Act of 1911 substituted "commissioner of banks" for "corporation commissioner" formerly appearing in this section.

Acceptance Prior to Statute. — Notwithstanding that, prior to the legislative enactment, an acceptance was beyond the power of a bank when not expressly permitted by the charter, an acceptance by a bank not so authorized was not invalid, provided it had been made on the express and independent of the drawer, or by some other actual security of the same character. Should the accepting bank purchase or discount its own acceptances, such acceptances will be considered as a direct loan to the drawer, and be subject to the limitation on loans hereinbefore provided in this chapter. The state banking commission may issue such further regulations as to such acceptances as it may deem necessary in conformity with this chapter. As used herein, the word "goods" shall be construed to mean and include goods, wares, merchandise, or agricultural products, including livestock. (1921, c. 4, s. 37; 1931, c. 414, s. 5; 1939, c. 91, s. 2; C. S. 220(1)).

§ 53-57. Nonpayment of check in error, liability for.—No bank shall be liable to a depositor because of the nonpayment, through mistake or error, and without malice, of a check which should have been paid had the mistake or error of nonpayment not occurred, except for the actual damage by reason of such nonpayment that the depositor shall prove, and in such event the liability shall not exceed the amount of damage so proven. (1921, c. 4, s. 38; C. S. 220(m)).

Editor's Note.—This section is a substantial re-enactment of C. S. sec. 232.

A bank is held liable to the drawer for its breach of promise to pay the check, upon the ground that there is an implied promise by the bank, arising from the deposit of the funds with it, that it will pay the checks when and as they are presented. If the bank fails to perform this promise, it becomes liable to the drawer for the damage sustained by him on account of its refusal or failure to pay his check. But the holder of the check can only sue the bank. The reason why the holder of the check not permitted to sue the bank has been stated by the authorities to be that there is no privity between the holder in the bank until by certification of the check or the acceptance thereof, expressed or implied, or by any other act or conduct it has made itself directly liable to the holder. First Nat. Bank v. Whitman, 94 U. S. 343, 24 L. Ed. 229; Commercial Nat. Bank v. First Nat. Bank, 118 N. C. 783, 24 S. E. 524; Hayes v. Blackwell, 192 N. C. 308, 134 S. E. 615.

Notwithstanding that these principles have been recognized, there are courts which hold, in well considered opinions, that the bank, by its acceptance, impliedly promised to pay the check. If it is notified that he has the check, or demand for its payment is made upon it, and it then has sufficient clear and unencumbered funds to the credit of the drawer with which to pay the check, it becomes directly liable to pay the check to itself. Standard Trust Co. v. Commercial Nat. Bank, 116 N. C. 112, 119, 81 S. E. 1074; Perry v. Bank, 121 N. C. 117, 32 S. E. 570; Commercial Bank v. First Nat. Bank, 118 N. C. 783, 24 S. E. 524; Hayes v. Blackwell, 192 N. C. 308, 134 S. E. 615.

For general treatment of subject, see Michie on Banks and Banking, pp. 1079, 1151 et seq. See also, 7 C. J. 425, p. 626.

Where Nonpayment Malicious.—This section does not apply when the nonpayment was through error, or mistake, and without malice, and that no actual damages resulted to depositor from such nonpayment. Woody v. National Bank, 194 N. C. 549, 140 S. E. 150.

Damages.—Any person will be deemed substantially damaged upon the refusal of a bank to pay his check, if the refusal is without due cause, and where the nonpayment is through mistake or error, and without malice, and that no actual damages resulted to depositor from such nonpayment. Woody v. National Bank, 194 N. C. 549, 140 S. E. 150, holding that on the facts admitted by demurrer plaintiff was entitled to nominal damages at least.

A bank wrongfully and unlawfully refusing to pay a check breaches its contract and the depositor is entitled to nominal damages at least. Thomas v. American Trust Co., 208 N. C. 653, 182 S. E. 147.

Charge on Injury to Credit and Reputation Not Supported by Evidence Is Error.—In an action to recover for the wrongful and unlawful refusal by a bank to pay a depositor's check, it is error for the court to charge the jury on the issue of damage that it should consider the evidence of damage sustained by plaintiff through injury to his credit or reputation in the community resulting from the bank's wrongful act alone. There is no evidence that plaintiff's credit or reputation had been injured thereby. Thomas v. American Trust Co., 208 N. C. 653, 182 S. E. 150.

§ 53-58. Checks sent direct to bank on which drawn.—Any bank receiving for collection or deposit any check, note, or other negotiable instrument drawn upon or payable at another bank, located in another town or city, whether within or without this state, may forward such instrument for collection, direct to the bank on which it is drawn, or at which it is payable, and such method of forwarding direct to the paying bank shall be deemed due diligence, and the failure of such paying bank, because of its insolvency or other default, to account for the proceeds thereof, shall not render the forwarding bank liable therefor: Provided, however, such forwarding bank shall have used due diligence in other respects in connection with the collection of such instrument. (1921, c. 4, s. 39; C. S. 220(h)).

Editor's Note.—This section is a substantial re-enactment of C. S. sec. 233 except that the last line of that section which provided, "The provision of this section shall not apply where there is more than one bank in a town," was omitted.

Dealsings Presumed to Contemplate Statute. — Banks must be presumed to have dealt with each other with respect to a statute of the State in which a check was deposited for collection, defining the rights and liabilities of banks and banks to which checks are forwarded for collection. Fed. Land Bk. v. Barrow, 189 N. C. 303, 310, 127 S. E. 3.

Sending Check to Federal Reserve Bank. — Under this section the sending of a cashier's check to the proper Federal Reserve Bank is due diligence in collecting the same, as would be sending it directly to the drawer bank. Fed. Land Bk. v. Barrow, 189 N. C. 303, 127 S. E. 3.

Abrogated Holdings. — The holding of the Supreme Court, in Bankers v. Braswell, 186 N. C. 261, 190 S. E. 357, in American Nat. Bank v. Savannah Trust Co., 172 N. C. 344, 90 S. E. 302, that "It is negligence in a bank having the check in its possession for collection to send it directly to the drawer, and this is true, even where there is the only bank at the place of payment," is abrogated by the express provisions of this statute. See Malloy v. Fed. Reserve Bank, 189 N. C. 127, 127 S. E. 337; Citizens Nat. Bank v. Barrow, 189 N. C. 303, 309, 127 S. E. 3.

Constitutes Good Presentment.—A collecting bank makes a good presentment of a check for payment by forwarding it to the drawer bank in another city by mail. Braswell v. Citizens Nat. Bank, 197 N. C. 229, 148 S. E. 236.
When Section Not Applicable—Rights and Liabilities as to Collection.—When a collecting bank receives a check for collection payable at a bank in another town, there is no authority of agency conferred by the delivery of the check on it to receive in payment anything but money; and where the drawer of the check has money to meet the check on deposit in the drawee bank, on presentation of the check, the intervening bank, in the course of collection, receives a check of the drawee bank in payment, which is not paid by reason of the drawee bank becoming insolvent before presentment of its check: Held, as a matter of law the drawer of the check is released from liability thereon. This section has no application to the facts in this case. Dewey Brothers v. McCormick, 195 N. C. 307, 142 S. E. 22.

Cited in Qualls v. Farmers, etc., Bank, 197 N. C. 438; 169 S. E. 546; Bank of Canton, etc., Co. v. Clark, 198 N. C. 169, 151 S. E. 102.

§ 53-59. Deposits in trust, payment of.—Whenever any deposits shall be made in any bank or banking institution in this state by any person in trust for any other person who is a minor of the age of fifteen years and upward, and no other or further notice of the existence and terms of a legal and valid trust shall have been given to the bank, in event of the death of the trustee, the same may be paid to the person acting as executor, administrator, guardian, or trustee, may invest in federal farm loan bonds or further notice of the existence and terms of a legal and valid trust shall have been given to the bank, in event of the death of the trustee, the same may be paid to the person acting as executor, administrator, guardian, or trustee, may invest in federal farm loan bonds or may be paid to any part thereof, together with the dividends or interest thereon, if any, to the minor for whom said deposit was made: Provided, that the amount of said deposit is not in excess of one hundred dollars. (1921, c. 4, s. 40; C. S. 220(o.).)

Cross References.—As to whom a deposit in trust for a minor might be paid generally, see § 53-53. As to deposits made by fiduciaries generally, see § 33-8 et seq. Cross Reference.—As to amount of deposit in trust for a minor, see § 53-59. Cross Reference.—As to form of investment, see § 33-8 et seq. Cross Reference.—As to amount of deposit in trust for a minor, see § 53-59.

§ 53-80. Farm loan bonds, authorized investment in.—Any bank or insurance company organized under the laws of this state, and any person acting as executor, administrator, guardian, or trustee, may invest in federal farm loan bonds issued by any federal farm loan bank or joint-stock land bank organized pursuant to an act entitled "An act of Congress to provide capital for agricultural development, to create standard forms of investment based upon farm mortgages to equalize rates of interest upon farm loans, to furnish a market for United States bonds, to create government depositories, and financial agents for the United States, and for other purposes," approved the seventeenth day of July, one thousand nine hundred and sixteen. (1921, c. 4, s. 41; C. S. 220(p.).)

Editor's Note.—This section is a re-enactment of the C. S. sec. 225.

§ 53-81. Federal Reserve Bank, authority to join.—The words "Federal Reserve Act," as hereinafter used, shall be held to mean the act of Congress of the United States, approved December twenty-third, nineteen hundred thirteen. The words "Federal Reserve Board" shall be held to mean the Federal Reserve Board created and described in the Federal Reserve Act. The words "Federal Reserve Banks" shall be held to mean Federal Reserve Banks created and organized under the authority of the Federal Reserve Act. The words "member bank" shall be held to mean any National or State bank or bank and trust company which has become or which becomes a member of one of the Federal Reserve Banks created by the Federal Reserve Act.

(a) Any bank incorporated under the laws of this state shall have the power to subscribe to the capital stock and become a member of a Federal Reserve Bank.

(b) Any bank incorporated under the laws of this state which is, or which may become, a member of the Federal Reserve Bank is by this chapter vested with all powers conferred upon member banks of the Federal Reserve Banks by terms of the Federal Reserve Act as fully and completely as if such powers were specifically enumerated and described therein, and such powers shall be exercised subject to all restrictions and limitations imposed by the Federal Reserve Act, or by regulations of the Federal Reserve Board made pursuant thereto. The right, however, is expressly reserved to revoke or to amend the powers herein conferred.

(c) A compliance on the part of any such bank with the reserve requirements of the Federal Reserve Act shall be held to be a full compliance with the provisions of the laws of this state, which require banks to maintain cash balances in their vaults or with other banks, and no such bank shall be required to carry or maintain reserve other than such as is required under the terms of the Federal Reserve Act.

(d) Any such bank shall continue to be subject to the supervision and examination required by the laws of this state, except that the Federal Reserve Board shall have the right, if it deems necessary, to make examinations; and the authority and power of such state to examine such banks may be exercised by the Federal Reserve Board, or to the examiners duly appointed by it, all information in reference to the affairs of any bank which has become, or desires to become, a member of a Federal Reserve Bank. (1921, c. 4, s. 49; C. S. 220(q.).)

Cross Reference.—As to amount of reserve required, see § 53-80.

Editor's Note.—This section is a substantial re-enactment of the C. S. sec. 221.

Unemployment Compensation.—A bank organized under the laws of this state is not an instrumentality of the federal government so as to exempt it from the tax imposed by the Unemployment Compensation Act, notwithstanding that the bank may be a member of the federal reserve system. Unemployment Compensation Comm. v. Wachovia Bank, etc., Co., 215 N. C. 491, 2 S. E. (2d) 592.

§ 53-82. Establishment of branches.—Any bank doing business under this chapter may establish branches in the cities in which they are located, or elsewhere, after having first obtained the written approval of the commissioner of banks, which approval may be given or withheld by the commissioner of banks, in his discretion, and shall not be given until he shall have ascertained to his satisfaction that the public convenience and advantage will be promoted by the opening of such branch. Such branch banks shall be operated as branches of and under the name of the parent bank, under the control and direction of the board of directors and executive officers of said parent bank. The board of directors of the parent bank shall elect a cashier and such other officers as may be required to properly conduct the business of such branch, and a board of managers or loan committee shall be responsible for the con-
duct and management of said branch, but not of the parent bank or of any branch save that of which the three officers, managers, or committee: Provided, that the commissioner of banks shall not authorize the establishment of any branch, the paid-in capital stock of whose parent bank is not sufficient in an amount to provide for the capital of at least twenty-five thousand dollars for the parent bank, and at least twenty-five thousand dollars for each branch which it is proposed to establish in cities or towns of three thousand population or less; nor less than thirty thousand dollars in cities and towns whose population exceeds three thousand, but does not exceed ten thousand; nor less than fifty thousand dollars in cities and towns whose population exceeds ten thousand, but does not exceed twenty-five thousand; nor less than one hundred thousand dollars in cities and towns whose population exceeds twenty-five thousand.

All banks operating branches prior to February 18, 1921, shall, within a time limit to be prescribed by the commissioner of banks, cause said branch bank to conform to the provisions of this section: Provided, however, that any bank with a capital stock (including both common and preferred) of one million ($1,000,000.00) dollars or more may without additional capital establish and operate such number of branches or agencies in the state of North Carolina as the commissioner of banks may in his discretion permit; but a bank operating branches under said provision shall at all times maintain an unimpaired capital of at least one million ($1,000,000.00) dollars: Provided further, that the commissioner of banks shall not permit the establishment of additional branches, and/or agencies unless said bank maintains its capital stock and surplus in ratio of one to ten to its deposits; Provided that in small communities having no other banking facilities, and upon a finding by the commissioner of banks that the public convenience and advantage will be promoted, and thereby enabled the opening of "tellers window agencies or branches" in such communities, the commissioner of banks may be permitted, but no more than one such agency or branch may be so opened in any one community nor shall any bank be permitted to open such an agency or branch when its unimpaired capital and surplus in proportion to deposits is below that herein required. (1921, c. 4, s. 43; Ex. Sess. 1921, c. 56, s. 2; 1927, c. 47, s. 8; 1931, c. 243, s. 5; 1933, c. 451, s. 1; 1935, c. 130; C. S. 290(r).)

Editor's Note. — There is no provision in the prior law corresponding to this section. However, C. S. sec. 216 contained a provision prohibiting the establishment of branches except with the consent of the corporation commission. Authority to establish branches under the old law must have been given by the legislature in the charter, and this must have been given by express terms for the court could not construe a provision in a charter to give authority by implication. Morehead Banking Co. v. Tate, 122 N. C. 313, 30 S. E. 341. [This case was decided prior to the statute.]

Contracts of Branch Illegally Established.—A bond given by a cashier of a branch bank for the faithful performance of his duties is not against public morals because the parent corporation may not have had the express authority to establish a branch bank. Morehead Banking Co. v. Tate, 122 N. C. 313, 30 S. E. 341. (This case was decided prior to the statute.)

Branch as Agent of Parent.—The relation between bank and the branch is that of principal and agent, and all the assets and indebtedness of the agency are those of the principal. Morehead Banking Co. v. Tate, 122 N. C. 397, 29 S. E. 775.

Creditors of Parent and Branch Share Ratably. — The creditors and depositors of the parent and branch share ratably where the assets are being liquidated. Worth v. Bank, 122 N. C. 397, 29 S. E. 775.

§ 53-63. Certificate of deposit, unlawful issue of.—It shall be unlawful for any bank to issue any certificate of deposit or other negotiable instrument of its indebtedness to the holder thereof except for lawful money of the United States, checks, drafts, or bills of exchange which are the actual equivalent of such money; nor shall such moneys, checks, drafts, or bills of exchange be the proceeds of any note given in payment of the purchase price of any stock. Any officer or employee of any bank violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction thereof shall be fined or imprisoned, or both, in the discretion of the court. (1921, c. 4, s. 44; C. S. 220(s)).

Cross Reference.—As to provision making it unlawful for bank to handle draft connected with receipt of liquor, see § 38-33. Editor's Note.—There was no provision in the prior law corresponding to this section. Cited in Southport v. Williams, 290 F. 488.

§ 53-64. Bank's own stock, unlawful to loan on.—It shall be unlawful for any bank to make any loan secured by the pledge of its own shares of stock, nor shall any bank be the holder of a pledge of any portion of its capital stock unless such stock is purchased or pledged to it to prevent loss upon a debt previously contracted in good faith. Provided, that whenever any bank shall have shares of its own stock sold to, or pledged to it, for the purpose of preventing a loss upon a debt previously contracted, it shall dispose of all such shares of stock within a period of six months from the date such stock was sold or pledged to it and if not so disposed of, the same shall be charged to profit and loss and no longer carried as an asset.
§ 53-65. Deposits payable on demand.—Any bank may receive deposits of funds subject to withdrawal or to be paid upon the checks of the depositor. All deposits in such banks shall be payable on demand, without notice, except when the contract of deposit shall otherwise provide. (1921, c. 4, s. 46; C. S. 220(u).) Cross References.—As to definition of “demand deposits,” see § 53-1. As to definition under prior law, see C. S. 226.

§ 53-66. Savings deposits.—Any bank conducting a savings department may receive deposits on such terms as are authorized by its board of directors and agreed to by its depositors. The board of directors shall prescribe the terms upon which such deposits shall be received and paid out, and a payee bank as collateral security. White v. Whitehurst, 194 N. C. 305, 139 S. E. 598.

§ 53-67. Boards of directors, banks controlled by.—The corporate powers, business, and property of banks doing business under this chapter shall be exercised, conducted, and controlled by its board of directors, which shall consist of not less than five directors, to be chosen by the stockholders, and shall hold office for one year, and until their successors are elected and qualified. The annual meeting of stockholders for the election of directors shall be held during the month of January of each year. (1921, c. 4, s. 46; 1925, c. 170; C. S. 220(w).)

Editor’s Note.—There was no provision in the prior law which were similar to this section. See discussion in 9 N. C. L. Rev. 13.

§ 53-68. State banks.—In order to prevent accumulation of unnecessary amounts of currency in the vaults of the banks and trust companies chartered by this state, all checks drawn on said banks and trust companies shall, unless specified on the face thereof, be payable at the option of the drawer bank in exchange drawn on the reserve deposits of said drawer bank when any such check is presented by or through any Federal Reserve Bank, post office, or express company, or any respective agents thereof. (1921, c. 20, s. 2; C. S. 220(aa).)
a draft does not discharge the check until the draft is paid in money.

The purpose of this section is to relieve the North Carolina banks of the pressure exerted upon them by the Federal Reserve Banks in seeking to enforce the policy of the Federal Reserve Acts. The Federal Reserve Acts impose upon the member banks over the counters of the banks which would not agree to remit at par, and demand payment in cash. The effect of this demand for cash is to create on the banks a premium for collecting checks over the counters of the banks which would not agree to remit at par, and demand payment in cash. The purpose of this section is to relieve the banks of the pressure exerted upon them by the Federal Reserve Acts.

It is the purpose of this section to effect the draft upon a reserve deposit as has always been the general custom. See the comprehensive article in 1 N. C. Law Rev. 133.

The Federal Reserve Bank cannot require payment in any other medium than the exchange. Federal Land Bank v. Barrow, 189 N. C. 303, 310, 127 S. E. 3. See also, 8 N. C. Law Rev. 36.
§ 53-75. Statement of account from bank to depositor deemed final adjustment if not objected to within five years.—When a statement of account has been rendered by a bank to a depositor accompanied by vouchers, if any, which are the basis for debit entries in such account, or the depositor's passbook has been written up by the bank showing the condition of the depositor's account and delivered to such depositor with like accompaniment of vouchers, if any, such account shall, after the period of five years from the date of its rendition in the event no objection thereto has been theretofore made by the depositor, be deemed finally adjusted and settled and its correctness conclusively presumed and such depositor shall thereafter be barred from questioning the incorrectness of such account for any cause. (1929, c. 188, s. 1.)

§ 53-76. Depositor not relieved from exercising diligence as to errors.—Nothing in the preceding section shall be construed to relieve the depositor from the duty now imposed by law of exercising due diligence in the examination of such account and vouchers, if any, when delivered by the bank and of immediate notification to the bank upon discovery of any error therein, nor from the legal consequences of neglect of such duty; nor to prevent the application of § 53-52 to cases governed thereby. (1929, c. 188, s. 2.)

§ 53-77. Governor empowered to proclaim banking holidays.—The governor is hereby authorized and empowered, by and with the advice and consent of the council of state, to name and set apart such day or days, as he may from time to time designate, as banking holidays. During such period of holidays, all the ordinary and usual operations and business of all banking corporations, state or national, in this state shall be suspended, and during such period no banking corporation shall pay out or receive deposits, make loans or discounts, transfer credits, or transact any other banking business whatsoever: Provided, however, that during any such holiday, including the holiday validated in this section, the commissioner of banks, with the approval of the Governor, may permit any or all such banking institutions to perform any or all of the usual banking functions.

The banking holiday herebefore proclaimed by the governor of this state for Monday, Tuesday, Wednesday, March sixth, seventh and eighth, are hereby declared to be banking holidays in the state of North Carolina. (1933, c. 120, ss. 1, 2.)

Editor's Note.—For article discussing this section, see H. N. C. Law Rev. 195.


Art. 7. Officers and Directors.

§ 53-78. Executive committee, directors shall appoint.—The board of directors shall appoint an executive committee or committees, each of which shall be composed of at least three of its members with such duties and powers as are defined by the regulations or by-laws, who shall serve until their successors are appointed. Such executive committee or committees shall meet as often as the board of directors may require, which shall not be less frequently than once each month, and approve or disapprove all loans and investments. All loans and investments shall be made under such rules and regulations as the board of directors may prescribe. (1921, c. 4, s. 49; C. S. 221(a).)

Editor's Note.—There were no sections in the banking law prior to 1921 corresponding to the sections under this article. The general corporation law, sections 55-48 et seq., was applicable by virtue of sec. 216.

§ 53-79. Minutes of directors and executive committee meetings.—Minutes shall be kept of all meetings of the board of directors and of the executive committee or committees, and same shall be recorded in a book or books which shall be kept for that purpose; which book or books shall be kept on file in the bank. Such minutes shall show a record of the action taken by the board of directors and executive committee or committees, on all loans, discounts, and investments made, authorized or approved, and such further action as the board of directors and executive committee or committees shall make concerning the conduct, management, and welfare of the bank. The minutes of the executive committee or committees shall be submitted to the board of directors for approval at each meeting of the board. (1921, c. 4, s. 50; C. S. 221(b).)

Cross Reference.—See note under § 53-78.

Effect of Not Writing Minutes.—The plaintiffs cannot be deprived of their right by reason of failure of the proper officer to actually make a written minute or record of the proceedings for the reason that proceedings of a corporate meeting of stockholders or directors are facts, and that they may be proved parol testimony where they are not so recorded. Bailey v. Hassell, 184 N. C. 450, 115 S. E. 166. And this notwithstanding this section, see Everett v. Staton, 192 N. C. 216, 220, 134 S. E. 492.

§ 53-80. Directors, qualifications of.—Every director of a bank doing business under this chapter shall be the owner and holder of shares of stock in the bank having a par value of not less than five hundred dollars; and not less than two hundred dollars if such bank shall have a capital stock of fifteen thousand dollars; and not less than two hundred dollars if such bank shall have a capital stock of fifteen thousand dollars or less. And every such director shall hold such shares in his own name unpledged and unencumbered in any way. The office of any director at any time violating any of the provisions of this section shall immediately become vacant, and the remaining directors shall declare his office vacant and proceed to fill such vacancy forthwith. Not less than three-fourths of the directors of every bank doing business under this chapter shall be residents of the state of North Carolina. Provided, that as to banks doing business before February 18, 1921, the requirements as to amount of stock owned by a director shall not apply unless the commissioner of banks shall rule that such director is not bona fide discharging his duties. (1921, c. 4, s. 51; 1931, c. 243, s. 5; C. S. 221(c).)

Cross Reference.—As to the law prior to the enactment of this section, see §§ 55-48.

Editor's Note.—As to the Act of 1931 substituting "commissioner of banks" for "corporation commission" formerly appearing in this section.

§ 53-81. Directors shall take oath. — Every director shall, within thirty days after his election, take and subscribe, in duplicate, an oath
that he will diligently and honestly perform his duties in such office; and that he is the owner in required to qualify him for such office, standing in his own name on its books, and one of such any officers, agents, or employees of such bank, or who shall knowingly permit to be violated by appearing in this section.

§ 53-82. Directors, liability of. — Any director, or bank who shall knowingly violate, or who shall knowingly permit to be violated by any officers, agents, or employees of such bank, any of the provisions of this chapter shall be held personally and individually liable for all damages which the bank, its stockholders or any other person shall have sustained in consequence of such violation. Any aggrieved stockholder in any bank in liquidation may prosecute an action for the enforcement of the provisions of this section. Only one such action may be brought. The procedure shall follow as nearly as may be that prescribed by § 44-14, relative to suits on bonds of contractors with municipal corporations. (1921, c. 4, s. 53; 1935, c. 464; C. S. 221(e).)

Cross References.—As to fraud to director of a general corporation, see § 55-56. As to criminal liability of bank directors, see § 53-129. See also §§ 14-254 and 53-130.

Editor's Note.—The amendment of 1935 added the last three sentences to the section.

Similarity to National Act.—This section is, with mere verbal changes, Comp. Stat. 9831, R. S. 5239. For federal cases construing the national banking act see Yates v. Jones Nat. Bank, 206 U. S. 158, 51 L. Ed. 1002, 27 S. Ct. 639; Thomas v. Taylor, 224 U. S. 72, 61 L. Ed. 1000, 37 S. Ct. 579.

Effect of Violation.—Doubletless, the General Assembly, at the regular session of 1921, thought that the inclusion of section 53-48 and this section would be sufficient, without providing for either the imposition of a penalty, or the procedure for paying the same. The provision with reference to the reserve was enforceable by the Corporation Commission in the exercise of its power of supervision of banks. No provision was made for the enforcement of provisions relative to individuals exceeding the statutory limitation. Violations of these and other provisions of the statute by directors might result in civil liability, only. However, at the Extra Session of 1921, the General Assembly added § 53-134 making such violation a misdemeanor. State v. Cooper, 190 N. C. 528, 532, 130 S. E. 180.

Elements of Crime in Violation.—An intent to defraud the bank or others is not required to be either alleged in the indictment or proved upon the trial of the issue raised by a plea of not guilty. Neither the bank nor any of its officers or directors have any discretion as to the making of loans which are thus forbidden. Intent is, therefore, not an element of the crime. The wilful doing of the unlawful act constitutes the crime declared by statute to be a misdemeanor. The committee, with the approval of the board of directors, may provide for such examinations by a certified public accountant or clearing-house examiner in any city where such examination is provided for by the rules of such clearing-house association. A copy of such report of examination, which is herein required to be made, attested, and verified under oath by the signature of at least three members of such committee, shall forthwith be filed with the commissioner of banks. (1921, c. 4, s. 54; 1931, c. 243, s. 5; C. S. 221(f)).

Editor's Note.—The Act of 1931 substituted "commissioner of banks" for "corporation commission" formerly appearing in this section.

§ 53-84. Depositories, designated by directors. — By resolution of the board of directors, other banks organized under the laws of this state, or of another state, or of the national banking act of the United States, shall be designated as depositaries or reserve banks in which a part of such bank's reserve shall be deposited, subject to payment on demand. A copy of such resolution shall, upon its adoption, be forthwith certified to the commissioner of banks and the depositary so designated shall be subject to the approval of the commissioner of banks. For causes which may deem adequate, the commissioner of banks shall have authority at any time to withdraw such approval. (1921, c. 4, s. 55; 1931, c. 243, s. 5; C. S. 221(g)).

Local Modification.—Guilford; Nash, Town of Spring Hope; 1931, c. 568; Halifax, Town of Hobe Sound; Haywood; Nash, Town of Bailey: 1935, c. 95.

Cross References.—As to the amount, etc., of the reserve, see § 53-50. As to draft upon depositaries as payment of check, etc., see § 53-70 et seq.

Editor's Note.—The Act of 1931 substituted "commissioner of banks" for "corporation commission" formerly appearing in this section.

Cited in State v. Cooper, 190 N. C. 528, 531, 130 S. E. 180.

§ 53-85. Stockholders' book. —The directors shall provide a book in which shall be kept the name and resident address of each stockholder, the number of shares held by each, the time when such person became a stockholder, together with all transfer of stock, stating the time when made, the number of shares and by whom transferred, which book shall be subject to the inspection of the directors, officers, and stockholders of the bank at all times during the usual hours for the transaction of business. (1921, c. 4, s. 56; C. S. 221(h)).

§ 53-86. Directors, officers, etc., accepting fees, etc. — No gift, fee, commission, or brokerage charge shall be received, directly or indirectly, by any officer, director, or employee of any bank doing [389]
business under this chapter, on account of any transaction to which the bank is a party. Any officer, director, employee, or agent who shall violate the provisions of this section shall be guilty of a misdemeanor, and shall be and thereafter remain ineligible as an officer, director, or employee of any bank doing business under this chapter. Nothing in this section shall be construed to prevent the payment of necessary and proper attorney's fees to any licensed attorney for professional services rendered. (1921, c. 4, s. 57; C. S. 221(l)).

§ 53-87. Dividends, directors may declare.—The board of directors of any bank may declare a dividend of so much of its undivided profits as they may deem expedient, subject to the requirements hereinafter provided. When the surplus of any bank having a capital stock of fifteen thousand dollars or more is less than fifty per cent of its paid-in capital stock, such bank shall not declare any dividend until it has transferred from undivided profits to surplus twenty-five per cent of said undivided profits, or any lesser percentage that may be required to restore the surplus to an amount equal to fifty per cent of the paid-in capital stock. When the surplus of any bank having a capital stock of less than fifteen thousand dollars is less than one hundred per cent of its paid-in capital stock, such bank shall not declare any dividend until it has transferred from undivided profits to surplus fifty per cent of said undivided profits, or any lesser percentage that may be required to restore the surplus to an amount equal to one hundred per cent of the paid-in capital stock. In order to ascertain the undivided profits from which such dividend may be made, there shall be charged and deducted from the actual profits:

(a) All ordinary and extraordinary expenses, paid or incurred, in managing the affairs and transacting the business of the bank;

(b) Interest paid or then due on debts which it owes;

(c) All taxes due;

(d) All overdrafts which have been standing on the books of the bank for a period of sixty days or longer;

(e) All losses sustained by the bank. In computing the losses, there shall be included debts owing the bank which have become due and are not in process of collection, and on which interest for one year or more is due and unpaid, unless said debts are well secured; and debts reduced to final judgments which have been unsatisfied for more than one year and on which no interest has been paid for a period of one year, unless said judgments are well secured.

(f) All investments carried on its books, which are prohibited under the provisions of this chapter, or rules and regulations made by the commissioner of banks, pursuant to the powers conferred under this chapter. (1921, c. 4, s. 58; 1927, c. 47, s. 10; 1931, c. 243, s. 5; C. S. 221(l)).

Editor's Note.—The 1927 amendment added subsection (f).

The Act of 1931 substituted "commissioner of banks" for "corporation commission" formerly appearing in this section.

§ 53-88. Surplus, shall not be used for.—The surplus of any bank doing business under this chapter shall not be used for the purpose of paying expenses or losses until the credit to undivided profits has been exhausted. But any portion of such surplus may be converted into capital stock and distributed as a stock dividend, provided that such surplus shall not thereby be reduced below fifty per cent of the paid-in capital of such bank, having a paid-in capital of fifteen thousand dollars or more. When the surplus of any bank having a capital stock of less than fifteen thousand dollars shall reach an amount equal to one hundred per cent of its paid-in capital, the board of directors of such bank shall declare a dividend of fifty per cent of said surplus and distribute the same as a stock dividend: Provided, that where the distribution of such a stock dividend would increase the capital stock of any bank to an amount greater than fifteen thousand dollars, the board of directors of such bank may, in its discretion, declare a stock dividend of only so much of said surplus as will be necessary to increase the stock of the said bank to fifteen thousand dollars. (1921, c. 4, s. 50; C. S. 221(k)).

Cross Reference.—As to definition of "surplus" and "undivided profits," see § 53-1.

§ 53-89. Overdrafts, payment by officer, etc.—Any officer (other than a director), or employee of a bank, who shall permit any customer or other person to overdraw his account, or who shall pay any check or draft, the paying of which shall overdraw any account, unless the same shall be authorized by the board of directors or by a committee of such board authorized to act, shall be personally and individually liable to such bank for the amounts of such overdrafts. (1921, c. 4, s. 60; C. S. 221(l)).

§ 53-90. Officers and employees shall give bond.—The active officers and employees of any bank before entering upon their duties shall give bond to the bank in a bonding company authorized to do business in North Carolina, in the amount required by the directors and upon such form as may be approved by the commissioner of banks, the premium for same to be paid by the bank. The commissioner of banks or directors of such bank may require an increase of the amount of such bond whenever they may deem it necessary. If injured by the breach of any bond given hereunder, the bank so injured may put the same in suit and recover such damages as it may have sustained. (1921, c. 4, s. 61; Ex. Sess., 1921, c. 18; 1927, c. 47, s. 11; 1929, c. 72, s. 2; 1931, c. 213, s. 5; C. S. 221(m)).

Editor's Note.—The Act of 1929 struck out the section as amended by the Act of 223 and inserted in lieu thereof the above.

The Act of 1931 substituted "commissioner of banks" for "corporation commission" formerly appearing in this section.

This statute enters into and forms a part of the bond. Hood v. Simpson, 206 N. C. 748, 175 S. E. 193.

Effect of Renewal of Bond.—When a bond which guarantees the fidelity of a bank cashier and guarantees the bank against loss by reason of embezzlement, etc., of said cashier, is executed for an indefinite term and thereafter is kept in force by the payment of annual premiums, for each year the officer was re-elected, then each and every renewal thereof is a separate and distinct bond or independent contract. Hood v. Simpson, 206 N. C. 748, 753, 175 S. E. 193.

§ 53-91. Officers and employees may borrow, when.—No officer or employee of a bank, nor a firm or partnership of which such officer or employee is a member, nor a corporation in which
such officer or employee owns a controlling interest, shall borrow any amount whatever from the bank of which he is an officer or employee, except upon good collateral or other ample security or endorsement; and no such loan shall be made until the same has been approved by a majority of the board of directors and a resolution, duly entered upon the minutes of the board of directors and signed by them, showing the amount of the loan, the directors approving the same and a brief description of the security upon which said loan is made; and a certified copy of such resolution shall be attached to the instrument evidencing the indebtedness. Provided, however, this section shall not apply to directors who are neither officers nor employees of the bank. (1921, c. 4, s. 69; 1925, c. 110, s. 2; 1927, c. 47, s. 12; C. S. 223(n).)

Editor's Note.—The scope of this section was broadened by the Act of 1925. The prohibition was extended to employees as well as officers. The provision as to partnerships and corporations in which officers or employees are interested is new. The proviso immediately preceding the proviso at the end of the section is also new. The proviso at the end of this section was added by the 1927 amendment.

Art. 8. Commissioner of Banks and Banking Department.

§ 53-92. Appointment of commissioner of banking state banking commission.—On or before April first, one thousand nine hundred and thirty-one, after the ratification of this section, and quadrennially thereafter, the governor, with the advice and consent of the senate, shall appoint a commissioner of banks who shall hold his office for a term of four years or until his successor has been appointed and has qualified, subject, however, to the provisions herein made as to his removal. The commissioner of banks shall, before entering upon the discharge of his duties, enter into bond with some surety company authorized to do business in the State of North Carolina, in the sum of not less than fifty thousand dollars, conditioned upon the faithful and honest discharge of all duties and obligations imposed by statute upon him.

There is hereby created, to become effective on April first, one thousand nine hundred and thirty-nine, a state banking commission, which commission shall consist of the state treasurer and the attorney general, who shall serve as ex officio members thereof, and five members to be appointed by the governor, four of which said members shall be practical bankers and one shall be a business man who is not an executive official in any bank, said five members shall be appointed for a term of four years beginning on April first, one thousand nine hundred and thirty-nine; and said appointive members shall receive as compensation the same per diem and expenses paid to the members of the advisory budget commission, which compensation shall be paid from the fees collected for the examination of banks, as provided by law.

The banking commission shall meet at such time or times, and not less than once every three months, as the commission shall, by resolution, prescribe, and the commission may be convened in special session at the call of the governor, or upon the request of the commissioner of banks.

The state treasurer shall be chairman of the said commission.

No member of said commission shall act in any matter affecting any bank in which he is financially interested, or with which he is in any manner connected. No member of said commission shall divulge or make use of any information coming into his possession as a result of his service on such commission, and shall not give out any information with reference to any facts coming into his possession by reason of his services on such commission in connection with the condition of any state banking institution. Such information shall be secured of him at any hearing at which he is duly subpoenaed, or when required by order of a court of competent jurisdiction.

The commissioner of banks shall act as the executive officer of the banking commission, but the commission shall provide, by rules and regulations, for hearings before the commission upon any matter or thing which may arise in connection with the banking laws of this state upon the request of any person interested therein, and review any action taken or done by the commissioner of banks.

The banking commission is hereby vested with full powers, duties, and functions now vested in or exercised by the commissioner of banks under the banking laws of this state. (1931, c. 243, s. 1; 1935, c. 266; 1939, c. 91, s. 1.)

Editor's Note.—The most notable change in the banking law is the creation of a new banking department and the new official— the commissioner of banks, to whom is transferred the supervision of banks heretofore exercised by the corporation commission.

All of the section except the first paragraph was inserted by the 1939 amendment in lieu of provisions relating to the former advisory banking commission.

Had the new banking department been created as a purely administrative agency it might fairly be contended that the finality of its action would be in an administrative sense only, and appropriate legal proceedings could be had to test them. But the corporation commission had judicial powers in dealing with banks—its stock assessments were, for example, given the effect of Superior Court judgments. Corporation Commission v. Murphy, 197 N. C. 42, 147 S. E. 667, and 200 U. S. 534, 50 S. Ct. 161, 74 I. Ed. 598, see also Corporation Commission v. Bank of Vanceboro, 200 N. C. 422, 157 S. E. 59. And the new commissioner of banks succeeds to those judicial powers so that he is obviously not a purely administrative official. There still remains the possibility that as to certain matters his rulings are administrative and that it is in respect to such rulings only that the decisions of the new commission as an appellate administrative body are final. 9 N. C. Law Rev. 348-350.


The commissioner of banks shall have the powers, duties and functions herein given, and in addition to such other powers and rights as may be necessary or incident to the proper discharge of his duties. (1931, c. 243, s. 2.)

Cross Reference.—For validation of foreclosures and executions of deeds of trust by the commissioner of banks, see § 53-35.

The Commissioner of Banks, when engaged in the liquidation of the assets of an insolvent bank, as authorized by statute, does not derive his power or his authority from the court. His power and authority, both to take possession of an insolvent bank, and to liquidate its assets for distribution among its creditors according to their respective rights, are derived from the statute. In re Central Bank, etc., Co., 206 N. C. 251, 253, 173 S. E. 340.

§ 53-94. Right to sue and defend in actions involving banks; liability to suit.—As commissioner of banks he is empowered to sue and prosecute
§ 53-95. Commissioner to exercise powers under supervision of banking commission.—All the powers, duties, and functions granted to or imposed upon the commissioner of banks by law shall be exercised by him under the direction and supervision of the banking commission, and wherever provision is made in any law now in effect authorizing and permitting the commissioner of banks to make rules and regulations with respect to any actions or things required to be done under the banking laws of this state, such rules and regulations shall be made by the banking commission, and the words "the commissioner of banks," used in such statutes authorizing him to make rules and regulations, shall be construed to mean the banking commission, and the words "banking commission" substituted in such statutes for "commissioner of banks." (1931, c. 243, s. 4; 1939, c. 91, s. 2.)

Editor's Note.—The 1929 amendment added that portion of the first sentence beginning with the words "under the direction." 

§ 53-96. Salary of commissioner; legal assistance and compensation.—The salary of the commissioner of banks shall be fixed by the advisory budget commission. The governor may in his discretion appoint and assign to the commissioner of banks such legal assistance as in his judgment may be necessary; and compensation therefor, when permanent, shall be fixed in like manner. (1931, c. 243, s. 6.)

§ 53-97. Vacancy appointments and removal.—Vacancies existing in the office of commissioner of banks by death, resignation or otherwise shall be filled by the governor; and he shall have the power of removal for sufficient cause. (1931, c. 243, s. 8.)

§ 53-98. Seal of office of commissioner; certification of documents.—The commissioner of banks shall have a seal of office bearing the legend "State of North Carolina—Commissioner of Banks," with such other appropriate device as he may adopt. (1931, c. 243, s. 9.)

§ 53-99. Official records.—The commissioner of banks shall keep a record in his office of his official acts, rulings and transactions: Provided, however, that where any disclosure of the records in his office, or of any report or other transaction, might injuriously affect any bank actually operating, such disclosure shall not be made or required except as may now be done under the provisions of law in similar cases. (1931, c. 243, s. 10.)

§ 53-100. General or special investigations of insolvent banks.—Whenever it may appear to be to the public interest, the governor may cause a general or special investigation to be made of the affairs of any insolvent bank or banks, singly or in related groups, with a view to discovering and establishing the causes of the failure of such bank or banks, and responsibility therefor; and of discovering the dealings with such banks of persons, officers, corporations or municipalities which may have given to such insolvency or which may have endangered or involved any public funds therein. The governor may assign counsel who shall prosecute such inquiry before the commissioner of banks, or a deputy or commissioner appointed by the commissioner of banks for the purpose; and the commissioner of banks is hereby empowered to conduct such investigation either in person or through such commissioner or deputy appointed by him. The inquiry shall be held at the office of commissioner of banks in the city of Raleigh or at any other place or places in the State designated by the commissioner of banks under such rules and regulations as the state banking commission may prescribe and may be adjourned from time to time as convenience may require. Attendance of witnesses and production of papers may be required by subpoena under the hand of the commissioner or his deputy, and on failure of any witness to appear as subpoenaed or his or her failure to produce any books or papers, as called for by such commissioner or deputy on subpoena or other order due notice shall be served, at the instance of such commissioner or deputy, of not less than three days to appear before a judge of the superior court residing in or holding courts within the district wherein such witness is subpoenaed or notified to appear or produce such records or papers, on a day certain and a place named, when such judge shall hear the matter and is authorized to punish such witness as for contempt as he may find on such hearing.

A summary of such investigation shall be made with the findings and recommendations of the commissioner thereon, and a copy thereof submitted to the governor, and when the facts shall disclose that any person or persons are criminally responsible, a summary shall be sent to the solicitor of the judicial district likely to have jurisdiction of the matter, whose duty it shall be to have the matter presented to the grand jury for its action. The governor may employ counsel to assist in the prosecution of any person or persons criminally responsible and fix his compensation and the manner of its payment. (1931, c. 243, s. 11.)

§ 53-101. Clerical help.—The commissioner of banks is empowered to employ sufficient clerical and secretarial help, and other necessary labor to conduct the affairs of his office with economy and efficiency. Persons so employed shall be paid as other employees in the departments of the State and shall be under the same rules and regulations. (1931, c. 243, s. 12.)

§ 53-102. Suitable offices; transfer of books, records, etc., by corporation commission.—Suitable offices shall be provided for the commissioner of banks in some State owned public building in Raleigh. (1931, c. 243, s. 13.)

§ 53-103. Acceptances.—Banking corporations and banking and trust companies doing a fiduciary business shall have power to accept drafts or bills of exchange drawn upon them, and to endorse
drafts or bills of exchange drawn upon another, having not more than six months sight to run, exclusive of days of grace, which grow out of transactions involving the domestic shipment of goods. No such banking corporation or banking and trust company doing a fiduciary business shall accept or indorse, whether in foreign or domestic transactions, for any one person, company, firm, or corporation to an amount equal at any time in the aggregate to more than ten per centum of its paid-up and unimpaired capital stock and surplus, unless the banking corporation or banking and trust company doing a fiduciary business is secured either by attached documents or by some other actual security growing out of the same transaction as the acceptance; and no such banking corporation or banking and trust company doing a fiduciary business alike regardless of the amount of capital stock and surplus, may authorize any banking corporation or banking and trust company doing a fiduciary business to accept or indorse such bills or drafts to an amount not exceeding at any time in the aggregate one hundred per centum of their paid-up and unimpaired capital stock and surplus: Provided, that the aggregate of acceptances growing out of domestic transactions shall in no event exceed fifty per centum of such capital stock and surplus. The commissioner of banks, however, under such general regulations as the state banking commission may prescribe, which shall apply to all banking corporations or banking and trust companies doing a fiduciary business alike regardless of the amount of capital stock and surplus, may authorize any banking corporation or banking and trust company doing a fiduciary business to accept or indorse such bills or drafts to an amount not exceeding at any time in the aggregate one hundred per centum of their paid-up and unimpaired capital stock and surplus: Provided, that the aggregate of acceptances growing out of domestic transactions shall in no event exceed fifty per centum of such capital stock and surplus. (1910, c. 76; 1931, c. 243, s. 5; 1939, c. 91, s. 2; C. S. 222(a).)

Editor's Note.—The Act of 1921 substituted "commissioner of banks" for "corporation commission" formerly appearing in this section.

§ 53-104. Commissioner of banks shall have supervision over, etc.—Every bank, corporation, partnership, firm, company, or individual, now or hereafter transacting the business of banking, or doing a banking business in connection with any other business, under the laws of and within this state, shall be subject to the provisions of this chapter, and shall be under the supervision of the commissioner of banks. The commissioner of banks shall exercise control of and supervision over the banks doing business under this chapter, and it shall be his duty to execute and enforce through the state bank examiners and such other agents as are now or may hereafter be created or appointed, all laws which are now or may hereafter be enacted relating to banks as defined in this chapter. For the more complete and thorough enforcement of the provisions of this chapter, the state banking commission is hereby empowered to promulgate such rules, regulations, and instructions as will provide adequate protection for the interests of the depositors, creditors, stockholders, and public in their relations with such banks. All banks doing business under the provisions of this chapter shall conduct their business in a manner consistent with all laws relating to banks and banking, and all rules, regulations, and instructions that may be promulgated or issued by the state banking commission. (1921, c. 4, s. 63; 1931, c. 243, s. 5; 1939, c. 91, s. 2; C. S. 222(a).)

Editor's Note.—Section 244 of the Consolidated Statutes was the corresponding section of the law prior to this section which changed the law considerably. See J N. C. Law Rev. 81.

The Act of 1931 substituted "commissioner of banks" for "corporation commission" and "chief state bank examiner" formerly appearing in this section.

§ 53-105. Reports of condition. Every bank shall make to the commissioner of banks not less than three reports during each year, according to the form which may be prescribed by said commissioner of banks; which report shall be verified by the oath or affirmation of the president, vice-president, cashier, secretary, or treasurer of said bank, and in addition thereto, two of the directors. Each such report shall exhibit in detail and under appropriate heads the resources, assets, and liabilities of such bank at the close of business on any past day by the commissioner of banks specified, and shall be transmitted to the commissioner of banks within ten days after the receipt of a request or requisition therefor from the commissioner of banks; and in a form prescribed by the commissioner of banks; a summary of such report shall be published in a newspaper published in the place where the bank is located, or if there is no newspaper in the place, then in the nearest one published thereto in the county in which such bank is established. Proof of such publication shall be furnished the commissioner of banks in such form as may be prescribed by him. (1921, c. 4, s. 64; 1923, c. 148, s. 2; 1931, c. 243, s. 5; C. S. 222(b).)

Editor's Note.—This section seems to cover all the terms of C. S. section 245, and supersedes it. However, there are a few changes. Formerly the secretary or treasurer could not verify the report on oath; and the full report must have been published "in a newspaper in the county in which the banking corporation or individual was located." The provisions prescribing the details of such report were also inserted.

The Act of 1931 amended the minimum number of reports from four to three. The Act of 1923 amended the number of reports to be made by the commissioner of banks to two reports a year. The Act of 1921 substituted "commissioner of banks" for "corporation commission" appearing in this section.

§ 53-106. Special reports. The commissioner of banks may call for special reports whenever in his judgment it is necessary to inform him of the condition of any bank, or to obtain a full and complete knowledge of its affairs. Said reports shall be in and according to the form prescribed by the commissioner of banks, and shall be verified in the manner provided in § 53-105, and shall be published as therein provided, if required by the commissioner of banks so to be. (1921, c. 4, s. 66; 1931, c. 243, s. 5; C. S. 222(d).)

Editor's Note.—There was no corresponding section in the prior law. However, under C. S. section 247 a special report might be required when necessary to acquire a full knowledge of a bank. There was no requirement as to form or publishing.

The Act of 1931 substituted "commissioner of banks" for "corporation commission" formerly appearing in this section.
§ 53-107. Failure to make report, penalty for.—Every bank failing to make and transmit any report which the commissioner of banks is authorized to require by this chapter, and in and according to the form prescribed by said commissioner of banks, within ten days after the receipt of a request or requisition therefor, or failing to publish the reports as required, shall forthwith be notified by the commissioner of banks, and if such failure continue for five days after the receipt of such notice, such delinquent bank shall be subject to a penalty of two hundred dollars. The penalty herein provided for shall be recovered in a civil action in any court of competent jurisdiction, and it shall be the duty of the attorney-general to prosecute all such actions. (1921, c. 4, s. 67; 1931, c. 243, s. 5; C. S. 222(c).)

Editor's Note. — This section is a re-enactment of C. S. section 248.

The Act of 1921 substituted "commissioner of banks" for "corporation commission" formerly appearing in this section.

§ 53-108. List of stockholders to be kept. — Every bank doing business under this chapter shall at all times keep a correct record of the names of all its stockholders, and once in each year, or whenever called upon, file in the office of the commissioner of banks a correct list of all its stockholders, the resident address of each, and the number of shares held by each. (1921, c. 4, s. 68; 1931, c. 243, s. 5; C. S. 222(f).)

Editor's Note. — This section is a substantial re-enactment of the first sentence of C. S. section 247.

The Act of 1921 substituted "commissioner of banks" for "corporation commission" formerly appearing in this section.

§ 53-109. Official communications of commissioner of banks. — Each official communication directed by the commissioner of banks, or any state bank examiner, to any bank, or to any officer thereof, relating to an examination or investigation conducted or made by the commissioner of banks, or containing suggestions or recommendations as to the conduct of the bank shall, if required by the authority submitting said communication, be submitted by the officer or director receiving it, to the executive committee or board of directors of such bank and duly noted in the minutes of such meeting. The receipt and submission of such notice to the executive committee or board of directors shall be certified to the commissioner of banks within such time as he may require, by three members of such committee or board. (1921, c. 4, s. 69; 1931, c. 243, s. 5; C. S. 222(g).)

Editor's Note. — The provisions of this section were new with the 1921 act.

The Act of 1921 substituted "commissioner of banks" for "corporation commission" formerly appearing in this section.

§ 53-110. Banking commission to prescribe books, records, etc.—Whenever in its judgment it may appear to be advisable, the state banking commission may issue such rules, instructions, and regulations prescribing the manner of keeping books, accounts, and records of banks as will tend to preserve uniformity in the books, accounts, and records of banks of the same class. (1921, c. 4, s. 70; 1931, c. 243, s. 5; 1939, c. 91, s. 2; C. S. 222(h).)

Editor's Note. — The provisions of this section first appeared in the act of 1921.

The Act of 1921 substituted "commissioner of banks" for "corporation commission" formerly appearing in this section.

§ 53-111. Reserve, when below legal requirement.—When the reserve of any bank falls below the amount required by law, it shall not make new loans or discounts, otherwise than by discounting or purchasing bills of exchange, payable at sight or on demand, nor make dividends of its profits until the reserve required by law is restored. The commissioner of banks shall require any bank whose reserve falls below the amount herein required immediately to make good such reserve. In case the bank fails for thirty days thereafter to make good its reserve the commissioner of banks may forthwith take possession of the property and business of such bank until its affairs be adjusted or finally liquidated as provided for in this chapter. (1921, c. 4, s. 71; 1931, c. 243, s. 5; C. S. 222(i).)

Cross References. — As to manner of making good an impaired capital, see § 53-42. As to limitations upon loans, see § 53-48. As to definition of reserve, see § 53-51. As to the amount of reserve, see § 53-50.

Editor's Note. — The Act of 1921 substituted "commissioner of banks" for "corporation commission" formerly appearing in this section.

Purpose of Section. — The wisdom of this provision and section 53-41 is evidenced by the fact that business is conducted in strict compliance seldom become insolvent, and thus bring loss and disaster upon depositors and stockholders and usually, also, upon others who may have no direct interest in the affairs of the bank, but who nevertheless suffer by reason of the loss sustained by those who do have such interest. These sections, although arbitrary as to details are supported in principle by the lessons taught in the school of experience. State v. Cooper, 190 N. C. 528, 532, 130 S. E. 180.

Individual Liability of Officer. — A bank must act through its officers, and where they have violated the provisions of this section and section 53-48, as to lending the bank's money, the offense is committed by the officers under the meaning of the statute, and they are individually indictable for such offenses. State v. Cooper, 190 N. C. 528, 532, 130 S. E. 180.

So where the official position of an officer of a bank is such as necessarily to acquaint him of the violation of the statute respecting the making of loans, and to fix him as a party thereto, it is sufficient evidence to sustain a conviction of the misdemeanor prescribed by section 53-134. State v. Cooper, 190 N. C. 528, 532, 130 S. E. 180.

§ 53-112. Appraisal of assets of doubtful value. — If any assets of a bank are of a doubtful or disputed value, an appraisal of such assets may be had by the commissioner of banks, and for the purpose of making such appraisal the commissioner of banks shall designate one agent as an appraiser and the bank shall designate an agent as an appraiser and the two so chosen shall designate a third. The appraisers so selected shall make an appraisal of the assets so designated as doubtful or disputed and file a written report of their appraisal with the bank and with the commissioner of banks. In making such appraisal the appraisers shall determine the actual cash market value of such assets. Such appraisal, when made, shall be accepted as the value of such assets for the purpose of examination or for the purpose of determining the actual cash market value of such assets. The appraisers designated shall not be interested, in any way, either in the bank or as an employee of the commissioner of banks and all expenses of such appraisal shall be paid by the bank whose assets are appraised. If any bank required to appoint an appraiser hereunder shall fail for ten (10) days to appoint an appraiser, the commissioner of banks may apply to the Clerk of the Superior Court of the county in which the bank is located for the appointment of such an appraiser, and the clerk shall thereupon make the
§ 53-113. Certified copies of records as evidence.—In all civil actions in the courts of this state wherein are involved as evidence or otherwise any of the records of the commissioner of banks, a certified copy over the signature and under the seal of the commissioner of banks shall be admissible in evidence to the same effect as if produced in court at trial by the proper custodian of the records.

Editor's Note.—The Act of 1931 substituted "commissioner of banks" for "corporation commissioner and corporation commission examiner" formerly appearing in this section.

§ 53-114. Other powers of state banking commission.—In addition to all other powers conferred upon and vested in the state banking commission, the said commission, with the approval of the governor, is hereby authorized, empowered and directed, whenever in its judgment the circumstances warrant it:

(a) To authorize, permit, and/or direct and require all banking corporations under its supervision to extend for such period and upon such terms as it deems necessary and expedient, payment of any demand and/or time deposits.

(b) To direct, require or permit, upon such terms as it may deem advisable, the issuance of clearing house certificates or other evidences of claims against assets of such banking institutions.

(c) To authorize and direct the creation, in such banking institutions, of special trust accounts for the receipt of new deposits, which deposits shall be subject to withdrawal on demand without any restriction or limitation and shall be kept separate in cash or on deposit in such banking institutions as it shall designate or invested in such obligations of the United States and/or the state of North Carolina as it shall designate.

(d) To adopt for such banking institutions such regulations as are necessary in its discretion to enable such banking institutions to comply fully with the federal regulations prescribed for national or state banks.

§ 53-115. State banking commission to make rules and regulations.—The state banking commission is hereby authorized, empowered and directed to make all necessary rules and regulations, and to give all necessary instructions with respect to such banking corporations which the commissioner of banks may authorize, permit and/or direct and require to be conducted under the provisions of §§ 53-77, 53-114, 53-115, and 53-116. And it shall be the duty of the examiners to verify all reports made to the commissioner of banks by the officers and directors, members, or individuals conducting any banking institution, as required by this chapter or by the commissioner of banks. The officers of every bank shall submit and surrender its books, assets, papers, and concerns to the examiners appointed under this chapter, who shall retain the custody and possession of such books, assets, papers, and concerns for such length of time as may be required for the purposes for which such examination is required by this chapter. If any officer shall refuse to surrender the books, assets, papers, and concerns as herein provided, or shall refuse to be examined under oath touching the affairs of such bank, the commissioner of banks may for the purpose of examining into the affairs of the bank, but the section did not go into detail as to the surrender of the books, but it fixed no penalty for a failure of the officers to fail to surrender the books, etc.

By virtue of C. S. sec. 250 it was the duties of the examiners to examine the books, papers and affairs of the bank, but the section did not go into detail as to the surrender of the books, but it fixed no penalty for a failure of the officers to fail to surrender the books, etc.

The Act of 1931 substituted "commissioner of banks" for "corporation commission examiner" formerly appearing in this section.
§ 53-119. Officers and employees, removal of.—The commissioner of banks shall have the right, and is hereby empowered, to require the immediate removal from office of any officer, director, or employee of any bank doing business under this chapter, who shall be found to be dishonest, incompetent, or reckless in the management of the affairs of the bank, or who persistently violates the laws of this state or the lawful orders, instructions, and regulations issued by the state banking commission. (1921, c. 4, s. 74; 1931, c. 243, s. 5; 1939, c. 91, s. 2; C. S. 223(c).)

Editor's Note. — There was no section in the Consolidated Statutes corresponding to this section.

The Act of 1931 substituted “commissioner of banks” for “corporation commission” formerly appearing in this section.

§ 53-120. Examiners may administer oath.—For the purpose of making examinations as required by this chapter, any duly appointed examiner may administer oaths to examine any officer, director, agent, employee, customer, depositor, shareholder of such bank, or any other person or persons, touching its affairs and business. Any examiner may summon in writing any officer, director, agent, employee, customer, depositor, shareholder, or any person or persons resident of this state to appear before him and testify in relation thereto. (1921, c. 4, s. 75; C. S. 223(d).)

Editor's Note. — This section is a substantial re-enactment of a portion of C. S. sec. 250.

§ 53-121. Examiners may make arrest.—When it shall appear to any examiner, by examination or otherwise, that any officer, agent, employee, director, stockholder, or owner of any bank has been guilty of a violation of the criminal laws of this state relating to banks, it shall be his duty, and he is hereby empowered to hold and detain such person or persons until a warrant can be procured for his arrest; and for such purposes such examiner shall have and possess all the powers of peace officers of such county, and may make arrest without warrant for past offenses. Upon report of his action to the commissioner of banks, said commissioner may direct the release of the person or persons so held, or, if in his judgment such person or persons should be prosecuted, the commissioner of banks shall cause the solicitor of the judicial district in which such detention is had to be promptly notified, and the action against such person or persons shall be continued a reasonable time to enable the solicitor to be present at the trial. (1921, c. 4, s. 76; 1931, c. 243, s. 5; C. S. 223(e).)

Cross Reference.—As to malfeasance of bank examiners, etc., see § 53-124 et seq., and also § 14-254.

Editor's Note.—For article discussing arrest without a warrant, see 15 N. C. Law Rev. 101.

This section is a re-enactment of C. S. sec. 254.

The Act of 1931 substituted “commissioner of banks” for “corporation commission” and “commission” formerly appearing in this section.

§ 53-122. Fees for examinations and other services.—For the purpose of paying the salaries and necessary traveling expenses of the commissioner of banks, State bank examiners, assistant State bank examiners, clerks, stenographers and other employees of the commissioner of banks, the following fees shall be paid into the office of the commissioner of banks: (a) Each bank and each branch of any bank which under the laws of the State of North Carolina is subject to supervision and examination by the commissioner of banks and is authorized to do business or is in process of voluntary liquidation shall, within ten days after the assessment has been made, pay into the office of the commissioner of banks according to its total resources as shown by its report of condition made to the commissioner of banks at the close of business of December thirty-first, nineteen hundred and twenty-six, and on the thirty-first day of December, or the date most nearly approximating same of each year thereafter on which a report of condition is made to the commissioner of banks not in excess of the following fees for its annual examination: Fifty dollars for the first one hundred thousand dollars of assets or less, seven dollars for each one hundred thousand dollars or fraction in excess thereof, and two dollars for each one hundred thousand dollars or fraction thereof of trust assets, which said trust assets shall not include real estate carried as such.

(b) All examinations made other than those provided for in subsection (a) hereof shall be deemed special examinations and for such special examination the bank shall pay into the office of the commissioner of banks the following fees for each special examination: Fifty dollars for the first one hundred thousand dollars of assets or less, seven dollars for each one hundred thousand dollars or fraction in excess thereof, and two dollars for each one hundred thousand dollars or fraction thereof of trust assets, which said trust assets shall not include real estate carried as such. The fees paid for special examination shall be based on the assets of the bank examined as of the date of such examination.

(c) For services performed for any bank other than examination, the commissioner of banks may make such charge as in his opinion is fair and just.

(d) In all criminal cases tried in any of the courts of this State wherein any of the employees of the commissioner of banks are used as witnesses, a fee of ten ($10.00) dollars per day and actual expenses incurred shall be allowed such witnesses and the same shall be paid to the commissioner of banks by the clerk of the court of the county in which the case is tried and thereafter charged in bill of costs as are other costs incurred in the trial; and in all civil actions tried in any of the courts of this State, wherein any of the employees of the commissioner of banks are required as witnesses, the party requiring such employee as witness shall deposit with the commissioner of banks the same sum as may thereto be advanced shall thereafter be charged in the bill of costs as other costs are charged. All sums paid under this subsection shall be paid to the commissioner of banks as are fees for examination and used in like manner.

(e) The total compensation and necessary traveling expenses of the employees of the commissioner of banks shall not in any one year exceed the total fees collected under the provisions of this section.

(f) It shall be the duty of the state banking commission annually to review the estimated cost of maintaining the office of the commissioner of banks and if the estimated fees provided for
§ 53-123. Examiners shall make report. — Examiners shall make a full and detailed report in writing to the commissioner of banks of the condition of each bank within ten days after each and every examination made by them. (1921, c. 4, s. 77; 1927, c. 47, s. 15; 1931, c. 243, s. 5; 1943, c. 738; C. S. 223(f).)

Editor's Note. — This section is a re-enactment of C. S. sec. 252. However there were several radical changes. The prior section the full amount of the fees fixed for the annual examination must be paid and in addition the expenses incurred and services rendered, other than examination fees. However there were several radical changes.

§ 53-124. Examiner making false report. — If any bank examiner shall knowingly and willfully make any false or fraudulent report of the condition of any bank, which shall have been examined by him, with the intent to aid or abet the officers, agents or employees of such bank in continuing to operate an insolvent bank, or if any such examiner shall keep or accept any bribe or gratuity given for the purpose of inducing him not to file any report of examination of any bank made by him, or shall neglect to make an examination of any bank by reason of having received or accepted any bribe or gratuity, he shall be guilty of a felony, and on conviction thereof shall be imprisoned in the state prison for not less than four months nor more than ten years. (1921, c. 4, s. 79; C. S. 224(a).)

Cross Reference. — See § 14-254.

§ 53-125. Examiners disclosing confidential information. — If any bank examiner or other employee of the commissioner of banks fails to keep secret the facts and information obtained in the course of an examination of a bank, except when the public duty of such examiner or employee requires him to report upon or take official action regarding the affairs of such bank, he shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not more than five hundred dollars or imprisoned not more than twelve months, or both, in the discretion of the court. Nothing in this section shall prevent the proper exchange of information with the representatives of the banking departments of other states, with the Federal Reserve Bank or national bank examiners, or other authorities, with the creditors of such bank or others with whom a proper exchange of information is wise or necessary, or with the clearing-house officials and examiners. (1921, c. 4, s. 80; 1931, c. 243, s. 5; C. S. 224(b).)

Editor's Note. — This section is a substantial reenactment of C. S. sec. 251. The Act of 1931 substituted "commissioner of banks" for "corporation commission" formerly appearing in this section.

§ 53-126. Loans or gratuities forbidden. — No State bank, or any officer, director or employee thereof shall hereafter make any loan or grant any gratuity to the commissioner of banks, any bank examiner or assistant bank examiner of the commissioner of banks of North Carolina. Any such officer, director or employee violating this provision shall be guilty of a misdemeanor and imprisoned not exceeding one year or fined not more than one thousand dollars, or both; and they may be fined a further sum equal to the money so loaned or gratuity given. If the commissioner of banks, or any bank examiner, or assistant bank examiner of the commissioner of banks of North Carolina shall accept a loan or gratuity from any State bank, or from any officer, director or employee thereof, he shall be guilty of a misdemeanor and imprisoned not exceeding one year, or fined not more than one thousand dollars, or both, and may be fined a further sum equal to the money so loaned or gratuity given. (1927, c. 29, s. 1; 1931, c. 243, s. 5.)

Editor's Note. — The Act of 1931 substituted "commissioner of banks" for "chief state bank examiner" and "corporation commission" formerly appearing in this section.

Art. 10. Penalties.

§ 53-127. Use of "bank," "banking," or "trust" in corporate name. — No corporation shall hereafter be chartered under the laws of this state with the words "bank," "banking," or "trust" as a part of its name except corporations reporting to and under the supervision of the commissioner of banks, or corporations under the supervision of the insurance commissioner; nor shall any corporate name be amended so as to include the words "bank," "banking," "banker," or "trust," unless the corporation be under such supervision. No person, association, firm or corporation domiciled within the state of North Carolina except corporations, persons, associations, or firms reporting to and under the super-
vision of the commissioner of banks or under the supervision of the insurance commissioner, shall then advertise or put forth any sign as bank, banking, banker or trust company, or use the word "bank," "banking," "banker," or "trust," as a part of its name and title, or in any way solicit or receive deposits or transact business as a trust company: Provided, that this chapter shall not be held to prevent any individual as from acting in any trust capacity as heretofore: Provided, further, that it shall be lawful for any corporation incorporated prior to January first, one thousand nine hundred and five, to retain the word "trust" in the name of said corporation, though it does not transact a banking business or such other business as requires its examination by the commissioner of banks or the insurance commissioner.

Any violation of the provisions of this section shall be a misdemeanor, and upon conviction thereof the offender shall be fined in a sum not exceeding five hundred dollars for each offense. (1921, c. 4, s. 81; 1931, c. 243, s. 5; 1943, c. 543; C. S. S. 224(c).)

Cross Reference.—As to unauthorized use of the word "trust" in corporate name, see §§ 55-12 and 55-46.

Editor’s Note.—The Act of 1931 substituted "commissioner of banks" for "insurance commissioner" formerly appearing in this section.

The 1943 act rewrote the section expanding it to include the provisions of duplicating sections—C. S. §§ 1124 and 1124-b—whereof sections were then repealed.

Alleging Corporation is a Bank. — Where the indictment charges the employee with making false entries upon the books of the bank in which he was employed, and that it was a corporation existing under the laws of the state of North Carolina, it is not defective for failing to particularize that it was a bank, within the contemplation of the statute under which the indictment had been drawn. State v. Hedgcock, 183 N. C. 714, 117 S. E. 47.

§ 53-128. Derogatory reports, willfully and maliciously making.—Any person who shall willfully and maliciously make, circulate, or transmit to another or to the public, any statement, rumor, or suggestion, written, printed, or by word of mouth, which is directly or by inference derogatory to the financial condition, or affects the solvency or financial standing of any bank, or who shall counsel, aid, procure, or induce another to state, transmit, or circulate any such statement or rumor shall be guilty of a misdemeanor, and upon conviction thereof shall be fined or imprisoned, or both, in the discretion of the court. (1921, c. 4, s. 82; C. S. 224(d).)

§ 53-129. Misapplication, embezzlement of funds, etc.—Whoever being an officer, employee, agent or director of a bank, with intent to defraud or injure the bank, or any person or corporation, or to deceive an officer of the bank or an agent appointed to examine the affairs of such bank, embezzles, abstracts, or misapplies any of the money, funds, credit or property of such bank, whether owned by it or held in trust, or who, with such intent, willfully and fraudulently issues or puts forth a certificate of deposit, draws an order or bill of exchange, makes an acceptance, assigns a note, drafts, draws or otherwise procures, or has procured, any money for a bank not in good faith, intended to become the property of such bank; or whoever being an officer, employee, agent, or director of a bank, makes or

permits the making of a false statement or certificate, as to a deposit, trust fund, contract, or makes or permits to be made false entries in a book, report, statement or record of such bank, or conceals or permits to be concealed by any means or manner, the true and correct entries of said bank, or its true and correct transactions, who knowingly loans, or permits to be loaned, the funds or credit of any bank to any insolvent company or corporation, or corporation which has ceased to exist, or which never had any existence, or upon collateral consisting of stocks or bonds of such company or corporation, or who makes or publishes or knowingly permits to be made or published a false report, statement or certificate as to the financial condition of such bank, shall be guilty of a felony and upon conviction thereof shall be fined not more than ten thousand dollars or imprisoned in the State's prison not more than thirty years, or both. (1921, c. 4, s. 83; 1927, c. 47, s. 16; C. S. 224(e).)

Editor's Note.—This section was revised in 1927, the position of many phrases and clauses being changed. It would seem, however, that the section was not changed materially in many respects although it was made somewhat more comprehensive.

The intent and purpose of this section is to prevent the defraudation of those owners of a bank or the depletion of its assets or injury to its business by falsification of the bank's books by its officers or employees, and an indictment for the offense is not sufficient which merely charges such falsification. Without the further false entries were material or affected the interests of the bank or deceived its officers. State v. Cole, 203 N. C. 922, 163 S. E. 594.

A specific intent to deceive or to defraud is not necessary for conviction of an officer, employee, or agent of a bank under the provisions of this section, it being sufficient if the defendant willfully made false entries on the books of the bank under the provisions of this section. State v. Lattimore, 201 N. C. 32, 158 S. E. 741.

In a prosecution under this section for willfully making false entries on the books of a bank an instruction which required showing the falsity of the entries to be material to a conviction of a bank officer or employee of making false entries on the books of the bank under the provisions of this section with its cashier, it is not required that he himself was necessary for a conviction, is not in conflict with this section as passed in 1921. State v. Switzer, 187 N. C. 88, 121 S. E. 143.

Embezzle" means to misappropriate as well as to convert to one's own use. State v. Maslin, 195 N. C. 537, 141 S. E. 1, citing State v. Lanier, 89 N. C. 517; State v. Forst, 114 N. C. 845, 19 S. E. 252.

Section 14-254 Not in Conflict.—Section 14-254, making it a criminal offense for the cashier or certain other officers, agents and employees of a bank to be guilty of malfeasance in the respects therein enumerated, making the intent necessary for a conviction, is not in conflict with this section as passed in 1921. State v. Switzer, 187 N. C. 88, 121 S. E. 143.

Conviction of Depositor. — In order to convict a depositor of a bank who has abstracted funds from the bank in connection with its business, it is not required that he himself was an officer of the bank or that he was present when the money was feloniously "abstracted," under the provisions of § 14-254; and he may be convicted thereunder when the bill of indictment charges that the person charged under an instruction to the jury defining it as the taking from or withdrawing from the bank, with the intent to injure or defraud. State v. Switzer, 187 N. C. 88, 121 S. E. 143.

Conviction of Depositor. — In order to convict a depositor of a bank who has abstracted funds from the bank in connection with its business, it is not required that he himself was an officer of the bank or that he was present when the money was feloniously "abstracted," under the provisions of § 14-254; and he may be convicted thereunder when the bill of indictment charges that the person charged under an instruction to the jury defining it as the taking from or withdrawing from the bank, with the intent to injure or defraud. State v. Switzer, 187 N. C. 88, 121 S. E. 143.

Same.—Necessity of Being Present.—Though the depositor was not present at the time the offense was committed, he may be convicted as a principal under the counts of the indictment so charging the offense. State v. Switzer, 187 N. C. 88, 121 S. E. 143.

Allegation That All Defendants Were Officers.—It is not necessary for an indictment, charging a conspiracy to vio-
late the provisions of this section, to allege that all of the defendants were employees or officers of the bank, the indi-
cement being sufficient if it alleges that some of the de-
defendants were officers or employees of the bank and that the
other defendants conspired with them to do the unlawful

Indictment.—In a prosecution under this section and §
14-254 it was not necessary to aver or to prove that the
money or funds had been committed by the bank to the
custody of the defendant or that there had been any
breach of trust or confidence except that which arose out
of the relation between the bank and the defendant. Nor
was it necessary in the very words that the de-
defendant had converted the property to his own use.
The words 'did embezzle' sufficiently indicated the criminal
act. They were sufficiently set out under §
15-151, without specifically naming any particular victim
of the preconceived purpose. And the indictment
was sufficient though there was nothing to indicate the num-
ber of abstractions, if more than one. State v. Maslin,
195 N. C. 537, 540, 143 S. E. 3, citing State v. Switzer,
187 N. C. 68, 121 S. E. 43.

Evidence.—In a prosecution under this section and §
14-254 expert parol evidence may be properly admitted to
trace book entries, without contradicting them, so as to
show that the officer of the bank had embezzled the
bank's funds held in trust, as charged in the bill of in-
dictment. In such case there was no invasion of the
province of the jury by the expression of an opinion upon a

Variance as to Some Items.—In a prosecution of an officer
of a bank for publishing a false report of the bank's condi-
tion, it was not necessary to aver a variance between the
al-
egations and proof as to some of the items of the report
will not be fatal when there is no variance with respect to all
the items, it being sufficient for conviction. The report
as published was false in any particular as alleged in the
indictment and was published with knowledge of such
falsehood and with a wrongful or unlawful intent. State

§ 53-130. Making false entries in banking ac-
counts; misrepresenting assets and liabilities of
banks.—If any person shall willfully and know-
ingly subscribe to, or make, or cause to be made,
any false statement or false entry in the books of
any bank, or shall knowingly subscribe to or ex-
hibit false papers, with intent to deceive any
person authorized to examine into the affairs of such
bank, or shall willfully and knowingly make, state
or publish any false statement of the amount of
the assets or liabilities of any bank, he shall be
guilty of a felony, and upon conviction thereof
shall be imprisoned in the state's prison not less
than four months nor more than ten years. (Rev.,
s. 3326; 1903, c. 275, s. 27; C. S. 4402.)

§ 53-131. False certification of a check.—Who-
ever, being an officer, employee, agent, or director
of a bank, certifies a check drawn on such bank,
and willfully fails to forthwith charge the amount
thereof against the account of the drawer there-
of, or willfully certifies a check drawn on such bank
unless the drawer of such check has on de-
posit with the bank an amount of money subject to
the payment of such check an equivalent to the
amount therein specified, shall be guilty of a felony,
and upon conviction shall be punished by a fine
more than five hundred dollars or imprisoned in the
state prison for not more than five years, or both.
(1921, c. 4, s. 84; C. S. 224(f.).)

§ 53-132. Insolvent banks, receiving deposits in.
—Any person, being an officer or employee of a
bank, who shall receive, being an officer thereof,
persons other than the bank's depositors, their money,
checks, drafts, or other property as a deposit therein when
he has knowledge that such bank is insolvent,
shall be guilty of a felony, and upon conviction thereof
shall be fined not more than five thousand
dollars or imprisoned in the state prison not more than
five years or, both. Provided, that in any
indictment hereunder insolvency shall not be
defined as defined under subsection (d) in the definition of insolvency un-
der § 53-1.

(1921, c. 4, s. 85; 1927, c. 47, s. 17; C.
S. 231(g.).)

Editor's Note.—The proviso at the end of this section was
added by the 1927 amendment. This was the only change
affected by the amendment.

The words "insolvent," in this section, means when the bank
cannot meet its ordinary liabilities or, if the condition of the bank shall not require that the condition of the bank should at the time be such as to enable it to pay all of its de-
defendants in the same manner as in demand. State v. High-
tower, 187 N. C. 300, 121 S. E. 616.

A bank is insolvent within the meaning of this section,
when the actual cash market value of its assets is not suf-
ficient to pay its liabilities to its depositors or other cred-

Elements of Crime.—In order for a conviction under the
provisions of this section, the state must prove beyond a rea-
sonable doubt the actual receipt of the deposits by defendant
officer of the bank at the time when the bank was insolvent
in his own knowledge, or that such officer permitted an em-
bezzlement of the bank's funds held in trust, as charged in the bill of in-
dictment and was published with knowledge of such
falsehood and with a wrongful or unlawful intent. State
v. Hightower, 187 N. C. 300, 121 S. E. 616.

How Knowledge Determined. — The question as to an
officer's knowledge is ordinarily to be determined with ref-
erence to all the facts and circumstances in which
offense is committed. There is no variance with respect to
to his own knowledge, or such officer permitted an em-
bezzlement of the bank's funds held in trust, as charged in the bill of in-
dictment and was published with knowledge of such
falsehood and with a wrongful or unlawful intent. State
v. Hightower, 187 N. C. 300, 121 S. E. 616.

§ 53-3.—Admissions. — Upon the trial of an officer of an ins-
olvent bank under this section the officer's admissions that
he knew of the insolvenoy of the bank at the time in ques-
tion with his explanation thereof is competent testimony. State

Who May Bring Action for Civil Liability.—A violation of
this section by an employee, or by officers and directors of a
bank, resulting in damages to a depositor, is a wrong
against the depositor; he, and not the bank or its receiver is
entitled to maintain an action to recover the damages result-
ing from such wrong. See Russell v. Boone, 188 N. C. 830,
135 S. E. 926; Houston v. Thornton, 122 N. C. 365, 29 S. E. 827;
Townsend v. Williams, 117 N. C. 330, 23 S. E. 461; Solomon
v. Bates, 118 N. C. 311, 24 S. E. 478; Tate v. Bates,
118 N. C. 287, 24 S. E. 483; Bane v. Powell, 192 N. C. 387, 192
N. C. 115, 132 S. E. 616.

In his opinion in State v. Hightower, 187 N. C. 300, 121 S. E. 616, speaking of this section, Chief Justice Stacy says:
"The statute was designed to protect the depositing public
against this kind of practice on the part of officers and em-
ployees of banks, and they will be held to a strict accounta-
bility under its provisions when they receive, or when any
such officer, officer or employee of the bank, with
knowledge of the fact that, by reason of the bank's
insolvency, such deposits then being received are taken at the
expense or certain peril of the depositors presently mak-
ing them." Bane v. Powell, 192 N. C. 387, 192 N. C. 115, 132 S. E. 616.

The right of a depositor in a bank, who has sustained dam-
ages, pecuniary to himself, by the wrongful act of the officers
and directors of the bank, to recover damages in an action
brought by the bank or the officers and directors of the bank, is not
affected by the decision in Douglass v. Dawson, 190 N. C. 458,
130 S. E. 195; the right is expressly recognized in the opinion

Same.—Liability as Bank Asset. — Sums for which bank
officers and directors are liable for receiving or permitting
receipt of deposit with knowledge of bank's insolvency,
con-
tributed to the payment of such check an equivalent to the
amount therein specified, shall be guilty of a felony, and upon conviction thereof
shall be punished by a fine
more than five hundred dollars or imprisoned in the
state prison for not more than five years, or both.
(1921, c. 4, s. 84; C. S. 224(f.).)

§ 53-322. Insolvent banks, receiving deposits in.
—Any person, being an officer or employee of a
bank, who shall receive, being an officer thereof,
persons other than the bank's depositors, their money,
checks, drafts, or other property as a deposit therein when
he has knowledge that such bank is insolvent,
shall be guilty of a felony, and upon conviction thereof
shall be fined not more than five thousand
dollars or imprisoned in the state prison not more than
five years or, both. Provided, that in any
indictment hereunder insolvency shall not be
defined as defined under subsection (d) in the definition of insolvency un-
der § 53-1.

(1921, c. 4, s. 85; 1927, c. 47, s. 17; C.
S. 231(g.).)
receiver afterwards. Wall v. Howard, 194 N. C. 310, 139 S. E. 449.

Bank Examiner as Expert Witness.—In an action to con- velt an officer of a bank under this section, the testimony of the State Bank Examiner is to be received as that of an expert upon the question of the bank's insolvency. State v. Hightower, 187 N. C. 185, 121 S. E. 656.

Same.—Weight of Evidence.—Where the State Bank Ex- aminer and another expert have been permitted to give their testimony as to the bank's insolvency at the time of the commence- ment of the proceeding, whether stating the basis of their opinions therein, it may not be decided as a matter of law, upon conflicting evidence, that the defendant must have known of the insolvent condition testified to by the ex- perts. State v. Hightower, 187 N. C. 185, 121 S. E. 656.

Certified Accountant as Witness.—Upon the trial of a bank official under the provisions of this section testimony of a certified public accountant who had had experience in such matters and who had examined the books of the bank and had obtained from the directors, collectively and in- dividually, information as to the value of its assets includ- ing lands and collateral, that the bank was insolvent at the time in question is not objectionable. State v. Brewer, 202 N. C. 187, 162 S. E. 363.

§ 53-133. Capital stock, advertising larger amount than that paid in.—It shall be unlawful for any bank to advertise in a newspaper, letter- head, or any other way, a larger capital stock than has been actually paid in in cash. Any bank violat- ing this section shall be subject to a penalty of five hundred dollars for each and every of- fense. The penalty herein provided for shall be recovered by the state in a civil action in any court of competent jurisdiction, and it shall be the duty of the attorney-general to prosecute all such ac- tions. (1921, c. 4, s. 86; C. S. 224(h).)

§ 53-134. Offenses declared misdemeanors; prosecution; employment of counsel; punishment. — Any offense against the banking laws of the state of North Carolina, which is not elsewhere specifically declared to be a crime, and which elsewhere a penalty is not specifically provided, is hereby declared to be a misdemeanor, and shall be punishable at the discretion of the court. The commissioner of banks is authorized and directed to prosecute all offenses against the banking laws of the state, and to that end is expressly author- ized to employ counsel to prosecute all such cases. (1921, c. 4, s. 86; C. S. 224(h).)

Cross Reference.—See annotation under §§ 53-48 and 53-82.

Editor's Note.—The act of 1927 re-enacted this section in full.

The Act of 1931 substituted "commissioner of banks" for "corporation commission" formerly appearing in this section.

Unlawful Act of Making Loans.—Under this section, the unlawful act of making loans in violation of sec. 53-48 is made a misdemeanor, and is punishable as such at the dis- cretion of the court. State v. Cooper, 190 N. C. 528, 130 S. E. 180.

Officers Individually Liable. — Guilt is personal, and the manifest purpose of the General Assembly in declaring the act of the violation of the statute misdemeanors, punishable at the discretion of the court, was to provide further assurance that these wise and prudent statutory provisions should be obeyed by those who alone could violate them, to wit, officers and directors of the bank. Their personal and individual liability for damages sustained by the shareholders or by the bank stockholders, or for any party or persons, as a result of the violation of these and other provisions of the statute by directors or officers, was evidently not deemed sufficient for the purpose in the mind of the General Assembly. State v. Cooper, 190 N. C. 528, 130 S. E. 180.

§ 53-135. General corporation law to apply.— All provisions of the law relating to private corpora- tions, and particularly those enumerated in the chapter entitled "Corporations," not incon- sistent with this chapter or with the business of banking, shall be applicable to banks. (1921, c. 4, s. 87; C. S. 224(j).)

Editor's Note.—The corresponding section of the prior law was C. S. sec. 256. This section is a re-enactment.

Stated in Cole v. Farmers Bank, etc., Co., 221 N. C. 269, 20 S. E. (2d) 54.

Art. 11. Industrial Banks.

§ 53-136. Industrial bank defined. — The term "industrial bank," as used in this article shall be construed to mean any corporation organized, or which may hereafter be organized, under the general corporation laws of this state, which is en- gaged in lending money to be repaid in weekly, or monthly, or other periodical installments, or principal sums as a business: Provided, however, this definition shall not be construed to include building and loan associations, or commercial or savings banks. (1923, c. 225, s. 1; C. S. 225(a).)

Editor's Note.—It was stated in the caption of the act of 1923, which revised the law regulating industrial banks, that the purpose was to provide for the supervision and regula- tion of industrial banks. While this section is a re-enactment of C. S. sec. 255, it is more specific in its terms, the provi- sions respecting loans which are to be paid in weekly in- stallments, etc., and the proviso, being added by the act of 1923.

§ 53-137. Manner of organization. — Corpora- tions may be organized under this article in the same manner as provided for corporations authorized under the chapter on corporations. (1923, c. 225, s. 2; C. S. 225(b).)

Editor's Note.—This section is a literal re-enactment of C. S. sec. 256.

§ 53-138. Corporate title. — Every corporation incorporated or reorganized pursuant to the provi- sions of this article shall be known as an in- dustrial bank, and may use the word "bank" as part of its corporate title. (1923, c. 225, s. 3; C. S. 225(c).)

Editor's Note.—This section is a literal re-enactment of C. S. sec. 256.

§ 53-139. Capital stock.—The amount of cap- ital stock with which any industrial bank shall commence business shall not be less than twenty- five thousand dollars ($25,000.00), in cities or towns of fifteen thousand population or less; nor less than fifty thousand dollars ($50,000.00), in cities or towns whose population exceeds fifteen thousand but does not exceed twenty-five thousand; nor less than one hundred thousand dollars ($100,- 000.00), in cities or towns whose population ex- ceeds twenty-five thousand; the population to be ascertained by the last preceding national census: Provided, that this section shall not apply to industrial banks organized and doing business prior to March 3, 1923. (1923, c. 225, s. 4; C. S. 225(d).)

Editor's Note.—C. S. sec. 257, which was the corresponding section of the prior law merely provided that the capital should not be under $25,000.

§ 53-140. Sales of capital stock; accounting; fees.—The capital stock sold by any industrial bank in process of organization, or for an increase of the capital stock, shall be accounted for to the
The act of 1923.

three, five and seven of § 55-26, and paragraph be necessary or incidental for the carrying out of three of § 53-43; such additional powers as may
ty to commeluce business to any industrial bank
The commissioner of banks shall refuse author-
their corporate purposes, and in addition thereto
The 1943 amendment added paragraph 7.
3. To charge for a loan made pursuant to this section one dollar for each fifty dollars or a frac-
tion thereof loaned, up to and including loans of two hundred and fifty dollars, and for loans in excess of two hundred and fifty dollars, one dol-
lar for each two hundred and fifty dollars excess or fraction thereof, to cover expenses, including any examination or investigation of the character and circumstances of the borrower, comaker, or
An additional fee of five dollars may be charged on such loans where same are secured by mortgage on real estate. No charge shall be collected unless a loan shall have been made.
4. To establish branch offices or places of busi-
ness within the county in which its principal office is located, and elsewhere in the state, after hav-
ing first obtained the written approval of the commissioner of banks, which approval may be given or withheld by the commissioner of banks in his discretion: Provided, That the commis-
sioner of banks shall not authorize the establish-
ment of any branch the paid-in capital of whose parent bank is not sufficient in amount to pro-
vide for the capital of at least twenty-five thousand dollars ($25,000.00) for the parent bank and at least twenty-five thousand dollars ($25,000.00) for each branch which it is proposed to be es-
1. To loan money on real or personal security
2. To sell or offer for sale its secured or unse-
cured evidences or certificates of indebtedness, or investment, and to receive from investors therein or purchasers thereof payments therefor in install-
ments or otherwise, with or without an allowance of interest upon such payments, whether such evidence or certificates of indebtedness or of in-
vestment be hypothecated for a loan or not, and to enter into contracts in the nature of a pledge or otherwise with such investors or purchasers with regard to such evidences or certificates of indebtedness, or of investment; and no such trans-
action shall in any way be construed to affect the rate of interest on such loans.
1. To loan money on real or personal security and reserve lawful interest in advance upon such loans, and to discount or purchase notes, bills of exchange, acceptances or other choses in action.
3. To charge for a loan made pursuant to this section.
2. To sell or offer for sale its secured paid-in capital and reserve lawful interest in advance upon such evidences or certificates of indebtedness, or of investment; and no such trans-
section one dollar for each fifty dollars or a frac-
tion thereof, to cover expenses, including any examination or investigation of the character and circumstances of the borrower, comaker, or
The Act of 1931 substituted "commissioner of banks" for "corporation commission" formerly appearing in this section.
§ 53-141. Powers.—Industrial banks shall have the powers conferred by paragraphs one, two, three, five and seven of § 55-26, and paragraph three of § 53-43; such additional powers as may be necessary or incidental for the carrying out of
The commissioner of banks shall refuse author-
their corporate purposes, and in addition thereto
The 1943 amendment added subdivision (5) of this sec-
tion. The amendment of 1935 added subdivision (5) of this sec-
tion in its entirety.
The Act of 1931 substituted "commissioner of banks", "commissioner of banks' for
§ 53-142. Restriction on powers. — No indus-
trial bank shall deposit any of its funds in any banking corporation unless such corporation has been designated as such depositary by a vote of a majority of the directors, or of the executive com-
mittee, exclusive of any director who is an offi-
cer, director, or trustee of the depositary so des-
zignated, present at any meeting duly called at which a quorum is in attendance, and approved by the commissioner of banks. (1923, c. 225, s. 7; 1931, c. 243, s. 5; 1935, c. 81, s. 2; 1939, c. 244, ss. 1, 2; 1943, c. 233; C. S. 225(f).)
Editor's Note.—This section is virtually a re-enactment of C. S. sec. 229. However, subsection 4 has been changed con-
considerably; prior to the re-enactment it was provided that branch offices could be established only in the county in which the principal office was located.
The Act of 1931 substituted "commissioner of banks", "commissioner of banks' for
§ 53-143. Limit of loans.—The total liabilities to any industrial bank of any person, corporation, company, or firm, for money borrowed including in the liabilities of the company or firm the lia-
 § 53-141 CH. 53. BANKS—INDUSTRIAL BANKS § 53-143
not exceed ten per cent of the actually paid-up capital and surplus of such industrial bank, but the discount of bona fide bills of exchange or acceptances drawn against actually existing values, and the discount of commercial or business paper actually owned by the person or persons, corporation, company, or firm negotiating the same, shall not be considered money so borrowed. (1923, c. 225, s. 8; C. S. 225(h.).)  

Editor’s Note.—This section is a literal re-enactment of C. S. sec. 261.

§ 53-144. Supervision and examination.—Every industrial bank now or hereafter transacting the business of an industrial bank as defined by this article, whether as a separate business or in connection with any other business under the laws of and within this state, shall be subject to the provisions of this article, and shall be under the supervision of the commissioner of banks. The commissioner of banks shall exercise control of and supervision over the industrial banks doing business under this article, and it shall be his duty to execute and enforce, through the state bank examiners and such other agents as are now or may hereafter be created or appointed, all laws which are now or may hereafter be enacted relating to industrial banks as defined in this article. For the more complete and thorough enforcement of the provisions of this article, the state banking commission is hereby empowered to promulgate such rules, regulations, and instructions, not inconsistent with the provisions of this article, as may, in its opinion, be necessary to carry out the provisions of the laws relating to industrial banks as in this article defined, and as may be further necessary to insure such safe and conservative management of industrial banks under the supervision of the commissioner of banks as may provide adequate protection for the interest of creditors, stockholders, and the public, in their relations with such institutions. All industrial banks doing business under the provisions of this article shall conduct their business in a manner consistent with all laws relating to industrial banks, and all rules, regulations, and orders that may be promulgated or issued by the state banking commission. (1923, c. 225, s. 11; 1931, c. 245, s. 5; 1939, c. 91, s. 2; C. S. 225(k.).)  

Editor’s Note.—The corresponding section of the Consolidated Statutes was sect. 263. It provided for a supervision by the state banking commission of the state banks under § 53-20, as amended, as are necessary and proper. The conservator, under the direction of the commissioner of banks, shall take possession of the books, records and assets of every description of such bank, and take such action as may be necessary to conserve the assets of such bank pending further disposition of its business as provided by law. Such conservator shall have all such rights, powers and privileges, subject to the commissioner of banks, now possessed by or hereafter given to the commissioner of banks under § 53-50, as amended, as are neces-
sary to conserve the assets of said bank. During the time that such conservator remains in possession of such bank, the rights of all parties with respect thereto, shall be the same as those provided in § 53-20, as amended. All expenses of any such conservator shall be paid out of the assets of such bank and shall be a lien thereon which shall be prior to any other lien provided by this article or otherwise. The conservator shall receive as salary an amount no greater than that paid at the present time to employees of departments of the state government for similar services. (1933, c. 155, s. 1.)

Editor's Note.—This article is substantially a copy as to state banks of Titles II and III of the Federal Act of March 9, 1933, Public No. 1, 72nd Congress. 11 N. C. Law Rev. 196.

§ 53-148. Examination of bank.—The commissioner of banks shall cause to be made such examination of the affairs of such bank as shall be necessary to inform him as to the financial condition of such bank. (1933, c. 155, s. 2.)

§ 53-150. Termination of conservatorship.—If the commissioner of banks shall become satisfied that it may safely be done, he may, in his discretion, terminate the conservatorship and permit such bank to resume the transaction of its business, subject to such terms, conditions, restrictions and limitations as he may prescribe. (1933, c. 155, s. 3.)

§ 53-151. Special funds for paying depositors and creditors ratably; new deposits.—While such bank is in the hands of the conservator appointed by the commissioner of banks, the commissioner of banks may require the conservator to set aside from unpledged assets and make available for withdrawal by depositors and payment to other creditors on a ratabable basis, such amounts as, in the opinion of the commissioner of banks, may safely be used for this purpose; and the commissioner of banks, may, in his discretion, permit the conservator to receive deposits, but deposits received while the bank is in the hands of the conservator (as well as special or trust deposits received by any bank, under the orders of the commissioner of banks, since March 2, 1933), shall not be subject to any limitation as to payment or withdrawal, and such deposits shall be segregated and shall not be used to liquidate any indebtedness of such bank existing at the time that a conservator was appointed for it, or any subsequent indebtedness incurred for the purpose of liquidating any indebtedness of said bank existing at the time such conservator was appointed. Such deposits received while the bank is in the hands of the conservator, as well as the special or trust deposits received since March 2, 1933, shall be kept on hand in cash or on deposit with a federal reserve bank. In being transmitted to the federal reserve bank, said deposits shall be so marked and designated as to indicate to such federal reserve bank that they are special deposits. (1933, c. 155, s. 4.)

§ 53-159. Reorganization on agreement of depositors and stockholders.—By the agreement of (a) depositors and other creditors of any bank representing at least seventy-five per cent in amount of its total deposits and other liabilities, and stockholders owning at least two-thirds of each class of its outstanding capital stock as shown by the books of the bank, or (c) both depositors and other creditors representing at least seventy-five per cent in amount of the total deposits and other liabilities, and stockholders owning at least two-thirds of its outstanding capital stock as shown by the books of the bank, any bank may effect such reorganization with the consent and approval of the commissioner of banks. The commissioner of banks may, in its discretion, determine the per cent thereof as above provided. When such reorganization becomes effective, all books, records and assets of such bank shall be disposed of in accordance with the provisions of the plan, and the affairs of the bank shall be conducted by its board of directors in the manner provided by the plan and under the conditions, restrictions and limitations which may have been prescribed by the commissioner of banks. In any reorganization which shall have become effective and shall have become effective as provided herein, all depositors and other creditors and stockholders of such bank, whether or not they shall have consented to such plan of organization, shall be fully and in all respects subject to and bound by its provisions, and claims of all depositors and other creditors shall be treated as if they had consented to such plan of reorganization: Provided, however, that no reorganization shall affect the lien of secured creditors. (1933, c. 155, s. 5.)

Editor's Note.—The most important feature of the law is the provisions for the reorganization of prime or preferred stock. By a reorganization agreement having the consent of certain percentages of the creditors or stockholders and also of the Commissioner of Banks, the affairs of the bank may be removed from conservatorship and restored to the board of directors. All non-consenting depositors and their creditors are expressly made bound by the act. The provision in the second paragraph is identical with the federal act (Sec. 202) but its validity may be questioned on a constitutional ground not applicable to the Federal Government, I. e., impairment of contract. 11 N. C. Law Rev. 196.

§ 53-153. Segregation of recent deposits not effective after bank turned back to officers; notice of turning bank back to officers. — After fifteen days after the affairs of a bank shall have been turned back to its board of directors by the conservator, either with or without a reorganization as provided in § 53-152 hereof, the provisions of § 53-151 with respect to the segregation of deposits received while it is in the hands of the conservator, and with respect to the use of such deposits to liquidate the indebtedness of such bank, shall no longer be effective: Provided, that before the conservator shall turn back the affairs of the bank to its board of directors, he shall cause to be published in a newspaper published in the city, town or county in which such bank is located, and if no newspaper is published in such city, town or county, in a newspaper to be selected by the commissioner of banks, a notice in form approved by the commissioner of banks, stating the date on which the affairs of the bank will be returned to its board of directors, and that the said provisions of § 53-151 will not be effective after fifteen days after such date; and on the date of publication of such notice, the conservator shall immediately send to every person who is a depositor in the bank, or to the bank or on deposit with a federal reserve bank. In being transmitted to the federal reserve bank, said deposits shall be so marked and designated as to indicate to such federal reserve bank that they are special deposits. (1933, c. 155, s. 4.)

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Chapter 54. Co-Operative Organizations.

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§ 54-1. Application of term.—The term “building and loan association,” as used in this subchapter, shall apply to and include all corporations, companies, societies, or associations organized for the purpose of making loans to their members only, and of enabling their members to acquire real estate, make improvements thereon and remove incumbrances therefrom by the payment of money in periodical installments or principal sums, and for the accumulation of a fund to be returned to members who do not obtain advances for such purposes. It shall be unlawful for any corporation, company, society, or association doing business in this state not so conducted to use in its corporate name the term “building and loan association” or “building association,” or in any manner or device to hold itself out to the public as a building and loan association. (Rev., s. 3881; 19055. Cet ch. 15169.)

§ 54-2. Method of incorporation; powers. — It shall be lawful for any persons in any city, town, or county of this state, under any name by them to be assumed, to associate for the purpose of organizing and establishing a homestead and building and loan association, and, being so associated, they shall, on complying with this subchapter, be a body politic and corporate, and as such be capable in law to hold and dispose of property, both real and personal; may have and use a common seal; may choose a presiding and other officers; may enact by-laws for the regulation of the affairs of such corporation, and compel the due observance of the same by fines and penalties; may sue and be sued, plead and be impleaded, answer and be answered in any court in this state, and do all acts necessary for the well ordering and good government of the affairs of such corporation, and shall exercise all and singular the powers incident to bodies politic and corporate: Provided, that before any such corporation shall be entitled to the privileges of this subchapter it shall file with the clerk of the superior court of the county where such corporation is designed to act a copy of the certificate of incorporation of such corporation, signed by at least seven members, to be recorded in the office of such clerk, and shall pay a tax of twenty-five dollars to the clerk, which tax shall be paid over by the clerk to the treasurer of the county, to the use of the school fund of the county. The clerk shall certify a copy of the certificate of incorporation of such corporation, signed by at least seven members, to be recorded in the office of such clerk, and shall pay a tax of twenty-five dollars to the clerk, which tax shall be paid over by the clerk to the treasurer of the county, to the use of the school fund of the county. The clerk shall certify a copy of the charter to the insurance commissioner. The clerk shall not issue or record the same until duly authorized to do so by the Insurance Commissioner as hereinafter provided.

(a) Upon receipt of a copy of the certificate of [406]
incorporation of the proposed association, the Insurance Commissioner shall at once examine into all the facts connected with the formation of such proposed corporation, including its location and proposed stockholders, and if it appears that such corporation, if formed, will be lawfully entitled to commence the business for which it is organized, the Insurance Commissioner shall so certify to the Clerk of Court in the county in which organized, who shall thereupon issue and record such certificate of incorporation. But the Insurance Commissioner may refuse to so certify, if upon examination and investigation he has reason to believe that the proposed corporation is formed for any purpose other than a mutual building and loan business, or that the character, general fitness, and responsibility of the persons proposed as stockholders in such corporation are not such as to command the confidence of the community in which said building and loan association is proposed to be located; or that the public convenience and advantage will not be promoted by its establishment; or that the name of the proposed corporation is likely to mislead the public as to its character or purpose; or if the proposed name is the same as one already adopted or appropriated by an existing association in the same county, or so similar thereto as to be likely to mislead the public.

(b) Upon receipt of such certificate from the Insurance Commissioner, the Clerk of Court shall, if said certificate of incorporation be in accordance with law, issue and cause same to be recorded in the records of his office as hereinabove provided. (Rev., s. 3877; 1905, c. 435, s. 1; 1931, c. 73; C. S. 5170.)

Cross References.——As to annual license tax, see § 54-25 and § 105-73. As to power to merge, see § 53-15.

Editor's Note.—The Act of 1931 amended this section by striking out the words "second paragraph, fourth sentence, and last sentence." 

§ 54-3. Amendments to certificate.—Any addition, alteration or amendment of the certificate of incorporation of any building and loan association shall be made at any annual or special meeting of such association, held in pursuance of the provisions of § 54-10, by a majority of the shareholders present in person or represented by proxy at any such meeting, and any such addition, alteration or amendment shall be signed, certified, and recorded as is provided in § 54-2. (Rev., s. 3878; 1905, c. 435, s. 2; 1939, c. 128, s. 1; C. S. 5171.)

§ 54-4. Prior amendments validated.—All additions, alterations or amendments of the certificate of incorporation of any building and loan association made prior to March 17, 1939, and which failed to comply with all of the provisions of the statutes of North Carolina applicable thereto, be, and the same are hereby declared to be sufficient and valid to the same extent as if the provisions of said statutes had been fully complied with. (1939, c. 128, s. 2.)

§ 54-5. Form of certificate.—Substantially the following form shall be used by associations to be formed under this chapter:

Certificate of Incorporation

This is to certify that we, the undersigned citizens of the state of North Carolina, hereby associate ourselves into a building and loan association under and by virtue of the provisions of subchapter I, entitled Building and Loan Associations, of chapter 54 of the North Carolina Code, and by this certificate do set forth:

First. The name of said association is to be

Second. The location where its business is to be transacted is in the of in the county of and state of North Carolina, and the principal office of said corporation is to be at No., street, in the of aforesaid.

Third. The object for which said association is formed is to enable the subscribers hereto to assist each other, and all who may become associated with them, in making loans to its members only, and to enable them to acquire real estate, making improvements thereon and removing incumbrances therefrom by the payment of periodical installments, and to accumulate a fund, to be paid by its members who do not obtain loans for the purposes aforesaid when the funds of said association shall amount to the sum of dollars per share of the first and subsequent classes or series.

Fourth. The amount fixed as the value of each share, when matured or full paid, is to be dollars. The number of shares to be subscribed before said association shall begin business shall be . The maximum number of shares in this association at any one time to be in force shall be . The number of shares subscribed for by the incorporators is, and the number of shares subscribed for by each of them is as follows:

<table>
<thead>
<tr>
<th>Name</th>
<th>Number of Shares</th>
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In witness whereof, we have hereunto set our hands and seals, the day of A. D. 19.

(Seal.)

(Seal.)

(Seal.)

(Seal.)

(Seal.)

Signed, sealed, and delivered in the presence of

(Rev., s. 3870; 1905, c. 435, s. 27; C. S. 5172.)

§ 54-6. When to begin business.—Upon filing the certificate of incorporation with the clerk of the superior court of the county where the principal office of the corporation is located, and with the insurance commissioner, the company shall become a body politic and corporate, and shall be authorized to begin business, when licensed by the insurance commissioner. (Rev., s. 3880; Code, s. 2297; 1907, c. 959, s. 1; C. S. 5173.)

§ 54-7. Chapter on corporations applicable. — All of the provisions of law relating to private corporations, and particularly those enumerated in the chapter entitled Corporations, not incon-
sistent with this subchapter, or with the business of building and loan associations, shall be applicable to building and loan associations. (Rev., s. 3882; C. S. 5174.)

§ 54-8. Charters validated. — The charts of all building and loan associations heretofore organized are hereby in all respects validated and confirmed, and all such associations shall have the powers and privileges of associations formed under this subchapter. (Rev., s. 3883; 1905, c. 435, s. 27; C. S. 5175.)

§ 54-9. May become members of and hold stock in federal home loan bank.—Any building and loan association heretofore or hereafter organized under the laws of this state may subscribe to, purchase, hold, own and dispose of stock in any federal home loan bank, and may become members of any such bank authorized by or organized under an act of congress entitled "The Federal Home Loan Bank Act," approved July 22, 1932. (1933, c. 80.)

§ 54-10. Annual meetings.—The annual meeting of any such association shall be held at such time and place as shall be fixed in the notice of said meeting. There shall be published once a week for two weeks preceding such meeting, in a newspaper published in the county or town where the association has its principal office, a notice, signed by the secretary, of such meeting, and the time and place where the same is to be held; and such further notice shall be given as the charter or by-laws of the association may require. Notice of special meetings of shareholders shall be given in a like manner. Unless otherwise provided, twenty-five shareholders, present in person or represented by proxy, shall constitute a quorum at any regular or special shareholders' meeting. If no newspaper be published in the county or town in which any association has its principal office, then the notice above provided may be published by posting same at a conspicuous place in the office of the association, and a like notice at the door of the county court house. (1933, c. 19.)

§ 54-11. Conversion of building and loan associations into federal savings and loan associations.—Any corporation organized and existing under the laws of this State and operating as a building and loan association, and upon such filing with the insurance commissioner the corporation shall cease to exist as a corporation, and upon such filing with the insurance commissioner the corporation shall have the powers and privileges of associations formed under this subchapter, or with the business of building and loan associations, shall be applicable to building and loan associations. (Rev., s. 3882; C. S. 5174.)

The purpose of said meeting shall be a statement of the time, place and purpose for which such meeting is called. It shall be regarded as sufficient notice of the purpose of said meeting if the call contain the following statement: "The purpose of said meeting being to consider the matter of the conversion of this corporation into a federal savings and loan association, pursuant to act of Congress approved June thirteenth, nineteen hundred and thirty-three." The secretary or other officer of the corporation shall make proof by affidavit at such meeting of due service of the notice or call for said meeting.

3. At the meeting of the shareholders of such corporation, called and held as above provided, such shareholders may, by affirmative vote of a majority of shareholders present, in person or by proxy, declare by resolution the determination to convert said corporation into a federal savings and loan association. A copy of the minutes of the proceedings of such meeting of the shareholders certified by the president or vice-president and secretary or assistant secretary of the corporation shall be filed in the office of the insurance commissioner of this State within five days after such meeting, and a like copy shall also be filed in the office of the clerk of the superior court of the county in which such corporation has its principal office. Each of said certified copies when so filed shall be presumptive evidence of the holding and the action of such meeting.

4. Within a reasonable time after the receipt of a certified copy of the minutes of said meeting the insurance commissioner shall either approve or disapprove the same. If the proceedings be approved by him he shall so endorse the certified copy of the minutes in his office, and shall issue a certificate certifying his approval of the conversion and proceedings, and send same to the corporation. Such certificate shall be recorded in the office of the clerk of superior court of the county in which the corporation has its principal office, and the original shall be held by the corporation. If the commissioner disapproves such proceedings he shall mark the certified copy of minutes in his office disapproved and notify the corporation to that effect.

5. Within sixty days after the approval of the proposed proceedings by the insurance commissioner, the officers of said corporation shall take such action, in the manner prescribed or authorized by the laws of the United States, as shall make it a federal savings and loan association, and there shall thereupon be filed in the office of the insurance commissioner a copy of the charter or authorization issued to such corporation by the federal home loan bank board, or a certificate showing the organization and conversion of such corporation into a federal savings and loan association, and upon such filing with the insurance commissioner the corporation shall cease to be a state corporation and shall be deemed to be converted into a federal savings and loan association.

6. Whenever any such corporation shall so convert itself into a federal savings and loan association it shall thereupon cease to be a corporation under the laws of this State, except that
its corporate existence shall be deemed to be extended for the purpose of prosecuting or defending suits by or against it and of enabling it to close its concerns as a state corporation, and to dispose of and convey its property. At the time when such conversion becomes effective all the property of the state corporation, including all its right, title and interest in and to all property of whatever kind, whether real, personal or mixed, and things in action, and every right, privilege, interest and asset of any conceivable value or benefit then existing, belonging or pertaining to it, or which would inure to it, shall immediately by act of law and without any conveyance or transfer, and without any further act or deed, be vested in and become the property of the federal savings and loan association, which shall have, hold and enjoy the same in its right as fully and to the same extent as the same was possessed, held and enjoyed by the state corporation; and the federal savings and loan association may authorize the taking of stock in the association so buying the assets in payment thereof; and upon liquidation of the selling corporation the stock so received shall be distributed to its shareholders. In the event such sale shall be authorized, and approved by the insurance commissioner, the directors and officers of the state corporation shall file with the clerk of the superior court in the county in which the association will commence business as a building and loan association, pursuant to the laws of the state of North Carolina." The secretary or other officer of the association shall make proof by affidavit at such meeting of the due service of the notice or call for said meeting.

3. At the meeting of the members of such association, called and held as above provided, such members may, by affirmative vote of fifty-one per cent or more of members present, in person or by proxy, declare by resolution the determination to convert said association into a building and loan association operating under the laws of the state of this state. A copy of the minutes of the proceedings of such meeting of the members, certified by the president or vice-president and secretary or assistant secretary of the association, shall be filed with the federal home loan board within five days after such meeting. Such certified copy, when so filed, shall be presumptive evidence of the holding and the action of such meeting.

4. Within thirty days after the approval of said proceedings by the board the officers of said association shall file with the clerk of the superior court of the county where such association is desirous to act a copy of the certificate of incorporation of such association signed by at least seven members, to be recorded in the office of such clerk. Such certificate of incorporation shall conform to the provisions of the laws of this state. The clerk shall certify a copy of the certificate to the insurance commissioner, and shall not issue or record the same until duly authorized to do so by the insurance commissioner. Upon receipt of a copy of the certificate of incorporation the insurance commissioner shall at once examine into the facts connected with the conversion of such association, and, if it appears that such association if converted will be lawfully entitled to commence business as a building and loan association pursuant to the laws of this state, the insurance commissioner shall so certify to the clerk of the court in the county in which the association will be located, who shall thereupon issue and record such certificate of incorporation. Upon the issuance and recordation of such certificate of incorporation the association shall file with the board a certified copy of same. Thereupon the association shall apply to a federal savings and loan association and be deemed to be converted into a building and loan association under the laws of this state, whose corporate existence shall be deemed then to begin.

5. At the time when the corporate existence of said state association begins all the property of the said federal association, including all its rights, title and interest in and to all property of whatsoever kind, whether real, personal or mixed, and things in action, and every right, privilege, interest and asset of any conceivable value or benefit then existing or belonging or pertaining to it, or which would inure to it, shall immediately by act of law and without any conveyance or transfer, and without any further act or deed, be vested in and become the property of such state association.
tion, which shall have, hold and enjoy the same in its own right as fully and to the same extent as if the same was possessed, held or enjoyed by said federal association; and such state association shall be deemed to be a continuation of the entity and of the identity of said federal association, operating under and pursuant to the laws of this state, and all the rights, obligations and liabilities connected therewith, and shall execute and perform each and every such trust and relation in the same manner as if such state association had itself assumed the trust or relation, including the obligations and liabilities connected therewith. (1937, c. 12.)

§ 54-12.1. Merger of building and loan associations.—Any two or more building and loan associations organized or to be organized, or existing under the laws of any other state or country, as provided in the provisions of this chapter, may merge into a single association which may be either one of said merging associations, and the procedure to effect such merger shall be as follows:

1. The directors, or a majority of them, of such associations as desire to merge, may, at separate meetings, enter into a written agreement of merger signed by them, and under the corporate seals of the respective associations, specifying each association to be merged and the association which is to receive into itself the merging association or associations, and prescribing the terms and conditions of the merger and the mode of carrying it into effect. Such merger agreement may provide the manner and basis of converting or exchanging the shares in the association or associations so merged for shares of the same or a different class of the receiving association.

2. Such merger agreement together with the copies of the minutes of the meetings of the respective boards of directors verified by the secretaries of the respective meetings shall be submitted to the insurance commissioner, who shall cause a careful investigation and examination to be made of the affairs of the associations proposing to merge, including a determination of their respective assets and liabilities. The reasonable cost and expenses of such examination shall be defrayed by each association so investigated and examined. If, as a result of such investigation, he shall conclude that the shareholders of each of the associations proposing to merge will be benefited thereby, he shall, in writing, approve same, or shall, if he deems that the proposed merger will not be in the interest of all members of the associations so merging, disapprove, in writing, the same. If he approve the merger agreement, then same shall be submitted, within thirty days after notice to such associations of such approval, to the shareholders of each of such associations, as provided in the next subsection.

3. A special meeting of the shareholders of each of said associations shall be held separately upon written notice to each shareholder of not less than twenty days, specifying the time, place and purpose for which such meeting is called and such notice shall be served personally or sent by mail, postage prepaid, to each shareholder at the last known address of such shareholder appearing upon the books of the association; of the time, place and object of which meeting due notice shall be given by publication at least once a week for four successive weeks in one or more newspapers published in the county wherein each such association has its principal office or conducts its business (and if there be no newspaper published in such county then in a newspaper published in an adjoining county). The secretary or other officer of the association shall make proof by affidavit at such meeting of the due service of the notice or call for said meeting.

4. At separate meetings of the shareholders of each of such associations, called and held as above provided, such shareholders representing a majority of the outstanding shares of stock entitled to vote, by affirmative vote of at least two thirds of the shareholders present, in person or by proxy, may declare by resolution the determination to merge into a single association upon terms of the merger agreement as shall have been agreed upon by the directors of the respective associations and as approved by the insurance commissioner. Members of the associations who do not attend the meetings or who do not vote thereat, shall, if the merger is so approved by the members, be deemed to consent to the merger. Upon the adoption of such resolution, a copy of the minutes of the proceedings of such meetings of the shareholders of the respective associations, certified by the president or vice president and secretary or assistant secretary of the merging associations, shall be filed in the office of the insurance commissioner of this state, which the respective associations so merged shall be filed in the office of the insurance commissioner of this state, within ten days after such meetings, and within fifteen days of the receipt of the certified copy of the minutes of said meetings the insurance commissioner shall either approve or disapprove the same. If the proceedings be approved by him he shall so endorse the certified copy of the minutes in his office, and shall issue a certificate certifying his approval of the merger and send same to each of said associations. Such certificate shall be filed and recorded in the office of the clerk of superior court of the county or counties in this state in which the respective associations so merged shall have their original certificates of incorporation recorded; provided, that the only fees that shall be collected in connection with the merger of said associations shall be filing and recording fees. When such certificate is so filed, the merger agreement shall take effect according to its terms and shall be binding upon all the members of the associations so merging, and the same shall thereafter be taken and deemed to be the act of merger of such constituent building and loan associations under the laws of this state. A proper record or certified copy thereof shall be evidence of the agreement and act of merger of said build-
ing and loan associations and the observance and performance of all acts and conditions necessary to have been observed and performed precedent to such merger. If the commissioner shall disapprove the proceedings he shall mark the certified copies of the meetings in his office disapproved and notify the associations to that effect.

5. Upon the merger of any association, as above provided, into another:

a. Its corporate existence shall be merged into that of the receiving association; and all and singular its rights, powers, privileges and franchises, and all of its property, including all right, title, interest in and to all property of whatsoever kind, whether real, personal or mixed, and things in action, and every right, privilege, interest or asset of any conceivable value or benefit then existing belonging or pertaining to it, or which would inure to it under an unmerged existence, shall immediately by act of law and without any conveyance or transfer, and without any further act or deed, be vested in and become the property of such receiving association which shall have, hold and enjoy the same in its own right as fully and to the same extent as if the same were possessed, held or enjoyed by the association or associations so merged; and such receiving association shall absorb fully and completely the association or associations so merged;

b. Its rights, liabilities, obligations and relations to any person shall remain unchanged, and the association into which it has been merged shall, by the merger, succeed to all the relations, obligations and liabilities, as though it had itself assumed or incurred the same, and no obligation or liability of a member in an association a party to the merger shall be affected by the merger, but the obligations and liabilities shall continue as they existed before the merger, unless otherwise provided in the merger agreement;

c. A pending action or other judicial proceeding to which any association that shall be so merged is a party, shall not be deemed to have abated or to have discontinued by reason of the merger, but may be prosecuted to final judgment, order or decree in the same manner as if the merger had not been made; or the receiving association may be substituted as a party to such action or proceeding, and any judgment, order or decree may be rendered for or against such other association if the merger had not occurred. (1943, c. 450, s. 1.)

Art. 2. Shares and Shareholders.

§ 54-13. Number of shares and entrance fee prescribed.—Any corporation created under and by virtue of this subchapter shall have power to declare in its certificate of incorporation the maximum number of shares of which the corporation shall consist to be in force at any one time, the par value of the same, to prescribe the entrance fee per share to be paid by each shareholder at the time of subscribing, to regulate the amount of the installments to be paid on each share, and the time at which the same shall be paid and payable: Provided, that not more than one per cent of the par value of each share of stock subscribed, may be paid as commissions or other remuneration for the soliciting and sale of stock. (Rev. s. 3888; 1905, c. 455, s. 4; 1931, c. 75; C. S. 5176.)

Editor's Note.—The Act of 1911 added the proviso to this section by which a building and loan association is prohibited from paying more than 1% for services in obtaining stock subscriptions. No penalty is attached for violation but the license of the association might be revoked under the provisions of § 54-28 if any prohibited payments were discovered through the annual report (see § 54-26) or otherwise. 9 N. C. Law Rev. 351.


§ 54-14. Different classes of shares; dividends; reserve fund.—Every building and loan association doing business in this state shall be authorized to issue as many series or classes and kinds of shares and at such stated periods as may be provided for in its charter or by-laws: Provided, the dividends on paid-up stock shall be less than the association is earning, and such stock may have the right to share in the dividends between the rate paid and the earned per centum. Every association shall at all times have on hand and unpledged, in investments of the United States government or the government of the state of North Carolina, or stock in the federal home loan bank, or bonds issued by the federal home loan bank, or on deposit in such bank or banks as may have been approved by a majority of the entire board of directors, an amount equal to at least five per centum of the aggregate amount of paid-up stock outstanding, as shown by the books of the association. When the aggregate of investment or funds in hand or on deposit as herein provided falls below the amount required under this section, the association shall make no new real estate loans until the required amount has been accumulated: Provided, that the refinancing, recasting or renewal of loans previously made, and/or loans made as a result of foreclosure sales under instruments held by the interested building and loan association, shall not be considered as new loans within the meaning of this section. (Rev. s. 3888; 1905, c. 455, s. 4; 1931, c. 107; 1933, c. 26; 1941, c. 67: C. S. 5178.)

Editor's Note.—The Act of 1931 amended this section in two ways: (1) by doing away with all provisions about guaranteed dividends; (2) by requiring a reserve paid-up stock.

Public Laws of 1933, c. 26, substituted the above section in lieu of the former reading. A comparison of the old with the new is necessary to determine the changes. See 11 N. C. Law Rev., 207, for comment on changes made in this section by the 1933 amendment.

The 1941 amendment inserted the words "and unpledged" near the beginning of the second sentence.

Optional payment stock may be issued under this section. Lumpkin v. Durham Bldg., etc., Co., 204 N. C. 563, 169 S. E. 156.

§ 54-15. Certificate issued and payment enforced.—Any such corporation shall have power to issue to each member a certificate of the shares held by him, and to enforce the payment of all installments and other dues due to the corporation from the members or shareholders by such fines and forfeitures as the corporation may from time to time provide in the by-laws or its certificate of incorporation. (Rev. s. 3888; 1905, c. 435, s. 4; C. S. 3178.)

§ 54-16. New members admitted. — Any person applying for membership or shares in any cor-
poration after the end of a month from the date of its incorporation may be required to pay, on subscribing, such sums or assessments as may from time to time be fixed and assessed in the manner provided by the corporation, upon the stock of such new member or shareholder on like footing with the original members and others holding shares at the time of such application. (Rev., s. 3886; 1905, c. 435, s. 5; C. S. 5179.)

§ 54-17. Shareholders equally liable. — All shareholders shall enjoy the same relative position as to debts, losses, and profits of the association: Provided, that this shall not prevent the payment of a lesser rate of dividend on paid-up stock as provided in § 54-14, but this provision shall not prevent any association from receiving dues in advance, allowing such a rate of interest for the anticipated payments of dues as may be agreed upon by the directors. No series or class of stock shall be paid off until fully matured: Provided, that this section shall not prevent the cashing in of any stock before maturity. (Rev., s. 3884; 1905, c. 435, s. 7; 1907, c. 959, s. 2; 1919, c. 172, s. 2; 1931, c. 109; C. S. 5180.)

Editor's Note.—The Act of 1931 struck out the former section and inserted the above in lieu thereof. The stockholders' equality feature of the law is now expressly qualified by a provision that a lesser rate of dividend may be declared on paid-up stock than on serially maturing series. What seems to be meant is that until the full matured value of serial stock is earned, i. e., until it has actually matured, it cannot be paid off, but that after it is paid under an agreement or guarantee, but that before maturity it may be cashed in at its value then accrued. This construction has been put upon the act as now amended by a building and loan officer who was consulted on the subject. 9 N. C. Law Rev. 352.

In General.—In case of the insolventy of a building and loan association, every person having stock therein, whether as creditor or debtor, must be considered a corporation, and every member indebted to it must be treated as a debtor. Strauss v. Carolina Interstate Bldg., etc., Ass'n, 117 N. C. 398, 21 S. E. 450; 118 N. C. 556, 24 S. E. 116. Such debtors are liable for authorized assessments to cover losses. New Bern Bldg., etc., Ass'n v. Blalock, 150 N. C. 490, 76 S. E. 523.

Liability of Corporation. — Where a corporation becomes the holder of stock in another corporation, e. g., a Building and Loan Association, which becomes insolvent, it may be held liable on the same, as an incorporator, in the association assuming the stock of the shareholders v. Monroe Land, etc., Co., 126 N. C. 662, 36 S. E. 130.

Stockholder and Debtor. — Where the borrower from a building and loan association takes out stock, at maturity the debt secured by a mortgage on his building, he occupies, upon the bankruptcy of the association in the hands of a receiver in bankruptcy, two independent relations to the association — that of stockholder, and that of debtor to the association, and he is not entitled to have his payments made on his shares of stock credited to his debt, as against the claims of the other creditors. Rendelman v. Stoessel, 195 N. C. 640, 143 S. E. 219.

§ 54-18. Minors as shareholders. — Minors of the age of twelve years and upwards are authorized and empowered to become shareholders in and become, hold, pay direct, manage, or transfer, and otherwise deal in the shares in such a stock association in the same manner and with the same powers, rights, and liabilities, force and effect as though such minors were of full age. The provisions of this section shall apply to federal savings and loan associations having their principal offices in this state. (Rev., s. 3885; 1903, c. 728; 1905, c. 435, s. 1; 1939, c. 179; C. S. 5181.)

Editor's Note.—The 1939 amendment added the last sentence.

This section is a statutory exception to the general rule that contracts of infants are voidable at the option of the infant, and when so avoided are void ab initio. Coker v. Virginia-Carolina Joint-Stock Land Bank, 208 N. C. 41, 178 S. E. 803.

§ 54-19. Manner of making loans; security required. — At such times as the by-laws shall designate, not less frequently than once a month, the board of directors shall hold meetings at which the funds in the treasury applicable for loans may be loaned: Provided, that between meetings of the board of directors any three members of said board may act as an executive committee and may, by unanimous vote, make such loans. Any loans so made or approved by the executive committee shall be reported to the board of directors at its next meeting. No loans shall be made by such association to any one not a member thereof. Borrowers shall be required to give real estate security, either by way of mortgage or deed of trust, subject only to mortgages or deeds of trust to secure loans made by the association and undue taxes and special assessments: Provided, that the shares of any such association may be received as security for a loan on such shares of an amount not to exceed ninety per centum of the amount paid in as dues on such shares: Provided, further, that bonds issued as general obligations of the United States government and bonds issued as general obligations of the state of North Carolina may be received as security to an amount not exceeding ninety per centum of the face value of such bonds. (Rev., s. 3890; 1905, c. 435, s. 8; 1907, c. 959, s. 4; 1919, c. 249; 1937, c. 11; 1941, c. 65; C. S. 5182.)

Cross References. — As to investment in bonds guaranteed by United States, see § 53-44. As to loans on mortgages, etc., issued under federal housing act, see § 53-45.

Editor's Note.—The 1937 amendment so changed this section that a comparison here is not practical. The 1941 amendment changed the wording of the proviso to the first sentence.

§ 54-20. Direct reduction of principal. — The board of directors of any building and loan association, heretofore or hereafter organized under the laws of this state, may, unless specifically prohibited by the certificate of incorporation, constitution or by-laws of the association, by resolution or by-law, permit borrowing members to repay their indebtedness by a direct monthly or periodical reduction of principal method. In every such case the borrower shall in writing make such agreement with the association relative to the repayment of his indebtedness as the directors may require. The agreement shall stipulate that the borrower or debtor shall make periodical payments, not less frequently than once a month, until such mortgage indebtedness and advances, if any, made by the association for payment of taxes, assessments, insurance premiums and other purposes, as may be owing from the borrower to the association, with interest thereon, shall have been fully paid. The balance of any loan account under such direct reduction of principal method shall be determined monthly, quarterly or semiannually, in order to ascertain the amount then necessary to satisfy in full the mortgage obligation, and when so ascertained such amount shall be the amount due upon said loan at said time to said association or any representative or successor thereof. Any association permitting such method of repayment may adopt a plan by which the in-
terest shall be computed periodically on the pre-
ceding balance, and such interest shall be added to
that preceding balance, together with any and all
advances and other charges above enumerated
made for the benefit of the borrower during the
said interest period, and then there shall be de-
ducted from the total any and all payments made
by the borrower to the association during said
period, or since the preceding balance was set up.
All payments made on a loan under such plan
of direct periodical reduction shall be applied first
to interest, and then to the principal of advances
made for the account of the borrower and charged
thereto, and to the principal of the loan. The
board of directors may adopt any other direct
periodic reduction of principal plan that will re-
quire complete repayment of such loans: Pro-
vided, no plan of payment shall be adopted that
will not mature and pay off the loan within twenty
years from the date of the making thereof: Pro-
vided further, the board of directors may authorize
the renewal or extension of the time of repayment
of any loan therefor made. No association shall
make any loan upon this plan to any person
unless he be a member of such association. (1937,
c. 18.)
§ 54-21. Federal housing administration insured
loans.—Notwithstanding any provision in this act
any building and loan association, whether oper-
ating on the serial sinking fund plan or the di-
rect reduction plan incorporated by and under
this act, is authorized and empowered to make
loans for the account of such corporation, and
charged thereto, and to the principal of the loan.
Any such association may, if authorized by
section 54-23, make for the benefit of the borrower
during the interest period, and then there shall be de-
ducted from the total any and all payments made
by the borrower to the association during said
period, or since the preceding balance was set up.
All payments made on a loan under such plan
of direct periodical reduction shall be applied first
to interest, and then to the principal of advances
made for the account of the borrower and charged
thereto, and to the principal of the loan. The
board of directors may adopt any other direct
periodic reduction of principal plan that will re-
quire complete repayment of such loans: Pro-
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will not mature and pay off the loan within twenty
years from the date of the making thereof: Pro-
vided further, the board of directors may authorize
the renewal or extension of the time of repayment
of any loan therefor made. No association shall
make any loan upon this plan to any person
unless he be a member of such association. (1937,
c. 18.)
§ 54-22. Repayment at any time. — Any mem-
ber of such association who shall borrow from it
shall have the right at any time prior to the
maturity of the shares pledged as collateral for
such loan to pay off and discharge his loan by
paying the amount received by him, including
the cost and expenses of making the loan, if the
same has been deducted therefrom, with interest
at the rate of five per centum per annum, to the
sum received by him to the date of settlement
and all fines and dues then remaining unpaid.
Upon such settlement he shall be credited with
only the withdrawal value of his shares as fixed
by the charter or by-laws, or by the directors of
such association. In case of default by a share-
holder who has borrowed from the association
and a foreclosure of his mortgage or deed of
trust, the amount of his indebtedness to such as-
sociation shall be ascertained in the manner pro-
duced by this section. (Rev., s. 3891; 1905, c. 18.)
Cross Reference. — As to interest and usury laws in gen-
eral, see 11 N. C. Law Rev., 208.
Stockholder Cannot Escape Payment of Losses.—Before
valuing himself of the privileges provided by this section
the stockholder must have paid any assessments to meet
losses of the corporation. New Bern Bldg., etc., Ass'n v. Blalock,
160 N. C. 490, 76 S. E. 532. See also Mears v. Davis,
121 N. C. 125, 28 S. E. 186.
Usury.—An illegal transaction cannot be settled. Dick-
erson v. Bldg. Asso., 89 N. C. 37. And the usury laws apply
to the same extent as to natural persons. Craven v. Ry.
Co., 77 N. C. 289. These laws will be found as section 24-1
et seq. of the General Statutes, and they cannot be changed
by special legislation. Rowland v. Old Dominion Bldg.,
etc., Ass'n, 116 N. C. 877, 22 S. E. 8. No subterfuge such as
calling the charge of "monthly" "quarterly," etc., or calling
a borrower a partner will prevent the transaction from being
Southern Bldg., etc., Ass'n, 120 N. C. 286, 26 S. E. 781. A
full exposition of usury will not be found in the notes to
section 24-2, and the principles there stated are applicable
when usury is charged by a building and loan association.
§ 54-23. Power to borrow money.—Any such as-
sociation may in its certificate of incorporation
constitutions or by-laws authorize the board of di-
rectors from time to time to borrow money, and
the board of directors may find from time to time, by
resolution adopted by a vote of at least two-thirds
of all the directors and duly recorded on the min-
utes, borrow money for purposes as stated in the
constitution or by-laws, without securing the consent
of the owner thereof. (Rev., s. 3891; 1905, c. 18.)
Refusal to Make Loan.—On association's refusal to make loan
to subscriber, the subscriber is entitled to recover
back money paid for shares of stock in association. Fagg
v. Southern Bldg., etc., Ass'n, 113 N. C. 364, 18 S. E. 655.
§ 54-24. Power of insurance commissioner. —
An illegal transaction cannot be settled. Dicker-
son v. Bldg. Ass'n, 119 N. C. 249, 26 S. E. 41; Cheek v. Iron Belt Bldg.,
etc., Ass'n, 125 N. C. 242, 35 S. E. 463; Hollowell v. South-
ern Bldg., etc., Ass'n, 120 N. C. 286, 26 S. E. 781. The
same rule as to the same doctrine that the borrower asks for an affirmative relief, as to
prevent the foreclosure of his mortgage, equity will make
payment of a legal rate of interest a prerequisite to the
grant of relief. This principle is fully explained in the note
to section 24-2. Building and loan association cases apply
the same: Rowland v. Old Dominion Bldg., etc., Ass'n, 118 N. C. 173,
24 S. E. 366; Williams v. Maxwell, 123 N. C. 386, 31 S. E. 821.
Forfeiture of Mortgage on Default.—A contract, by which
the stock, taken out by a borrower and assigned to the
association, is mortgaged to a mortgagee, and connected to the
association on default, without allowance of credit on the
mortgage for the payments made on the stock, is
Southern Bldg., etc., Ass'n, 116 N. C. 877, 22 S. E. 8.
Editor's Note. — Public Laws of 1933, c. 18, substituted the
words "one-fifth" for "one-fourth" in the first clause of the
old with the new is necessary to determine the
changes. The chief change of the 1933 amendment is the granting
of express authority to an association to pledge its assets
as security for money borrowed. For further comment,
Editor's Note. — Public Laws of 1941, c. 18, substituted "thirty-five" for "thirty-five" in line eleven and omitted from the first sentence a provi-
sion relating to the use of the money borrowed.
Art. 4. Under Control of Insurance
Commissioner.
§ 54-24. Power of insurance commissioner. —
The insurance commissioner of the state is
hereby empowered and directed to perform all
the duties and exercise all the powers as to build-
ing and loan associations, unless herein otherwise
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§ 54-25. Annual license fees. — All domestic building and loan associations shall pay an annual license fee of twenty-five dollars and may be licensed upon filing with the insurance commissioner an application in such form as he may prescribe. Such license fee shall be used to defray the expenses incurred by the insurance commissioner in supervising building and loan associations. (1919, c. 179, s. 1; C. S. 5186.)

Cross References.—As to annual license tax, see § 105-73. As to exception of building and loan associations from certain intangible taxes, see § 105-212. As to listing property for taxes, see § 105-347. As to an initial tax of twenty-five dollars ($25) before the assumption of corporate powers, see § 54-2.

§ 54-26. Statement filed by association. — Every association doing business under this subchapter shall file in the office of the insurance commissioner, on or before the first day of February in each year, in such form as he shall prescribe, a statement of the business standing and financial condition of the applicant on the preceding thirty-first day of December, signed and sworn to by the principal, or chief managing agent, attorney, or officer thereof, before the insurance commissioner, or before a commissioner of affidavits for North Carolina, or before some notary public. (Rev., s. 3894; 1905, c. 435, s. 11; 1907, c. 959, s. 5; C. S. 5187.)

§ 54-27. Statement examined, approved, and published; fees. — It shall be the duty of the insurance commissioner to receive and thoroughly examine each annual statement required by this subchapter, and if made in compliance with the requirements thereof, to publish an abstract of the same in one of the newspapers of the state, to be selected by the general agent or attorney making such statement, and at the expense of his principal. The insurance commissioner shall be entitled to a fee of five dollars, to be paid by the association filing such statement. (Rev., s. 3895; 1905, c. 435, s. 12; C. S. 5188.)

§ 54-28. License revoked. — If the insurance commissioner shall become satisfied at any time that any statements made by any association licensed under this subchapter are untrue, or in case a general agent shall fail or refuse to obey the provisions of this subchapter, or if upon examination the insurance commissioner is of opinion that such association or company is insolvent, or has exceeded its powers, or has failed to comply with any provisions of law, or its mode of business is not feasible for the purposes of carrying out successfully its plan, or that its condition is such as to render its further proceedings hazardous to the stockholders, he shall thereupon have power to revoke and cancel such license. (Rev., s. 3896; 1905, c. 435, s. 13; 1907, c. 959, s. 6; C. S. 5189.)

§ 54-29. Examinations made; expense paid. — If at any time the insurance commissioner has good reason to think that the standing and responsibility of any building and loan association or company doing business in this state, or its mode of business, is of a doubtful character, or in his discretion whenever he deems it prudent to do so, it shall be his duty to examine and investigate everything relating to the business of such company, and to that end he is hereby authorized, if he deem it advisable, to appoint a suitable and competent person to make such investigation, who shall file with the insurance commissioner a full report of his finding in such case. The expenses and cost of such examination shall be defrayed by the company or association subjected to investigation, and each company or association doing business in this state shall stipulate in writing, to be filed with the insurance commissioner, that it will pay all reasonable cost and expenses of such examination when it shall become necessary. (Rev., s. 3897; 1905, c. 435, ss. 14, 15; 1919, c. 179, s. 4; C. S. 5190.)

§ 54-30. Failing to exhibit books or making false statement a misdemeanor. — If any person having in his possession or control any books, accounts, or papers of any building and loan association licensed by law, shall refuse to exhibit the same to the insurance commissioner, or his agents on demand, or shall knowingly or wilfully make any false statement in regard to the same, he shall be guilty of a misdemeanor, and fined and imprisoned, at the discretion of the court. (Rev., s. 3329; 1893, c. 434; 1899, c. 164; C. S. 5191.)

§ 54-31. Agent must obtain certificate. — It shall be unlawful for any person to solicit business or act as agent for any building and loan association or company without having procured from the insurance commissioner a certificate that such association or company for which he offers to act is duly licensed by the state to do business for the current year in which such person solicits business or offers to act as agent. The fee for such license shall be $2.50, to be paid to the insurance commissioner at the time the certificate is issued; and no other license or fee shall be required for said business of an agent or solicitor so licensed. (Rev., s. 3898; 1895, c. 444, s. 3; 1899, c. 154, ss. 20; 1907, c. 950, s. 7; 1933, c. 17; C. S. 5192.)

Editor's Note.—Public Laws of 1931, c. 17, added the last sentence to this section, relating to fees.

§ 54-32. Penalties imposed and recovered. — Every general agent or attorney of any building and loan company or association who shall fail or refuse to perform any duty required of him by this subchapter shall forfeit and pay to the insurance commissioner fifty dollars for the state for every such refusal, to be recovered before any justice of the peace at the suit of the insurance commissioner. (Rev., s. 3899; 1899, c. 434, s. 2300g; 1899, c. 154, s. 2, subsec. 20; 1907, c. 950, s. 7; 1933, c. 17; C. S. 5193.)

§ 54-33. Notice required before appointment of receivers. — No judge or court shall appoint a receiver for any building and loan association organized and incorporated under the laws of this state unless five days' advance notice of the motion, petition or application for appointment of a receiver shall have been given to such association and to the insurance commissioner of the state. (1933, c. 58.)

Editor's Note.—See 11 N. C. Law Rev. 208.

Art. 5. Foreign Associations.

§ 54-34. Allowed to do business. — A building and loan association of another state may be ad-
mitted to transact business in this state in the manner hereinafter provided, and no association not so admitted shall transact business in this state. (Rev., s. 3900; 1905, c. 435, s. 17; C. S. 5194.)

§ 54-35. Copy of charter and list of officers filed. — Application for authority to transact business in this state shall be made to the insurance commissioner, and on making such application every such association shall file with the insurance commissioner a duly authenticated copy of its charter or certificate of incorporation, its constitution and by-laws, and thereafter certified copies of all amendments thereto, the names and addresses of its officers and directors, the compensation paid each officer, and a report of its condition, in such form as may be prescribed by the insurance commissioner, which shall be verified by oath of such officers and other persons as the commissioner shall designate, and the commissioner shall furnish blank forms for the report required, and may call for additional reports at such other times as may seem to him expedient. (Rev., s. 3902; 1905, c. 435, s. 19; C. S. 5195.)

§ 54-36. License granted. — If it shall appear to the insurance commissioner by the report aforesaid and by an examination of the affairs of such association that it has good assets of sufficient value to cover all liabilities, and that its methods of doing business are safe and not contrary to the missioner, and on making such application every such association that it has good assets of sufficient value to cover all liabilities, and that its methods of doing business are safe and not contrary to the missioner a duly authenticated copy of its charter or certificate of incorporation, its constitution and by-laws, and thereafter certified copies of all amendments thereto, the names and addresses of its officers and directors, the compensation paid each officer, and a report of its condition, in such form as may be prescribed by the insurance commissioner, which shall be verified by oath of such officers and other persons as the commissioner shall designate, and the commissioner shall furnish blank forms for the report required, and may call for additional reports at such other times as may seem to him expedient. (Rev., s. 3902; 1905, c. 435, s. 19; C. S. 5195.)

§ 54-37. Securities deposited. — The insurance commissioner before issuing the certificate of authority aforesaid shall require every such association to deposit with the commissioner such securities as he may approve, amounting to at least thirty thousand dollars, which securities shall be held by him in trust for the exclusive benefit and use of the policyholders, and thereafter any certificates of such securities on depositing with the commissioner such securities the par value of which shall be equal to such as may be withdrawn. (Rev., s. 3904; 1905, c. 435, s. 21; C. S. 5197.)

§ 54-38. Annual certificate; service of process. — Such certificate of authority shall be for the current year only, and shall not be issued until such association shall, by a duly executed instrument filed with the insurance commissioner of the state, constitute the insurance commissioner and his successors in office its true and lawful attorney, upon whom all original process in any action or legal proceedings against it may be served, and therein shall agree that any original process against it which may be served upon the commissioner shall be of the same force and validity as if served on the association, and that the authority thereof shall continue in force irrevocable so long as any liability of the association remains outstanding in this state. The service of such process shall be made by leaving a copy of the same in the office of the insurance commissioner, with a fee of two dollars, to be taxed in the plaintiff's costs. When any original process is thus served, the commissioner, by letter directed to the secretary, shall within two days after such service forward to the secretary a copy of the process served upon him, and such service shall be deemed sufficient service upon the association. The commissioner shall keep a record of all such process, showing the day and hour of service. (Rev., s. 3906; 1905, c. 435, s. 23; C. S. 5198.)

§ 54-39. Agent must have certificate of license; fees. — It shall be unlawful for any person to solicit business or act as agent for any foreign building and loan association or company doing business in this state without having first procured from the insurance commissioner a certificate that such association or company for which he offers to act is duly licensed by the state to do business for the current year in which such person solicits business or offers to act as agent. The insurance commissioner shall be entitled to a fee of one dollar for issuing each such certificate, to be paid by the company for which the same was issued. Any person violating the provisions of this section shall be guilty of a misdemeanor. (Rev., ss. 3327, 3901; 1895, c. 444, s. 3; 1905, c. 435, s. 18; C. S. 5199.)

§ 54-40. Fees and expenses. — Every such association shall pay for filing a certified copy of its charter or certificate of incorporation twenty dollars; for filing original annual reports, twenty dollars; for certificate of authority, annually, two hundred and fifty dollars; for certificate for each agency, five dollars; and shall defray all expenses incurred in making any examination of its affairs as herein provided for; and the insurance commissioner may maintain an action in the name of the state against such association for the recovery of such expenses in any court of competent jurisdiction. (Rev., s. 3905; 1905, c. 435, s. 22; C. S. 5200.)

Cross References. — As to license tax, see § 105-73. As to exception of building and loan associations from certain taxes, see § 105-212. As to listing property for taxes, see § 105-347.

§ 54-41. All contracts deemed made in this state. — Any contract made by any foreign association with any citizen of this state shall be deemed and considered a North Carolina contract, and shall be so construed by all the courts of this state according to the laws thereof. (1905, c. 435, s. 26; C. S. 5203.)

Cross References. — As to building and loan associations are subject to the application of the state usury laws where loans are made at home office. Rowland v. Old Dominion Bldg., etc., Ass'n, [415]
Art. 6. Withdrawals.

§ 54-42. Month's notice required for withdrawals.—Any shareholder in a building and loan association may withdraw all or any part of his or her holdings of unpledged or unhypothecated stock in such association by giving to the secretary of such association one month's written notice of his or her intention so to do, and the right of such shareholder to make such withdrawal shall accrue one month after the giving of such notice, subject to the conditions set out in § 54-43. (1933, c. 122, s. 1.)

Editor's Note.—See 11 N. C. Law Rev. 207, for review of this and § 54-43.

§ 54-43. Withdrawal or maturity fund.—Whenever any shareholder whose stock has matured or whose right to withdraw his stock has accrued, as set out in § 54-42, has not been paid because of insufficiency of funds in the treasury of the association, the secretary of said association shall under instruction from the directors, create a separate fund to be known as the "withdrawal or maturity fund" and into such fund shall be paid one-half of the net receipts of the association monthly. Net receipts shall mean the receipts of the association from interest, installments, rent and other revenue producing sources, diminished by the expenses of the association, and by any sums directed by the board of directors to be set apart and held separately for the purpose of meeting bills payable or notes payable at the maturity thereof. From time to time as the board of directors may direct, the secretary shall make a report on the receipts of the association from interest, installments, rent and other revenue producing sources, diminished by the expenses of the association, and by any sums directed by the board of directors to be set apart and held separately for the purpose of meeting bills payable or notes payable at the maturity thereof. From time to time as the board of directors may direct, the secretary shall make an equitable and ratable distribution of the funds in said "withdrawal or maturity fund" to the stockholders whose right to receive payment from said fund has accrued, as hereinbefore provided, at the date of such distribution. One-half of the net receipts of the association shall be added monthly to such fund so long as there remains any shareholder of the association entitled to receive a portion thereof as aforesaid. No shareholder whose stock has matured or whose right to withdraw his stock has accrued as hereinbefore set out, shall have the right to demand or receive any funds in excess of the amount equitably and ratably distributed as hereinbefore set out except on approval of board of directors of such association and/or the insurance commissioner. (1933, c. 122, s. 2.)

Art. 7. Statements of Financial Condition of Associations.

§ 54-44. Derogatory statements.—Any person who shall willfully and maliciously make, circulate, or transmit to another or others any statement, rumor, or suggestion, written, printed, or by word of mouth, which is directly or by inference derogatory to the financial condition, or affects the solvency or financial standing of any building and loan association, or who shall counsel, aid, procure, or induce another to state, transmit, or circulate any such statement or rumor shall be guilty of a misdemeanor, and upon conviction thereof shall be fined or imprisoned, or both, in the discretion of the court. (1915, c. 273; 1921, c. 4, s. 82; 1931, c. 12; C. S. 4231.)

SUBCHAPTER II. LAND AND LOAN ASSOCIATIONS.


§ 54-45. Application of term.—The term "Land and Loan Associations" shall apply to and include all corporations, companies, societies or associations organized for the purpose of making loans to their members only, and of enabling their members to acquire real estate, make improvements thereon, and remove incumbrances therefrom by the payment of money in periodical installments or principal sums, and for the accumulation of a fund to be returned to members who do not obtain advances for such purposes, where the principles of building and loan associations and their work are adapted to the use of the farmers and the rural population.

It shall be unlawful for any corporation, company, society, or association doing business in this state not so conducted to use in its corporate name the term "land and loan association," or in any manner or device to hold itself out to the public as a land and loan association. (1915, c. 172, s. 1; C. S. 5204.)

§ 54-46. Incorporation and powers.—Land and loan associations shall be incorporated, supervised, and be subject to such regulations and have such privileges as are prescribed for building and loan associations under the laws of this state as they now are or may be hereafter enacted, except as prescribed in this article. (1915, c. 172, s. 2; C. S. 5205.)

Cross Reference.—As to powers of building and loan associations, see § 54-2.

§ 54-47. Loans.—The boards of directors of land and loan associations may contract for loans to the amount of seventy-five per cent of the securities used by them as collateral, where the loans are on long time (three or more years), and for at least one per cent less than is charged by such associations on their loans to shareholders; and they may make short loans to their shareholders on their shares and personal indorsement or personal property. (1915, c. 172, s. 3; C. S. 5206.)

Cross Reference.—As to loans on mortgages, etc., issued under federal housing act, see § 53-45.

§ 54-48. Reserve associations.—Associations to be known as "Reserve Land and Loan Associations" may be chartered and licensed as provided in this article, when they are organized and the stock therein is held by local land and loan associations, and shall have such powers, rights, and privileges as are accorded to other domestic associations, and they may conform to such laws, rules, and regulations as may be prescribed by the laws of the United States, or of this state, to enable them to receive moneys, bonds, or securities to be used in loans and to secure the same. Such reserve associations shall be under the supervision of the insurance commissioner as are building and loan associations. (1915, c. 172, s. 4; C. S. 5907.)

§ 54-49. Land conservation and development bureaus; land mortgage associations. — Recognizing that agriculture is the most fundamental wealth-producing occupation of the State and that land is the basis of agriculture, the General Assembly
of North Carolina does hereby authorize and direct the State Department of Agriculture to establish as a major division of its organization a land conservation and land development bureau. The function of this bureau shall be to promote conservation, rural home ownership, and the development of the land resources of the State through land mortgage associations under the following provisions. (1925, c. 223, s. 1.)

§ 54-50. Number of incorporators; capital stock. —Any number of persons, resident freeholders of the State, not less than fifteen, may associate to establish an association on the terms and conditions and subject to the liabilities hereinafter prescribed. The aggregate amount of the capital stock of any such association shall not be less than twenty thousand dollars ($20,000). Such association shall mean a corporation organized under the laws of the State for the purpose of making loans upon agricultural lands, forest lands and dwelling houses within this State and known as a land mortgage association. (1925, c. 223, s. 2.)

§ 54-51. Incorporation.—The articles of incorporation shall be in writing signed and acknowledged by the incorporators and shall contain the following:

(1) The declaration that they are associating for the purpose of forming a land mortgage association under the provisions of this article.

(2) The name of such association, which shall be in no material respect similar to any other association in the same county.

(3) The name of the village, town or city, and the county where such association is to be located.

(4) The amount of capital stock, which shall be divided into shares of one hundred dollars each.

(5) The period for which such association is organized. (1925, c. 223, s. 3.)

§ 54-52. Organization. — The incorporators at their first annual meeting shall elect by ballot from their number a board of trustees of not less than six members who shall adopt a code of by-laws and a plan of organization approved by the Commissioner of Agriculture and the Corporation Commission. (1925, c. 223, s. 4.)

§ 54-53. Corporate powers. — Said land mortgage association shall have power: (a) To make loans, the conditions of which shall be approved by the Corporation Commission if the security taken therefor is to be used as the basis for a bond issue under subsection (c) hereof, and to accept as security for any such loan a first mortgage upon agricultural lands within this State. Such loan shall not exceed, however, sixty-five per cent of the value of such real estate so conveyed, according to the appraisal made as herein provided.

(b) To purchase first mortgages, herefore or hereafter issued against North Carolina agricultural lands, either improved or partially improved, from persons or firms resident of this State or corporations organized under the laws of this State engaged in the colonization or settlement of North Carolina lands and to whom such mortgages were issued, if, after investigation, the plan of settlement or colonization followed by such person, firm or corporation is approved by the Commissioner of Agriculture as beneficial to the settler or colonist, and if the lands against which such mortgages are issued are found by the said commissioner to be in fact agricultural lands suitable for agricultural purposes and the terms and conditions of the loans made by such person, firm or corporation are just and reasonable, or from banks or trust companies organized under the laws of this State, or of the United States, to do business in this State, to which such mortgages were issued direct by the borrowers. Each such mortgage shall be payable on the amortization plan maturing in not less than twenty years. The request for an investigation leading to such a purchase of mortgages from persons, firms or corporations engaged in the settlement or colonization of North Carolina lands shall be accompanied by a deposit, the amount of such deposit to be determined by the Commissioner of Agriculture. Upon completion of the investigation the Commissioner of Agriculture shall render a statement of expense accompanied by a remittance of any unused balance of such deposit, but no mortgage shall be purchased until the lands against which the same is issued have been appraised as hereinafter provided for the appraisal of land for a loan by the land mortgage association and such mortgage is approved by all members of the loan committee.

(c) To issue bonds secured by the pledge of the mortgage so taken or purchased.

(d) To pledge the notes and mortgages so taken or purchased under the provisions of subdivisions (a) and (b) hereof as security for the bonds of the land mortgage association referred to in subdivision (c) hereof. (1925, c. 223, s. 5.)

Cross References.—As to investment in bonds guaranteed by United States, see § 53-44. As to loan on mortgages, etc., issued under federal housing act, see § 53-45.

§ 54-54. Restrictions. — All mortgage obligations acquired by the company shall be subject to the following restrictions:

(a) Each such mortgage shall be a first and valid lien upon improved or partially improved agricultural lands within the State of North Carolina;

(b) Each such mortgage shall be a first and valid lien upon the whole and undivided fee and upon no lesser estate;

(c) Such mortgage shall be given to secure a principal indebtedness not exceeding in amount fifteen per cent of the capital and surplus of the company;

(d) All such mortgages shall contain provisions for soil conservation;

(e) All such mortgages shall contain provisions for the time of commencing payments for annual or semianual reduction of the indebtedness secured thereby, subject to the requirements as to repayment of loans and interest hereinafter provided;

(f) The company shall make no loan secured by mortgage of any real estate in which any officer or trustee of the company is interested either directly or indirectly, except upon the approval of two-thirds of all the trustees;

(g) A sufficient amount of the proceeds of
any loan made upon lands upon which are build-
ing in course of construction or upon which land clear- ing or other improvements are being made shall be retained by the association and paid out only upon construction or improvement vouch-
ers, countersigned by a duly authorized agent of the association. (1925, c. 223, s. 6.)

§ 54-55. Mortgage forms; approval. — The mort-
gages to be given to the association, the bonds to be issued and the trust deed executed to secure the bonds shall be in such form and shall contain such conditions as will adequately pro-
tect all parties thereto. The trustees shall pro-
vide the forms subject to the joint approval of the Corporation Commission and the Attorney-Gen-
eral. (1923, c. 223, s. 7.)

§ 54-56. Repayment of loan and interest. — The prospec-
tive borrower may be required to pay all expenses incidental to the examination of title and appraisal of the property. The total amount shall include (a) the rate of interest agreed upon; and (b) a payment. (1925, c. 223,

§ 54-57. Terms of payment. — A borrower may repay his loan by installments of such fre-
quency and amounts as may be agreed upon: Pro-
vided, that not less than one per cent of the orig-
inal amount of the mortgage shall be paid upon the principal thereof annually, and commencing not later than the sixth year succeeding the year in which the loan was made the borrower may pay a larger installment upon the principal, or the whole of it, at any interest date, such payments to be in amounts equal to additions of one or more principal amortization payments. Such payment may be made in cash, or by tendering at par bonds of the associations. For failure to pay the interest or any installment required by the terms of the loan, the borrower may be fined as the by-laws may prescribe. But the borrower shall never be required to pay more than the specified installment, nor to pay the principal be-
fore it is due except as prescribed herein for par-
tial repayment on account of depreciation and for foreclosure by the association. The borrower may on sixty days’ notice repay the association his total indebtedness, or, without such notice, upon payment of sixty days’ interest upon the principal unpaid. The borrower shall be entitled to a receipt for all installments as paid, and where the repayment is complete to a satisfaction of his note and mortgage. (1925, c. 223, s. 9.)

Cross Reference. — As to satisfaction of mortgages, see § 45-37 et seq.

§ 54-58. Transfer of mortgaged lands. — The ac-
quirer of any lands mortgaged to a land mort-
gage association shall enter at once, on the acqui-
sition of the land, into a written agreement with the association, attested by a notary, or a justice, and assume the personal responsibility for the indebtedness to the association attaching to such lands. This document must be presented to the trustees within fourteen days after demand. (1925, c. 223, s. 10.)

§ 54-59. Calling in loans before due. — Every land mortgage association shall have the power to call in loans upon sixty days notice:

(a) When the person acquiring the lands upon which money has been loaned does not comply with the provisions of § 54-58 and fulfill the obligations incumbent upon him;

(b) When the debtor does not meet the oblig-
ation imposed upon him by his contract and the by-laws of the land mortgage association;

(c) When the mortgaged premises become subject to forced sale;

(d) When the mortgaged premises are de-
preciating in value because of lack of care, of failure to maintain and conserve or from other cause.

The trustees of the association, whenever nec-
essary, shall provide for an inspection of mortgaged premises by the State Department of Agricult-
ure for an investigation of the care which is be-
ing given said premises, and may employ an ex-
pert to inspect the soil with a view of determining whether or not the same is being depleted. (1925, c. 223, s. 11.)

§ 54-60. Partial recall of debt. — The associa-
tion may require a suitable partial repayment of the debt if the mortgaged premises may have at any time become depreciated in value from any cause whatsoever. (1925, c. 223, s. 12.)

§ 54-61. Foreclosure. — Whenever any loan is called in and the borrower shall fail to pay the principal and interest due to the association as re-
quired by law and the notices given him, the land mortgage association may then foreclose upon the mortgaged premises as for a past due loan. But in no case shall a borrower be liable for a sum greater than the amount of the unpaid por-
tion of the loan with any accretions of interest thereon and expenses incidental to the collection thereof. (1925, c. 223, s. 13.)

§ 54-62. Appraisal of lands. — Upon application for a loan the land mortgage association shall cause the lands which it is proposed to mortgage to the association to be appraised by a competent appraiser furnished it by the State Department of Agriculture. (1925, c. 223, s. 14.)

§ 54-63. Preference prohibited; association bor-
rowing money. — No land mortgage association, and no officer or agent thereof, shall give any preference to any creditor by pledging any of the assets of such association as collateral se-
curity, except that any such association may bor-
row money for temporary purposes, and may pledge assets of the association as collateral se-
curity therefor. Whenever it shall appear that any land mortgage association has borrowed habi-
tually for the purpose of relaning, the Corpora-
tion Commission may require such association to pay off such amount so borrowed. (1925, c. 223, s. 15.)

§ 54-64. Bond issues.

(a) The bonds to be issued by any land mort-
gage association may be issued for such amounts, bearing such serial number, and date or dates, and be payable at such time and times, bear such rate of interest, and be redeemable at maturity or upon notice at such times and in such man-
er, as the land mortgage association may, sub-
ject to the approval of the banking commission, deem advisable.

(b) Each land mortgage association shall keep a register for the registration and transfer of
bonds issued by it in which it shall register, or cause to be registered, all bonds upon presenta-
tion thereof for such purpose; and such register shall contain the post office address of all regis-
tered holders of bonds and shall, at all reasonable times, be open to the inspection of the banking commission, or any of its deputies, and to the State Treasurer. (1925, c. 223, s. 16.)

§ 54-65. Deed of trust.
(a) To secure the payment of such bonds, the land mortgage association shall issue a co-
lateral deed of trust to the State Treasurer, pledg-
ing as security for such bonds the notes and mort-
gages taken or purchased, as provided herein, in an amount equal to or exceeding the aggregate amount of bonds issued or to be issued.
(b) The total amount of bonds actually out-
standing shall not at anytime exceed the total amount unpaid upon the notes secured by the mortgages belonging to the association and pledged for the payment of the bonds, plus such securities and moneys as may be on deposit with the State Treasurer under the provisions hereof.
(c) The aggregate amount of the principal of all bonds issued by land mortgage associations and outstanding at any one time shall not exceed twenty times the amount of the capital and surplus of the company. (1925, c. 223, s. 17.)

§ 54-66. Collaterals deposited with State Treas-
urer.—All mortgages pledged to secure the pay-
ment of the bonds issued hereunder shall be de-
posited and left with the State Treasurer. The land mortgage association may, with the approval of the State Treasurer, remove such mortgages from the custody of the State Treasurer, substit-
tuting in place thereof other of its mortgages, or money or State of North Carolina bonds or cer-
tificates of deposit, endorsed in blank, issued by state or national banks located in North Carolina, farm mortgage bonds issued under the provisions of the Federal Farm Loan Act approved July seventeenth, one thousand nine hundred and six-
teen, or obligations of the United States Govern-
ment, in an amount equal to or greater than the amount unpaid upon the notes secured by the mortgages withdrawn. (1925, c. 223, s. 18.)

§ 54-67. Redemption of bonds.
(a) Notice of redemption of bonds may on no account be given on the part of the holder there-
of, but may be given by the association only for the purpose of affecting redemption in accordance with the conditions of the bonds and as provided by law and the by-laws.
(b) If the land mortgage association shall elect to redeem any bond prior to maturity, six months notice of redemption shall be given and shall be effected by personal service upon the owner and holder of the bond, by notice mailed to his address as registered or by advertising the same three times in a newspaper selected by the State Treasurer.
(c) The numbers of the bonds of which notice of redemption is to be given shall be determined by lot, to be drawn by the president or the vice-

§ 54-68. Validity of bonds after maturity.—In case the holder of any bond outstanding shall not have presented the same for payment within the period of two years after its maturity or within two years after the date fixed for the re-
demption, as the case may be, then such bonds shall cease to be a lien upon the mortgages, moneys, and securities pledged to the State Treas-
urer and deposited with him as security therefor, but such bond shall still constitute, until the statute of limitations running against such bonds shall have expired, a single legal money claim or de-

§ 54-69. Bonds as payment.—If the association gives notice to a debtor for repayment of the mortgage loan the latter must pay to the associa-
tion in cash or in its bonds at par the face of the same so far as it has not yet been covered by its assets in the amortization and payments. (1925, c. 223, s. 21.)

§ 54-70. Bonds as investments.—The bonds of a land mortgage association shall be a legal in-
vestment for savings associations, trust compa-
nies, or other financial institutions chartered un-
der the laws of this State and shall also be a legal investment for trustees, executors, administrators, or custodians of public or private funds, or corpo-
rations, partnerships or associations. (1925, c. 223, s. 22.)

§ 54-71. Applications of earnings; reserve fund.
—the gross earnings of the association shall be as-
certained annually, and there shall first be de-
ducted therefrom the expenses incurred by the association for the preceding year and the balance thereof shall be set aside as a reserve fund for the payment of contingent losses, to an amount equal to two per cent of the capital stock outstanding, and until such reserve fund equals twenty per cent of the capital stock of such association. (1925, c. 223, s. 23.)

§ 54-72. Restriction on holding real estate.—
No land mortgage association shall acquire real estate (other than for the occupation of its office except to protect its interests in case any of the mortgages owned by it are foreclosed and the property therein described sold to pay the in-
debtedness secured thereby. All real estate so acquired shall be promptly sold. (1925, c. 223, s. 24.)

§ 54-73. Banking laws applicable.—The statutes relating to banks and banking in this State, that is, §§ 53-1 to 53-158, in so far as applicable and not in conflict with the provisions hereof shall apply to land mortgage associations. (1925, c. 223, s. 25.)

SUBCHAPTER III. CREDIT UNIONS.

Art. 9. Superintendent of Credit Unions.

§ 54-74. Office created.—There shall be estab-
lished in the State Department of Agriculture a superintendent of credit unions and such assist-
ants as may be necessary. (1915, c. 115, s. 1; 1925, c. 73, s. 41; 1935, c. 87; C. S. §308.)

Editor's Note.—The Public Laws of 1925, Ch. 73 struck out all of the old section and inserted this one in its stead.

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This subchapter was formerly entitled Savings and Loan Associations and the article headings conformed thereto. Public Laws 1925, chapter 54, provides: "In order to make the name of this organization conform with the names of similar organizations authorized by federal statute, the words 'savings and loan associations,' wherever appearing in Consolidated Statutes, sections five thousand two hundred and eighty-five thousand two hundred and forty-one, inclusive, (Michie's Code of one thousand nine hundred thirty's) shall be changed to read 'credit unions.'"

§ 54-75. Duties of the officer.—The duties of the superintendent of credit unions shall be as follows:
1. To organize and conduct, in the state department of agriculture, a bureau of information in regard to cooperative associations and rural and industrial credits.
2. Upon the application of three persons residing in the state of North Carolina, to furnish, without cost, such printed information and blank forms as, in his discretion, may be necessary for the formation and establishment of any local credit union in the state.
3. To maintain an educational campaign in the state looking to the promotion and organization of credit unions; and upon the written request of twelve bona fide residents of any particular locality in this state expressing a desire to form a local credit union at such locality, the superintendent or one of his assistants shall proceed as promptly as convenient to such locality and advise and assist such organizers to establish the institution in question.
4. To examine at least once a year, and oftener if such examination be deemed necessary by the superintendent or his assistant, the credit unions formed under this subchapter. A report of such examination shall be filed with the state department of agriculture, and a copy mailed to the principal office of the credit union or cooperative association, "to be accumulated." The superintendent or his assistant shall proceed as promptly as convenient to such locality and advise and assist such organizers to establish the institution in question.
5. The number of members of the credit committee, their powers and duties.
6. The number of members of the credit committee, their powers and duties.
7. The number of members of the supervisory committee, their powers and duties.
8. The par value of shares of capital stock.
9. The conditions upon which shares may be issued, paid in, transferred, and withdrawn.
10. The fines, if any, which shall be charged for failure to meet obligations to the corporation punctually.
11. The conditions upon which deposits may be received and withdrawn. Whether the proposed corporation shall, in addition, have power to borrow funds.
12. The manner in which the funds of the corporation shall be invested.
13. The conditions upon which loans may be made and repaid.
14. The maximum rate of interest that may be charged upon loans, not to exceed, however, the legal rate.
15. The method of receiving for money paid on account of shares, deposits, or loans.
16. The manner in which the reserve fund shall be accumulated.
17. The manner in which dividends shall be determined and paid to members.
18. The manner in which a voluntary dissolution of the corporation shall be effected. (1915, c. 115, s. 2; 1925 c. 73, s. 3; 1935, c. 87; C. S. 5210.)

§ 54-77. By-laws adopted.—At the time of filing the certificate the incorporators shall adopt by-laws which shall provide:
1. The name of corporation.
2. The purposes for which it is formed.
3. Qualifications for membership.
4. The date of the annual meeting; the manner in which in members shall be notified of meetings; the manner of conducting the meetings; the number of members which constitute a quorum at the meetings, and the regulations as to voting.
5. The number of members of the board of directors, their powers and duties, and the compensation and duties of officers elected by the board of directors.
6. The number of members of the credit committee, their powers and duties.
7. The number of members of the supervisory committee, their powers and duties.
8. The par value of shares of capital stock.
9. The conditions upon which shares may be issued, paid in, transferred, and withdrawn.
10. The fines, if any, which shall be charged for failure to meet obligations to the corporation punctually.
11. The conditions upon which deposits may be received and withdrawn. Whether the proposed corporation shall, in addition, have power to borrow funds.
12. The manner in which the funds of the corporation shall be invested.
13. The conditions upon which loans may be made and repaid.
14. The maximum rate of interest that may be charged upon loans, not to exceed, however, the legal rate.
15. The method of receiving for money paid on account of shares, deposits, or loans.
16. The manner in which the reserve fund shall be accumulated.
17. The manner in which dividends shall be determined and paid to members.
18. The manner in which a voluntary dissolution of the corporation shall be effected. (1915, c. 115, s. 2; C. S. 5211.)

§ 54-78. Certificate of incorporation. — The by-laws acknowledged to have been adopted by all of the incorporators, together with the certificate of incorporation, shall be filed in the office of the superintendent of credit unions who shall approve the certificate of incorporation if he is satisfied that it is in conformity with this subchapter, and shall approve the by-laws if he is satisfied as to the character of the incorporators and that the by-laws are reasonable and will tend
to give assurance that the affairs of the prospective credit union will be administered in accordance with this subchapter. Thereupon, the superintendent of credit unions shall issue to the corporation a certificate of approval, annexed to a duplicate of the certificate of incorporation and of the by-laws, which certificate of approval, together with the attached duplicate certificate of incorporation and duplicate by-laws, shall be filed in the office of the clerk of the superior court of the county in which the office of such credit union is situated, and upon such filing the incorporators shall become and be a corporation. The county clerk shall charge the same filing fee for filing the certificate of approval, certificate of incorporation and by-laws as he is now allowed to charge for filing a certificate of incorporation of a corporation organized under the business corporations law of the state. (1915, c. 115, s. 2; 1925, c. 73, s. 3; 1935, c. 87; C. S. 5212.)

Cross Reference.—As to clerk's fee for filing certificate of incorporation, see § 55-192.

§ 54-79. Amendment of by-laws.—The by-laws adopted by the incorporators and approved by the superintendent of credit unions shall be the by-laws of the corporation, and no amendment to the by-laws shall become operative until such amendment shall have been approved by the superintendent of credit unions, and a copy thereof certified by him, with a certificate of his approval, shall be filed in the office of the clerk of the superior court of the county where the office of the credit union is located. Such approval may be given or withheld by the superintendent of credit unions at his discretion. The county clerk shall receive the same fee for filing as provided in § 54-78. (1915, c. 115, s. 3; 1925, c. 73, s. 3; 1935, c. 87; C. S. 5213.)

§ 54-80. Restriction of use of terms.—The use by any person, copartnership, association, or corporation except corporations formed under the provisions of this subchapter, of any name or title which contains the words "credit union" shall be a misdemeanor: Provided, that the provisions of this section shall not apply to associations or credit union leagues, the membership of which is composed entirely of individual members being served such security as provisions of this subchapter. (1915, c. 115, s. 4; 1925, c. 73, s. 3; 1935, c. 87; 1941, c. 236; C. S. 5214.)

Editor's Note.—The 1941 amendment added the proviso.

§ 54-81. Change of place of business.—A credit union may change its place of business on the written approval of the superintendent of credit unions, which written approval shall be filed in the office of the superintendent of credit unions and a duplicate of the approval in the office of the clerk of the superior court of the county where its office was located, and a second duplicate in the office of the clerk of the superior court of the county in which the new office is to be located. Such approval of the superintendent may be given or withheld at his discretion. (1915, c. 115, s. 25; 1925, c. 73, s. 3; 1935, c. 87; C. S. 5215.)

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§ 54-82. General nature of business.—A credit union may receive the savings of its members in payment for shares or on deposit; may loan to its members at reasonable rates of interest not exceeding the legal rate, or may invest as hereinafter provided the funds so accumulated, and may undertake such other activities relating to the purpose of the corporation as its by-laws may authorize. (1915, c. 115, s. 5; 1925, c. 73, s. 3; 1935, c. 87; C. S. 5216.)

Editor's Note.—For act relating to withdrawal of deposits from the State Employees' Credit Union, see Session Laws 1943, c. 781.

§ 54-83. Receive deposits.—A credit union may receive on deposit the savings of its members and also nonmembers in such amounts and upon such terms as the board of directors may determine and the by-laws shall provide. (1915, c. 115, s. 16; 1925, c. 73, s. 3; 1935, c. 87; C. S. 5217.)

§ 54-84. Borrowing money.—If the by-laws so provide, a credit union shall have power to borrow money from any source in addition to receiving deposits, but the aggregate amount of such indebtedness shall not at any one time exceed more than four (4) times the sum of its capital, surplus and reserve fund. (1915, c. 115, s. 17; 1925, c. 73, s. 10; 1935, c. 87; C. S. 5218.)

§ 54-85. Authority to execute contracts of guaranty in certain cases.—A credit union may execute such contracts of guaranty as may be necessary to procure credit for its members: Provided, that the said contracts of guaranty shall not place on the said local credit union a liability arising in any one year in excess of ten (10) per cent of the total credit under the said contracts of guaranty handled through that association in a particular year; and provided further, that all such contracts shall be approved by the superintendent of credit unions and each such contract must bear his approval in writing before becoming effective. In assuming such liability the said credit union may require of the individual members being served such security as the board of directors of each such credit union may determine upon. (1925, c. 73, s. 11; 1935, c. 87.)

§ 54-86. Investment of funds.—The capital, deposits, undivided profits and reserve fund of the corporation may be invested in one of the following ways, and in such way only:

1. They may be lent to the members of the corporation in accordance with the provisions of this subchapter.
2. They may be deposited to the credit of the corporation in savings banks, credit unions, building and loan associations, state banks or trust companies, incorporated under the laws of the state, or in National banks located therein.
3. They may become insolvent, shall be preferred in the same way that funds of a "credit union" so deposited are preferred under the banking law of the state.
4. Not more than ten per cent of the capital stock and reserve fund of a credit union may be invested in the stock of another local credit
§ 54-87. Loans.
1. To Members.—A credit union may lend to its members for such purposes and upon such security and terms as the by-laws shall provide and the credit committee shall approve; but security must be taken for any loan in excess of fifty dollars. An indorsed note shall be deemed to be security within the meaning of this section.

2. Installment Loans.—A member who needs funds which to purchase necessary supplies for growing crops may receive a loan in fixed monthly installments instead of in one sum.

3. Loans to Members of Committee.—The supervisory committee shall appoint a substitute to act on the credit committee in the place of any member in case such member makes application to borrow money from the credit union or becomes surety for any other member whose application for a loan is under consideration.

4. Loans to Persons Not Members Forbidden.—All officers and members of any committees in any way knowingly permitting or participating in making a loan of funds of a credit union to one not a member thereof shall be guilty of a misdemeanor. The credit union shall have the right to recover the amount of such illegal loans from the borrower or from any officers or members of committees who knowingly permitted or participated in the making thereof, or from all of them jointly.

5. Repayment of Loans.—A borrower may repay the whole or any part of his loan on any day on which the office of the corporation is open for the transaction of business. (1915, c. 115, s. 19; 1917, c. 233, s. 4; 1925, c. 73, s. 3; 1935, c. 87; C. S. 5320.)

Cross Reference.—As to loans on mortgages, etc., issued under federal housing act, see § 53-45.

§ 54-88. Rate of interest; penalty.—No corporation organized pursuant to this subchapter shall directly or indirectly charge or receive any interest, discount, or consideration, other than the entrance fee, greater than the legal rate.

Any corporation, any person, the several officers of any corporation, and the members of committees who shall violate the foregoing prohibition shall be guilty of a misdemeanor. The corporation shall also be subject to procedure by the superintendent of credit unions as prescribed herein in article fourteen. (1915, c. 115, s. 20; 1925, c. 73, s. 3; 1935, c. 87; C. S. 5321.)

§ 54-89. Interest or discount rate charged by agricultural association.—An agricultural credit corporation or association, organized under the laws of the State of North Carolina, may charge and collect by way of interest or discount on all loans made for agricultural purposes to farmers, growers and truckers of staple agricultural crops, fruits and vegetables respectively, or for the purpose of raising, breeding, fattening, or marketing of live stock, a rate of interest or discount not to exceed three per cent per annum in excess of the rate of interest or rediscount rate charged by any Federal intermediate credit bank to such agricultural credit corporation or association when rediscounting or purchasing from it the notes of such farmers, growers and truckers: Provided, that the total rate, both interest and rediscount, to the borrower shall not exceed eight per centum (8%) per annum. (1915, c. 101; 1929, c. 43, s. 1; 1931, c. 329.)

Cross Reference.—As to commission in lieu of interest, see §§ 44-57 and 44-28.

§ 54-90. Reserve fund.—All entrance fees, transfer fees, and fines shall, after the payment of organization expenses, be known as reserve income, and shall be added to the reserve fund of the corporation.

At the close of each fiscal year there shall be set apart to the reserve fund twenty per centum of the net income of the corporation which has accumulated during the year. But upon the recommendation of the board of directors, the members at an annual meeting may increase, and whenever such funds equal the amount of the capital, the proportion of profits which is required by this section to be set apart to the reserve fund. Nor shall the reserve fund in any case exceed the capital of the corporation plus fifty per centum of its other liabilities.

The reserve fund shall belong to the corporation and shall be held to meet contingencies, and shall not be distributed to the members except upon the dissolution of the corporation. (1915, c. 115, s. 21; 1939, c. 400, s. 2; C. S. 5222.)

Editor's Note.—The 1939 amendment substituted "twenty" for "twenty-five" in line two of the second paragraph.

§ 54-91. Dividends.—At the close of the fiscal year a credit union may declare a dividend not to exceed six per cent per annum from the income during the year and which remains after the deduction of expenses, losses, interest on deposits, and the amount required to be set apart to the reserve fund. Dividends shall be paid on all fully paid shares outstanding at the close of the fiscal year, but shares which become fully paid during the year shall be entitled to a proportional part of such dividend calculated from the first day of the month following such payment in full. (1915, c. 115, s. 22; 1925, c. 73, s. 3; 1935, c. 87; C. S. 5223.)

§ 54-92. Voluntary dissolution.—At any meeting specially called to consider the subject, three-fourths of the members present and represented may vote to dissolve the corporation and upon such vote shall signify their consent to such dissolution in writing. Such corporation shall then file in the office of the superintendent of credit unions such consent, attested by its secretary or treasurer and its president or vice-president, with a statement of the names and residences of the existing board of directors of the corporation and the names and residences of its officers duly veri-
tion.—The corporation shall be deemed an institu-
tion for saving, shall not be subject to any stock-transfer
or transfer tax either when issued by the corporation or trans-
ferred from one member to another. (1915, c. 115, s. 15; 1925,
c. 73, s. 3; 1935, c. 87; C. S. 5229.)

Editor's Note.—The words "buildings and loan associations"
in the first clause of this section were stricken out.

§ 54-95. Shares and deposits for minors and in
trust.—Shares may be issued and deposits re-
ceived in the name of a minor, and such shares and deposits may, in the discretion of the direc-
tors, be withdrawn by such minor or his parent or
guardian, and in either case payments made on such withdrawals shall be valid. If shares are hold or deposits made in trust, the name and
residence of the beneficiary shall be disclosed and the account shall be kept in the name of such holder as trustee for such person. Such shares or deposits may be withdrawn by the person for whom the shares were held or for whom such deposits were made, or by his legal representatives. (1915, c. 115, s. 14; C. S. 5227.)

§ 54-96. Fines and penalties.—For failure by any member of a credit union to meet his payments on obligations when due, such fines and other penal-
alties may be imposed upon the delinquent mem-
ber as the by-laws provide. Such fines shall not exceed two per centum per month or a fraction thereof on amounts due, except that a mini-

mum fine of five cents may be imposed. (1915, c. 115, s. 15; 1925, c. 73, s. 3; 1935, c. 87; 1939, c. 400, s. 3; C. S. 5228.)

§ 54-97. Liability of shareholders. — A share-
holder of any such corporation, unless the by-
laws so provide, shall not be individually liable for the payment of its debts for an amount in excess of the par value of the shares which he owns or for which he has subscribed. (1915, c. 115, s. 26; C. S. 5229.)

Art. 13. Members and Officers.

§ 54-98. Who may become members. — The
membership of the corporation shall consist of those persons who have been duly elected to mem-
bership and who have subscribed for one or more
shares and have paid for the same in whole or in part, together with the entrance fee as provided in the by-laws, and have complied with such other requirements as the by-laws may contain. No credit union shall ever pay any commission or offer compensation for the securing of members or on the sale of shares. (1915, c. 115, s. 6; 1925, c. 73, s. 3; 1935, c. 87; C. S. 5230.)

§ 54-99. Expulsion and withdrawal of members.
—The board of directors may expel from the
 corporation any member who has not carried out his engagement with the corporation, or has been convicted of a criminal offense, or neglects or refuses to comply with the provisions of this
subchapter or of the by-laws, or who habitually neglects to pay his debts, or shall become insolvent or bankrupt. The members at a regularly called meeting may expel from the corporation any member who has become intemperate or in any way financially irresponsible; no member shall be expelled until he has been informed in writing of the charges against him and an opportunity has been given him, after reasonable notice, to be heard thereon.

A member may withdraw from a credit union by filing a written notice of his intention to withdraw. The amounts paid in on shares or deposits by an expelled or withdrawing member, with any dividends credited to his shares and any interest accrued on his deposits to the date of expulsion or withdrawal, shall be paid to such member, but in the order of expulsion or withdrawal and only as funds therefor become available, after deducting any amounts due to the corporation by such member. The member shall have no other or further right in the credit union or to any of its benefits, but such expulsion or withdrawal shall not operate to relieve the member from any remaining liability to the corporation. (1915, c. 115, s. 23; 1925, c. 73, s. 3; 1935, c. 87; C. S. 5233.)

§ 54-100. Meetings; right of voting.—The fiscal year of every such corporation shall end at the close of business on the thirty-first day of December. The annual meeting of the corporation shall be held at such time and place as the by-laws prescribe. Special meetings may be held by order of the directors or of the supervisory committee, and shall be held upon request in writing of ten per cent of the members. Notice of all meetings of the corporation shall be given in the manner prescribed in the by-laws. At all meetings of members or shareholders a member shall have one vote and but one vote, irrespective of the number of shares that may be held by him, and in case of sickness or other unavoidable absence of a member he shall be allowed to vote by proxy in writing, but no member present shall vote more than one such proxy. At any meeting the members may decide upon any question of interest to the corporation, and overrule the board of directors, and by a three-fourths vote of those present and represented, provided the notice of the meeting shall have specified the question to be considered, may vote to amend the by-laws. (1915, c. 115, s. 8; C. S. 5238.)

§ 54-101. Election of directors and committees.

1. Number Elected.—At the annual meeting the members shall elect a board of directors of not less than five members, a credit committee and a supervisory committee of not less than three members each. However, in credit unions whose business offices are located in places other than incorporated cities, the board of directors as such may also be the credit committee. Except as herein specified, no member of the board shall be a member of either of such committees, nor shall one person be a member of more than one of such committees. All members of committees and all directors, as well as all officers whom they may elect, shall be sworn, and shall hold their several offices for such term as may be determined by the by-laws.

2. Oath of Office.—The oath required of each director, officer, and member of committee shall be the oath of the individual taking the same that he will, so far as the duty devolves on him, diligently and honestly administer the affairs of such corporation, and will not knowingly violate or willingly permit to be violated any of the provisions of law applicable to such corporation, and that he is the owner in good faith and in his own right on the books of the corporation of at least one share therein. Such oath shall be subscribed by the individual making it and certified by the officer before whom it is taken, and shall immediately be transmitted to the superintendent of credit unions and filed and preserved in his office. (1915, c. 115, s. 9; 1925, c. 73, s. 3; 1935, c. 87; C. S. 5233.)

§ 54-102. Duties of board of directors. 1. Elect Executive Officers.—At their first meeting and at each first meeting in the fiscal year, the board of directors shall elect from their number a president, vice-president, a secretary, and a treasurer, who shall be the executive officers of the corporation. The offices of secretary and treasurer may, if the by-laws so provide, be held by one person.

2. General Management.—The board of directors shall have the general management of the affairs, funds, and records of the corporation, shall meet as often as may be necessary, and, unless the by-laws shall specifically reserve all or any of these duties to the members, it shall be the special duty of the directors: 1. To act upon all applications for membership and the expulsion of members.

2. To fix the amount of the surety bond which shall be required of each officer having the custody of funds.

3. To determine from time to time the rate of interest which shall be allowed on deposits and charged on loans.

4. To fix the maximum number of shares which may be held by and the maximum amount which may be lent to any one member; to declare dividends; and to recommend amendments to the by-laws.

5. To fill vacancies in the board of directors or in the credit committees until the election and qualification of successors.

6. To have charge of the investment of the funds of the corporation except loans to members, and to perform such other duties as the members may from time to time authorize.

3. Compensation.—No member of the board of directors or of the credit or supervisory committee shall receive any compensation for his services as a member of the board or committees. But the officers elected by the board of directors may receive such compensation as the members may authorize. (1915, c. 115, s. 10; C. S. 5234.)

§ 54-103. Duties of credit committee.—The credit committee shall approve every loan or advance made by the corporation to members. Every application for a loan shall be made in writing and shall state the purpose for which the loan is desired and the security offered. No loan shall be made unless it has received the unanimous
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approval of those members of the committee who were present when it was considered, who shall constitute at least a majority of the committee, nor if any member of the committee shall disapprove thereof; but the applicant for a loan may appeal from any decision of the credit committee to the board of directors. The credit committee shall meet as often as may be required after due notice has been given to each member. (1915, c. 115, s. 11; C. S. 5323.)

§ 54-104. Duties of supervisory committee.—The supervisory committee shall inspect the securities, cash, and accounts of the corporation and supervise the acts of its board of directors, credit committee, and officers. At any time the supervisory committee, by a unanimous vote, may suspend the credit committee or any member of the board of directors, or any officer elected by the board, and by a majority vote may call a meeting of the shareholders to consider any violation of this subchapter or of the by-laws, or any practice of the corporation which, in the opinion of said committee, is unsafe and unauthorized. Within seven days after the suspension of the credit committee the supervisory committee shall cause notice to be given of a special meeting of the members to take such action relative to such suspension as may seem necessary. The supervisory committee shall fill vacancies in their own number until the next regular meeting of the members.

At the close of each fiscal year the supervisory committee shall make a thorough audit of the receipts, disbursements, income, assets, and liabilities of the corporation for the fiscal year, and shall make a full report thereon to the directors. This report shall be read at the annual meeting of the members and shall be filed and preserved with the records of the corporation. (1915, c. 115, s. 12; C. S. 5326.)


§ 54-105. Subject to superintendent of credit unions.—Corporations organized under the provisions of this subchapter shall be subject to the supervision of the superintendent of credit unions. (1915, c. 115, s. 7; 1925, c. 73, s. 3; 1935, c. 57; C. S. 5327.)

§ 54-106. Reports; penalties; fees.—1. Every corporation organized under this subchapter shall, in January and in July of each year, make a report of condition to the superintendent of credit unions giving such information as he shall require, which reports shall be verified by the oath of the treasurer and by oath of a majority of the supervisory committee, and shall make such other and further reports under like oath as the superintendent shall demand at any time.

2. Each credit union applying on or after July first, one thousand nine hundred forty-one, for a certificate to do business under the provisions of this subchapter shall, before receiving such certificate, pay into the office of the superintendent of credit unions a charter fee of five dollars ($5.00).

3. Each credit union subject to supervision and examination by the superintendent of credit unions, including credit unions in process of voluntary liquidation, shall pay into the office of the superintendent of credit unions supervisory fees as follows: (a) two dollars and fifty cents ($2.50) for the first one thousand dollars ($1,000.00) of assets and fifty cents ($0.50) for each additional thousand dollars ($1,000.00) of assets, or fraction thereof, payable during the month of July each year on the basis of total assets as shown by its report of condition made to the superintendent of credit unions as of the previous June thirtieth, or the date most nearly approximately same of each year; and (b) two dollars and fifty ($2.50) for the first one thousand dollars ($1,000.00) of assets and fifty cents ($0.50) for each additional thousand dollars ($1,000.00) of assets, or fraction thereof, payable during the month of January each year on the basis of total assets as shown by its report of condition made to the superintendent of credit unions as of the previous December thirty-first, or the date most nearly approximating same of each year: Provided, that no credit union shall be required to pay any supervisory fee until the expiration of twelve months from the date of the issuance of a certificate of incorporation to such credit union.

4. Any such corporation which neglects to make semi-annual reports as provided in paragraph 1 of this section, or any of the other reports required by the superintendent of credit unions at the time fixed by the superintendent, shall forfeit to the superintendent of credit unions five dollars ($5.00) for each day such neglect continues; and, furthermore, the superintendent of credit unions shall have authority, in his discretion, to revoke the certificate of incorporation and take possession of the assets and business of any corporation failing to pay the fees required in this section after serving notice of at least fifteen (15) days upon such corporation of his intention so to do.

5. Moneys collected under this section shall be deposited with the state treasurer of North Carolina and expended, under the terms of the Executive Budget Act, to defray expenses incurred by the office of the superintendent of credit unions in carrying out its supervisory and auditing functions. (1915, c. 115, s. 7; 1925, c. 73, ss. 3, 7; 1935, c. 87; 1941, c. 235; C. S. 5328.)

Editor's Note.—Under the first paragraph of this section it was formerly provided that the report, therein referred to, "shall be verified by the oath of the president, treasurer and secretary, as well as by the oath of a majority of the members of the supervisory committee". By Public Laws 1925, ch. 73, the word "president" was stricken out and the word "and" substituted in lieu of "as well as."

Prior to the 1941 amendment annual reports were required. The amendment changed the provision relating to penalties and added subsections 2, 3 and 5.

§ 54-107. Annual examinations required. — The superintendent of credit unions shall cause every such corporation to be examined once a year and whenever he deems it necessary. The examiners appointed by him shall be given free access to all books, papers, securities, and other sources of information in respect to the corporation; and for the purpose of such examination the superintendent shall have power and authority to subpoena and examine personally, or by one of his deputies or examiners, witnesses on oath and documents, whether such witnesses are members of the corporation or not, and whether such documents are documents of the corporation or not.
§ 54-108. Revocation of certificate; liquidation.—
If any such corporation shall neglect to make its annual report, as provided in this article, or any other report required by the superintendent of credit unions, for more than fifteen days, or shall fail to pay the charges required, including the fines for delay in filing reports, the superintendent of credit unions shall give notice to such corporation of his intention to revoke the certificate of approval of the corporation for such neglect or failure, and if such neglect or failure continues for fifteen days after such notice, the said superintendent shall, at his discretion, revoke the certificate, and he, personally or by one of his deputies, shall take possession of the property and business of the corporation and retain possession until such time as he may permit it to resume business, or until its affairs be finally liquidated as provided in the banking laws of the state. (1915, c. 115, s. 7; 1925, c. 73, ss. 3, 8; 1935, c. 87; C. S. 5239.)

Editor's Note.—The words "or any other report required by the superintendent of savings and loan associations," (now credit unions), following the words "as provided in this article," in the first part of the section were added by Public Laws 1925, ch. 71.

§ 54-109. Deficits supplied; business discontinued.—If it shall appear to the superintendent of credit unions by any examination or report that any such corporation is insolvent, or that it has violated any of the provisions of this subchapter or any other law of the state, he may, by order made over his hand and official seal, after a hearing or an opportunity for a hearing given the accused corporation, direct any such corporation to discontinue the illegal methods or practices mentioned in the order to make good any deficit. A deficit, in the discretion of the superintendent of credit unions, may be made good by an assessment on the members in proportion to their shares held by each member. If any such corporation shall not comply with such order within the time stipulated after the same shall have been delivered in person or shall have been mailed to the last address filed by such corporation in the office of the superintendent of credit unions (provided, that not more than thirty (30) days shall be allowed) the superintendent shall thereupon take possession of the property and business of such corporation and retain such possession until such time as he may permit it to resume business or its affairs be finally liquidated, as provided in the banking law of the state. (1915, c. 115, s. 7; 1925, c. 73, ss. 3, 9; 1935, c. 87; C. S. 5541.)

Editor's Note.—The provision, in the third sentence of this section, that "the time stipulated after the same shall have been delivered in person or shall have been mailed to the last address filed by such corporation in the office of the superintendent of credit unions (Provided, that not more than thirty (30) days shall be allowed)," was substituted by the acts of 1925, ch. 71, in place of the former provision "sixty days after the same shall have been mailed to the last address filed by such corporation in the division of markets and rural co-operation," which was stricken out by same act.

Art. 15. Central Associations.

§ 54-110. Central association.—(1) Upon application of seven or more credit unions for a central corporation for the purpose of securing credit and discounting notes with any outside agency, and to act as a clearing house in the settlement of these accounts, the superintendent of credit unions shall, upon receipt and investigation of charters and by-laws signed by the secretary-treasurers of the several credit unions, approve same if he is satisfied they are in conformity with and give reasonable assurance that the affairs of the corporation will be administered in accordance with this article.

(2) The procedure and plan of organization, method of operation, officers and their duties, supervision, liquidation and dissolution shall be the same as with any local credit union; except that the membership of a central credit union shall be institutional and only local credit unions can become members, unless the by-laws otherwise prescribe.

(3) Any local credit union can become a member of a central association by subscribing to any number of shares and paying for same, in whole or in part, not to be in excess of twenty-five (25%) of their share capital and reserve fund.

(4) Deposits in the central association may be accepted from any source in such amounts and upon such terms as the board of directors may determine and the by-laws shall prescribe.

(5) The secretary-treasurer shall cast the one vote of local member credit unions in its annual election of officers and at all meetings of the member associations unless the by-laws otherwise prescribe.

(6) A central credit union shall not charge more than three-fourths (34) of one per cent for discounting paper, provided that no discount rate shall make the interest higher than the legal rate.

(7) Section 54-84 shall not apply to a central association, and such an association shall have power to borrow money from any source in amounts not in excess of ten times the amount of its capital and reserve fund.

(8) A central credit union shall not be taxable under any law which shall exempt any local credit union. (1925, c. 73, s. 17; 1935, c. 87.)

SUBCHAPTER IV. CO-OPERATIVE ASSOCIATIONS.

Art. 16. Organization of Associations.

§ 54-111. Nature of the association.—Any number of persons, not less than five, may associate themselves as a mutual association, society, company, or exchange, for the purpose of conducting any agricultural, horticultural, forestry, dairy, mercantile, mining, manufacturing, telephonic, electric light, power, storage, refrigeration, flume, irrigation, water, sewage, or mechanical business on the mutual plan. For the purposes of this subchapter, the words association, company, corporation, exchange, society, or union shall be construed to mean the same; Provided, that the membership of agricultural organizations incorporated under this subchapter shall consist of producers of agricultural products, handled by such organizations or by organizations owned and controlled by such producers. (1915, c. 144, s. 1; 1925, c. 179, ss. 1, 2; 1931, c. 447; C. S. 5548.)

Cross Reference.—As to power of a mutual corporation to create stock, see § 55-72.
§ 54-112. Use of term restricted.—No corporate or association hereinafter organized for doing business in profit in this state shall be entitled to use the term "mutual" or any other part of its corporate or other business name, unless it has complied with the provisions of this subchapter; and any corporation or association violating the provisions of this section may be enjoined from doing business under such name at the instance of any shareholder of any association legally organized under this subchapter. (1915, c. 144, s. 18; 1925, c. 179, s. 1; C. S. 5243.)

§ 54-113. Articles of agreement.—The persons desiring to organize such association shall sign and acknowledge written articles which shall contain the name of the association and the names and residences of the persons forming the same. Such articles shall also contain a statement of the purposes of the association and shall designate the city, town, or village where its principal place of business shall be located. The articles shall also state the amount of authorized capital stock, the number of shares subscribed, and the par value of each. No shareholder in any corporation organized under this subchapter shall be personally liable for any debt of the corporation. (1915, c. 144, s. 2; C. S. 5244.)

§ 54-114. Certificate of incorporation.—The original articles of incorporation of corporations organized under this subchapter, or a true copy thereof, verified as such by the attaheds of two of the signers thereof, shall be filed with the secretary of state. A like verified copy of such articles and certificate of the secretary of state, showing the date when such articles were filed with and accepted by the secretary of state, within thirty days of such filing and acceptance, shall be filed with and recorded by the clerk of the superior court of the county in which the principal place of business of the corporation is to be located, and no corporation shall, until such articles be left for record, have legal existence. The clerk of court shall forthwith transmit to the secretary of state a certificate stating the time when such certificate was received. Upon the issuance of such certificate, the secretary of state shall issue a certificate of incorporation. (1915, c. 144, s. 3; C. S. 5245.)

§ 54-115. Fees for incorporation.—For filing the articles of incorporation of corporations organized under this subchapter, the fees therefor shall be paid the secretary of state ten dollars and his fees allowed by law, and for the filing of an amendment to such articles, five dollars and his fees allowed by law: Provided, that when the authorized capital stock of such corporations shall be less than one thousand dollars, such fee for filing either the articles of incorporation or amendments thereto shall be two dollars. For recording copy of such articles, the clerk of court shall receive a fee of fifty cents, to be paid by the person presenting such papers for record. (1915, c. 144, s. 4; C. S. 5246.)

§ 54-116. By-laws adopted.—At the time of making the articles of incorporation the corpora
tors shall make by-laws which shall provide: 1. The name of the corporation.
2. The purposes for which it is formed.
3. Qualifications for membership.
4. The time of the annual meeting; the manner in which members shall be notified of meetings; the manner of conducting the meetings; and the number of members which shall constitute a quorum at the meetings, and regulations as to voting.
5. The number of members of the board of directors; powers and duties; the compensation and duties of officers elected by the board of directors.
6. In the case of selling agencies or productive societies, regulations for grading.
7. In the case of selling agencies or productive societies, regulations governing the sale of products by the members through the organization.
8. The par value of the shares of capital stock.
9. The conditions upon which shares may be issued, paid in, transferred, and withdrawn.
10. The manner in which the reserve fund shall be accumulated.
11. The manner in which the dividends shall be determined and paid to members.
12. Associations, societies, companies or exchanges, organized hereunder to engage in the telephone or electric light business upon a mutual basis, shall adopt a by-law limiting the patrons and subscribers to members of the association. (1915, c. 144, s. 5; 1925, c. 179, s. 4; C. S. 5247.)

Editor's Note.—This section was amended by Public Laws 1925, ch. 179, by adding thereto subsection twelve.

§ 54-117. General corporation law applied; dealing in products of non-members.—All mutual associations shall be maintained in accordance with the general corporation law, except as otherwise provided for in this subchapter. And no corporation or association hereafter organized under this subchapter for doing business in this State shall be permitted to deal in the products of non-members to an amount greater in value than such as are handled by it for members. (1915, c. 144, s. 17; 1925, c. 179, s. 1; 1931, c. 447, s. 2; C. S. 5248.)

Editor's Note.—The Act of 1911 added the second sentence to this section.

§ 54-118. Other corporations admitted.—All mutual corporations, companies, or associations heretofore organized and doing business under prior statutes, or which have attempted to so organize and do business, shall have the benefit of all of the provisions of this subchapter, and be bound thereby on filing with the secretary of state a written declaration, signed and sworn to by the president and secretary, to the effect that the mutual company or association has by a majority vote of its shareholders decided to accept the benefits of and to be bound by the provisions of this subchapter. No association organized under this subchapter shall be required to do or perform anything not specifically required herein, in order to become a corporation. (1915, c. 144, s. 16; 1925, c. 179, s. 1; C. S. 5249.)
Art. 17. Stockholders and Officers.

§ 54-119. Certificate for stock fully paid. — Certificates of stock shall not be issued to any subscriber until fully paid, but the by-laws of the association may allow subscribers to vote as shareholders: Provided, part of the stock subscribed for has been paid in cash. (1915, c. 144, s. 11; C. S. 5250.)

§ 54-120. Ownership of shares limited. — No shareholder in any such association shall own shares of a greater aggregate par value than twenty per cent of the paid-in capital stock, except as hereinafter provided, or be entitled to more than one vote. A mutual association shall reserve the right of purchasing the stock of any member whose stock is for sale, and may restrict the transfer of stock to such persons as are made eligible to membership in the by-laws. (1915, c. 144, s. 9; 1925, c. 179, s. 1; C. S. 5251.)

§ 54-121. Shares issued on purchase of business. — Whenever an association, created under this subchapter, shall purchase the business of another association or person, it may pay for the same in whole or in part by issuing to the selling association or persons shares of its capital stock to an amount which at par value would equal the fair market value of the business so purchased, and in such case the transfer to the association of such business at such valuation shall be equivalent to payment in cash for the shares of stock so issued. (1915, c. 144, s. 10; C. S. 5252.)

§ 54-122. Absent members voting. — At any regularly called general or special meeting of the shareholders a written vote received by mail from any absent shareholder, and signed by him, may be read in such meeting, and shall be equivalent to a vote of such of the shareholders so signing. Provided, he has been previously notified in writing of the exact motion or resolution upon which such vote is taken, and a copy of same is forwarded with and attached to the vote so mailed by him. In case of sickness or other unavoidable absence of a member, he shall be allowed to vote by proxy in writing; but no member shall vote more than one such proxy. (1915, c. 144, s. 12; C. S. 5253.)

§ 54-123. Directors and other officers. — Every such association shall be managed by a board of not less than five directors. The directors shall be elected by and from the stockholders of the association at such time and for such term of office as the by-laws may prescribe, and shall hold office for time for which elected and until their successors are elected and shall enter upon the discharge of such duties as are prescribed in the by-laws; but a majority of the stockholders shall have the power at any regular or special stockholders' meeting, legally called, to remove any director or officer for cause, and fill the vacancy, and thereupon the director or officer so removed shall cease to be a director or officer of the association. The officers of every such association shall be a president, one or more vice-presidents, a secretary and treasurer, who shall be elected annually by the directors, and each of the officers must be a director of the association. The office of secretary and treasurer may be combined, and when so combined the person filling the office shall be secretary-treasurer. (1915, c. 144, s. 6; C. S. 5254.)

Art. 18. Powers and Duties.

§ 54-124. Nature of business authorized. — An association created under this subchapter shall have power to conduct any agricultural, horticultural, forestry, dairy, mercantile, mining, manufacturing, telephone, electric light, power, storage, refrigeration, flume, irrigation, water, sewerage, or mechanical business, on the mutual plan. (1915, c. 144, s. 8; 1925, c. 179, ss. 1, 3; C. S. 5255.)

§ 54-125. Amendment of articles. — The association may amend its articles of incorporation by a majority vote of its shareholders at any regular shareholders' meeting, or any special shareholders' meeting called for that purpose, on ten days notice to the shareholders. The power to amend shall include the power to increase or diminish the amount of capital stock and the number of shares: Provided, the amount of the capital stock shall not be diminished below the amount of the paid up capital at the time the amendment is adopted. Within thirty days after the adoption of an amendment to its articles of incorporation, an association shall cause a copy of such amendment adopted to be recorded in the office of the secretary of state and of the clerk of court of the county where the principal place of business is located. (1915, c. 144, s. 7; C. S. 5256.)

§ 54-126. Apportionment of earnings. — The directors, subject to revision by the association at any general or special meeting, shall apportion the earnings by first paying dividends on the paid-up capital stock, not exceeding six per cent per annum, then setting aside not less than ten per cent of the net profits for a reserve fund, until an amount has been accumulated in the reserve fund equal to thirty per cent of the paid-up capital stock, and not less than two per cent thereof for an educational fund to be used in teaching cooperation, and the remainder of the net profits by uniform dividend upon the amount of purchases of shareholders and upon the wages and salaries of employees, and one-half of such uniform dividend to nonshareholders on the amount of their purchase, which may be credited to the account of such nonshareholders on account of capital stock of the association; but in selling agencies such as creameries, canneries, warehouses, factories, and the like, dividends shall be prorated on raw material delivered instead of on goods purchased. In every association which is both a selling and productive concern, or in any association distributing the dividends the dividends may be on both raw material delivered and on goods or service purchased by patrons. (1915, c. 144, s. 13; 1925, c. 179, s. 5; C. S. 5257.)

Editor's Note. — The words, "for a service and distributing association" and "for service," in the last sentence of this section, were added, to the sentence as it formerly stood, by Public Laws 1925, ch. 179.

§ 54-127. Time of distribution. — The profits or net earnings of such associations shall be distributed to those entitled thereto, at such times as the by-laws shall prescribe, which shall be as
often as once in twelve months. (1915, c. 144, s. 14; C. S. 5258.)

§ 54-128. Annual reports.—Every association organized under the provisions of this subchapter shall annually, or on before the first day of March of each year, make a report to the secretary of state; such report shall contain the name of the company, its principal place of business in this state, and generally a statement as to its business, showing total amount of business transacted, amount of capital stock subscribed for and paid in, number of shareholders, total expenses of operation, amount of indebtedness or liabilities, and its profits and losses. A copy of such report shall also be filed with the division of markets in the Department of Agriculture. (1915, c. 144, s. 15; C. S. 5259.)

SUBCHAPTER V. MARKETING ASSOCIATIONS.

Art. 19. Purpose and Organization.

§ 54-129. Declaration of policy.—In order to promote, foster, and encourage the intelligent and orderly producing and marketing of agricultural products through cooperation, and to eliminate speculation and waste; and to make the distribution of agricultural products as direct as can be efficiently done between producer and consumer; and to stabilize the marketing problems of agricultural products this subchapter is enacted. (1921, c. 87, s. 1; 1935, c. 350, s. 1; C. S. 5259(a).)

Editor's Note.—An excellent discussion of co-operation marketing will be found in 1 N. C. Law Rev. 216, and a review of the cases in 2 N. C. Law Rev. 222. Volume 27 of the Columbia Law Review pp. 827 et seq. contains an article on the constitutionality of this and the corresponding statutes of other states as being in restraint of trade. The soundness of the North Carolina decisions upholding the statute is questioned.

Public Laws of 1935 inserted the words "producing and."


Same—Assailed on Ground of Insufficient Signers. — In Pittman v. Tobacco Growers Co-Op. Ass'n, 187 N. C. 340, 341, 121 S. E. 634, the Court said that the validity cannot be assailed by alleging an insufficient number of signers. This is a collateral attack and is not a direct attack by the State upon a quo warranto to vitiate the incorporation. Besides, there was no evidence of an insufficient sign-up, and if the plaintiff could bring a collateral attack to vitiate the organization, the burden is upon him to produce evidence to that effect. Withdrawal of Charter. — It was held in the Tobacco Growers Co-Op. Ass'n v. Jones, 185 N. C. 265, 117 S. E. 174, that since an association formed under this act had no capital, stock, surplus or credit except as given by the act, the legislature may withdraw its charter at any time, and for this reason a monopoly is safely guarded against. For a constructive criticism of this holding, see 27 Columbia Law Rev. 827 et seq.

§ 54-130. Definitions.—As used in this subchapter—

(a) The term "agricultural products" shall include horticultural, viticultural, forestry, dairy, livestock, poultry, bee, and any farm products;

(b) The term "member" shall include actual members of associations without capital stock and holders of stock in associations organized with capital stock;

(c) The term "association" means any corporation organized under this subchapter; and

(d) The term "person" shall include individuals, firms, partnerships, corporations, and associations.

Editor's Note.—The 1935 amendment omitted "common" which preceded the word "stock."

§ 54-131. Who may organize. — Five (5) or more persons engaged in the production of agricultural products may form a nonprofit, cooperative association, with or without capital stock, under the provisions of this subchapter. (1921, c. 87, s. 3; C. S. 5259(c).)

§ 54-132. Purposes. — An association may be organized to engage in any activity in connection with the producing, marketing or selling of the agricultural products of its members and other farmers, or with the harvesting, preserving, drying, processing, canning, packing, storing, handling, shipping, or utilization thereof, of the manufacturing or marketing of the by-products thereof; or in connection with the manufacturing, selling, or supplying to its members of machinery, equipment, or supplies: or in the financing of the above enumerated activities; or in any one or more of the activities specified herein. (1921, c. 87, s. 4: 1933, c. 350, s. 2; 1935, c. 320, s. 2; C. S. 5259(d).)

Editor's Note.—Public Laws of 1933, c. 350, inserted, near the beginning of this section, the words "and other farmers" after the word "members."

The amendment of 1935 inserted the word "producing" preceding the word "marketing."

§ 54-133. Preliminary investigation. — Every group of persons contemplating the organization of an association under this subchapter is urged to communicate with the chief of the division of markets, who will inform it whatever a survey of the marketing conditions affecting the commodities to be handled by the proposed association indicates regarding probable success. (1921, c. 87, s. 5; C. S. 5259(e).)

§ 54-134. Articles of incorporation. — Each association formed under this subchapter must prepare and file articles of incorporation, setting forth:

(a) The name of the association.

(b) The purposes for which it is formed.

(c) The place where its principal business will be transacted.

(d) The term for which it is to exist, not exceeding fifty (50) years.

(e) The names and addresses (not less than five) of those who are to serve as directors for the first term or until the election of their successors.

(f) If organized without capital stock, whether the property rights and interest of each member shall be equal or unequal; and if unequal, the article shall set forth the general rule or rules applicable to all members by which the property rights and interests, respectively, of each member
may and shall be determined and fixed; and this association shall have the power to admit new members who shall be entitled to share in the property of the association with the old members, in accordance with such general rule or rules. The amendment of the articles of incorporation shall not be altered, amended, or repealed except by the written consent or the vote of three-fourths of the members.

(g) If organized with capital stock, the amount of such stock and the number of such shares into which it is divided and the par value thereof. The capital stock may be divided into preferred and common stock. If so divided, the articles of incorporation must contain a statement of the number of shares of stock to which preference is granted and the number of shares of stock to which no preference is granted and the nature and extent of the preference and the privileges granted to each.

In addition to the foregoing, the petition for articles of incorporation may contain any provision consistent with law with respect to management, regulation, government, financing, indebtedness, membership, the establishment of voting districts and the election of delegates for representative purposes, the issuance, retirement, and transfer of its stock, if formed with capital stock, or any provisions relative to the way or manner in which it shall operate with respect to its members, officers, or directors, and any other provisions relating to its affairs; provided that nothing set forth in this paragraph shall be construed as limiting any of the rights or powers otherwise given to such associations.

The articles must be subscribed by the incorporators and acknowledged by one of them before an officer authorized by the law of this state to take and certify acknowledgments of deeds and conveyances; and shall be filed in accordance with the provisions of the general corporation law of this state; and when so filed, the articles of incorporation, or certified copies thereof, shall be received in all the courts of this state, and other places, as prima facie evidence of the facts contained therein, and of the due incorporation of such association.

The articles of incorporation shall be filed with the chief of the division of markets. (1921, c. 87, s. 8; 1935, c. 230, ss. 3, 4; C. S. 5259(f).)

§ 54-136. Amendments to articles of incorporation.—Each association incorporated under this subchapter must, within thirty (30) days after its incorporation, adopt for its government and management a code of by-laws, not inconsistent with the powers granted by this subchapter. A majority vote of a quorum of the members or stockholders attending a meeting, of which notice of the proposed by-law or by-laws shall have been given, is sufficient to adopt or amend the by-laws. Each association under its by-laws may also provide for any or all of the following matters:

(a) The time, place, and manner of calling and conducting its meetings.
(b) The number of stockholders or members constituting a quorum.
(c) The right of members or stockholders to vote by proxy or by mail, or by both, and the conditions, manner, form, and effects of such votes.
(d) The number of directors constituting a quorum.
(e) The qualifications, compensations, and duties and terms of office of directors and officers; time of their election, and the mode and manner of giving notice thereof.
(f) Penalties for violations of the by-laws.
(g) The amount of entrance, organization, and membership fees, if any; the manner and method of collection of the same, and the purposes for which they may be used.
(h) The amount which each member or stockholder shall be required to pay annually or from time to time, if at all, to carry on the business of the association, the charge, if any, to be paid by each member or stockholder for services rendered by the association to him, and the time of payment and the manner of collection; and the marketing contract between the association and its members or stockholders which every member or stockholder may be required to sign.
(i) The number and qualification of members or stockholders of the association and the conditions precedent to membership or ownership of common stock; the method, time, and manner of permitting members to withdraw or the holders of common stock to transfer their stock; the manner of assignment and transfer of the interest of members, and of the shares of common stock; the conditions upon which, and the time when membership of any member shall cease; the automatic suspension of the rights of a member when he ceases to be eligible to membership in the association, and mode, manner, and effect of the expulsion of a member; manner of determining the value of a member's interest and provision for its purchase by the association upon the death or withdrawal of a member or stockholder, or upon the expulsion of a member or forfeiture of his membership, or at the option of the association, by conclusive appraisal by the board of directors. In case of the withdrawal or expulsion
§ 54-137. General and special meetings; how called.—In its by-laws each association shall provide for one or more regular meetings annually. The board of directors shall have the right to call a special meeting at any time, and ten per cent of the members or stockholders may file a petition stating the specific business to be brought before the association, and demand a special meeting at any time. Such meeting must therefore be called by the directors. Notice of all meetings, together with a statement of the purposes therefor, shall be mailed to each member at least ten days prior to the meeting: Provided, however, that the by-laws may require instead that such notice may be given by publication in a newspaper of general circulation, published at the principal place of business of the association. (1921, c. 87, s. 11; C. S. 5259(i).)

§ 54-138. Conflicting laws not to apply.—Any provisions of law which are in conflict with this subchapter shall not be construed as applying to the associations herein provided for. (1921, c. 87, s. 20; C. S. 5259(j).)

§ 54-139. Limitation of use of term "co-operative".—No person, firm, or corporation, or association hereafter organized or doing business in this state shall be entitled to use the word "co-operative" as part of its corporate or other business name unless it has complied with the provisions of this subchapter. (1921, c. 87, s. 21; C. S. 5259(k).)

§ 54-140. Association heretofore organized may adopt the provisions of this subchapter.—Any corporation or association organized under previous existing statutes may, by a majority vote of its stockholders or members, be brought under the provisions of this subchapter by limiting its membership and adopting the other restrictions as provided herein. It shall make out in duplicate a statement signed and sworn to by its directors, upon forms supplied by the secretary of state, to the effect that the corporation or association has by a majority vote of its stockholders or members decided to accept the benefits and be bound by the provisions of this subchapter. Articles of incorporation shall be filed as required in § 54-134, except that they shall be signed by the members of the board of directors. The filing fees shall be the same as for filing an amendment to articles of incorporation. (1921, c. 87, s. 24; C. S. 5259(l).)

Cross Reference.—As to fees for filing an amendment to articles of incorporation, see § 54-144.

§ 54-141. Associations not in restraint of trade.—No association organized hereunder shall be deemed to be a combination in restraint of trade or an illegal monopoly; or an attempt to lessen competition or fix prices arbitrarily, nor shall the marketing contracts or agreements between the association and its members, or any agreements authorized in this subchapter be considered illegal or in restraint of trade. (1921, c. 87, s. 26; C. S. 5259(m).)

Purpose and Effect of Act.—This chapter, is an enabling act whereby associations of growers may be formed by the voluntary act of those joining therein for handling the product of its members, to enable them to obtain a fair price therefor without profit to the organization itself, in opposition to any agreement among the manufacturers or others that may have a contrary effect, and under conditions that will keep the public informed of its methods, and control them under governmental supervision when they go beyond a protective policy or become monopolistic in effect; and the statute, and the organization formed in pursuance thereof, are not objectionable as being in restraint of interstate commerce, or contrary to the law against monopolies or the public policy or Constitution of this State. Tobacco Growers Co-Op. Ass'n v. Jones, 185 N. C. 265, 117 S. E. 174. Presumption in Favor of Validity.—The legal presumption is in favor of the validity of the marketing contract made by a member with the cooperative association, in an action by the latter against the former for its breach, which presumption will only yield when its illegal character plainly appears; and in this case there is nothing appearing that would indicate the association proposed to sell the member's tobacco for a greater sum than its true or actual value, or that it was acting in violation of the Anti-trust Law, or in restraint of trade. Tobacco Growers Co-Op. Ass'n v. Jones, 185 N. C. 265, 117 S. E. 174.

Governmental Control as Affecting.—The governmental control to be exerted as hereinafter provided renders the marketing plan for the protection of its own members incapable of exercise to the extent of a monopoly or restraint of trade prohibited by law. Tobacco Growers Co-Op. Ass'n v. Jones, 185 N. C. 265, 117 S. E. 174.

§ 54-142. Application of general corporation laws.—The provisions of the general corporation laws of this state, and all power and rights thereunder, are also applicable to the associations organized hereunder, except where such provisions are in conflict with or inconsistent with the express provisions of this subchapter. (1921, c. 87, s. 28; C. S. 5255(o).)

Effect of Period Limiting Existence.—The provisions in the charter that an association under the provision of the cooperative marketing acts exists for five years, is the same as applies to a period limited for the existence of other corporations formed under other legislative acts, and does not contemplate that the association hold over the crops raised in any year for one or more successive years, such being destructive of the purposes of the association as contemplated by the statute. Tobacco Growers Co-Op. Ass'n v. Jones, 185 N. C. 265, 117 S. E. 174.

§ 54-143. Annual license fees.—Each association organized hereunder shall pay an annual license fee of ten dollars ($10), but shall be exempted from all franchise or license taxes. (1921, c. 87, s. 29; C. S. 5259(p).)

Cross Reference.—As to listing property for taxes, see § 105-316.

§ 54-144. Filing fees.—For filing articles of incorporation, an association organized hereunder shall pay ten dollars ($10); and for filing an amendment to the articles, two dollars and one-half ($2.50). (1921, c. 87, s. 30; C. S. 5259(q).)

Art. 20. Members and Officers.

§ 54-145. Members.—(a) Under the terms and conditions prescribed in its by-laws, an association may admit as members, or issue common stock, only to persons engaged in the production of the agricultural products to be handled by or through the association, including the lessees and tenants of land used for the produc-
tion of such products and any lessors and landlords who receive as rent part of the crop raised on the leased premises.

(b) If a member of a nonstock association be other than a natural person, such member may be represented by any individual, associate, officer, or member thereof, duly authorized in writing.

(c) One association organized hereunder may become a member or stockholder of any other association or associations, organized hereunder. (1921, c. 87, s. 7; C. S. 5259(r).)

§ 54-146. Directors; election.—(a) The affairs of the association shall be managed by a board of not less than five directors, elected by the members or stockholders from their own number. The by-laws may provide that the territory in which the association has members shall be divided into districts, and that the directors shall be elected according to such districts. In such case the by-laws shall specify the number of directors to be elected by each district, the manner and method of reapportioning the directors and of redistricting the territory covered by the association. The by-laws may provide that primary elections should be held in each district to elect the directors apportioned to such districts, and the result of all such primary elections must be ratified by the next regular meeting of the association.

(b) The by-laws shall provide that one or more directors shall be appointed by the director of agricultural extension or any other public official or commission. The directors so appointed need not be members or stockholders of the association, but shall have the same powers and rights as other directors.

(c) An association may provide a fair remuneration for the time actually spent by its officers and directors in its service. No director, during the term of his office, shall be a party to a contract or profit with the association differing in any way from the business relations accorded regular members or holders of common stock of the association, or to any other kind of contract differing from terms generally current in that district.

(d) When a vacancy on the board of directors occurs, other than by expiration of term, the remaining members of the board, by a majority vote, shall fill the vacancy, unless the by-laws provide for an election of directors by districts. In such case the board of directors shall immediately call a special meeting of the members or stockholders in that district to fill the vacancy: Provided, that this subsection shall not apply to the director or directors appointed under the provisions of subsection (b) of this section; Provided further, that any vacancy occurring in the office of a director appointed under subsection (b) of this section shall be filled in the same manner as the original appointment was made. (1921, c. 87, s. 12; C. S. 5259(r).)

§ 54-147. Election of officers.—The directors shall elect from their number a president and one or more vice presidents. They shall also elect a secretary and treasurer, who need not be directors, and they may combine the two latter offices and designate the combined office as secretary-treasurer. The treasurer may be a bank or any depository, and as such shall not be considered an officer, but as a function of the board of directors. In such case the secretary shall perform the usual accounting duties of the treasurer, excepting that the funds shall be deposited only as authorized by the board of directors. (1921, c. 87, s. 13; C. S. 5259(t).)

§ 54-148. Stock; membership certificates; when issued; voting; liability; limitation on transfer of ownership.

(a) When a member of an association established without capital stock has paid his membership fee in full, he shall receive a certificate of membership.

(b) No association shall issue stock to a member until it has been fully paid for. The promissory notes of the members may be accepted by the association as full or partial payment. The association shall hold the stock as security for the payment of the note, but such retention as security shall not affect the members' right to vote.

(c) Except for debts lawfully contracted between him and the association, no member shall be liable for the debts of the association to an amount exceeding the sum remaining unpaid on his membership fee or his subscription to the capital stock, including any unpaid balance on any promissory notes given in payment thereof.

(d) A cooperative association, incorporated under this subchapter, may fix or limit in its by-laws the amount of stock which one member might own in said association.

(e) No member or stockholder shall be entitled to more than one vote.

(f) Any association organized with stock under this subchapter may issue preferred stock, with or without the right to vote. Such stock may be redeemable or retrievable by the association on such terms and conditions as may be provided for by the articles of incorporation and printed on the face of the certificate.

(g) The by-laws shall prohibit the transfer of the common stock of the association to persons not engaged in the production of the agricultural products handled by the association, and such restrictions must be printed upon every certificate of stock subject thereto.

(h) The association may at any time, except when the debts of the association exceed fifty per cent (50%) of the assets thereof, buy in or purchase its common stock at book value thereof as conclusively determined by the board of directors, and pay for it in cash within one (1) year thereafter. (1921, c. 87, s. 14; 1935, c. 436, s. 27; C. S. 5259(u).)

Editor's Note—The amendment of 1935 changed subsection (d) of this section. Prior to the amendment no stockholder could own more than one-twentieth of the common stock and the association could in its by-laws limit the amount to less than one-twentieth.

§ 54-149. Removal of officer or director.—Any member may bring charges against an officer or director by filing them in writing with the secretary of the association, together with a petition signed by ten per cent of the members, requesting the removal of the officer or director in question. The removal shall be voted upon at the next regular or special meeting of the association, and by a vote of a majority of the members, the
association may remove the officer or director and fill the vacancy. The director or officer against whom such charges have been brought shall be informed in writing of the charges previous to the meeting, and shall have an opportunity at the meeting to be heard in person or by counsel, and to present witnesses; and the person or persons bringing the charges against him shall have the same opportunity.

In case the by-laws provide for election of directors by districts, with primary elections in each district, then the petition for removal of a director must be signed by twenty per cent of the members residing in the district from which he was elected. The board of directors must call a special meeting of the members residing in that district to consider the removal of the director. By a vote of the majority of that district, the director in question shall be removed from office:

Provided, that this section shall not apply to directors appointed under subsection (b) of § 54-146.

§ 54-150. Referendum.—Upon demand of one-third of the entire board of directors, any matter that has been approved or passed by the board must be referred to the entire membership of the stockholders for decision at the next special or regular meeting: Provided, however, that a special meeting may be called for the purpose.

(1921, c. 87, s. 15; C. S. 5259(v).)

§ 54-150. Referendum.—Upon demand of one-third of the entire board of directors, any matter that has been approved or passed by the board must be referred to the entire membership of the stockholders for decision at the next special or regular meeting: Provided, however, that a special meeting may be called for the purpose.


§ 54-151. Powers.—Each association incorporated under this subchapter shall have the following powers:

(a) To engage in any activity in connection with the producing, marketing, selling, harvesting, preserving, drying, processing, canning, packing, storing, handling, or utilization of any agricultural products produced or delivered to it by its members and other farmers; or the manufacturing or marketing of the by-products thereof; or in connection with the purchase, hiring, or use by its members of supplies, machinery, or equipment; or in the financing of any such activities; or in any one or more of the activities specified in this section. No such association, during any fiscal year thereof, shall deal in or handle products, machinery, equipment, supplies, and/or perform services for and on behalf of non-members to an amount greater in value than such as are dealt in, handled, and/or performed by it and on behalf of members during the same period.

(b) To borrow money and to make advances to members and other farmers who deliver agricultural products to the association.

(c) To act as the agent or representative of any member or members in any of the above mentioned activities.

(d) To purchase or otherwise acquire, and to hold, own, and exercise all rights or ownership in, and to sell, transfer, or pledge shares of the capital stock or bonds of any corporation or association engaged in any related activity or in the handling or marketing of any of the products handled by the association, or engaged in the financing of the association.

(e) To establish reserves and to invest the funds thereof in bonds or such other property as may be provided in the by-laws.

(f) To buy, hold, and exercise all privileges of ownership, over such real or personal property as may be necessary or convenient for the conducts and operation of any of the business of the association, or incidental thereto.

(g) To do each and every thing necessary, suitable or proper for the accomplishment of any one of the purposes or the attainment of any one or more of the objects herein enumerated; or conducive to or expedient for the interest or benefit of the association; and to contract accordingly; and in addition, to exercise and possess all powers, rights, and privileges necessary or incidental to the purposes for which the association is organized or to the activities in which it is engaged; and in addition, any other rights and powers, and privileges granted by the laws of this state to ordinary corporations, except such as are inconsistent with the express provisions of this subchapter; and to do any such thing anywhere.

(1921, c. 87, s. 6; 1933, c. 550, ss. 3, 4; 1935, c. 230, ss. 7-9; C. S. 5259(x)).

Editor's Note.—Public Laws of 1933, c. 390, made this section applicable to other farmers not members. Prior to the amendment the association could not handle the agricultural products of a non-member. See 11 C. L. Rev. 212, for review of this section as amended 1933.

Near the beginning of subsection (a) the amendment of 1935 inserted the word "producing," The amendment also changed the last sentence of that subsection and added the last clause of subsection (d).

Formation of Subsidiary Companies.—Objection to the validity of the Co-operative Marketing Act that an organization of tobacco growers thereunder has formed subsidiaries of minor companies to cure tobacco, redry it, and store it, prize it, and get it ready for market, is without merit, the money for such purpose being very small, specifically limited and under a complete system for its return to its members who have contributed it, it being necessary for the association to own or control enough of the facilities to make effective the authorized purpose of its organization. Tobacco Growers Co-Op. Ass'n v. Jones, 185 N. C. 265, 117 S. E. 174.

§ 54-152. Marketing contract.—(a) The association and its members may make and execute marketing contracts, requiring the members to sell, for any period of time, not over ten years, all or any specified part or share of their agricultural products or specified commodities either directly to the association or through the association or any facilities to be created by the association. The contract may provide that the association may sell or resell the products of its members, with or without taking title thereto, and pay over to its members the resale price, after deducting all necessary selling, overhead, and other costs and expenses, including interest on preferred stock, not exceeding eight per cent per annum, and reserve for retiring the stock, if any; and other proper reserves; and interest not exceeding eight per cent per annum upon common stock.

(b) The by-laws and the marketing contract may fix, as liquidated damages, specific sums to be paid by the member or stockholder to the association upon the breach by him of any provision of the marketing contract regarding the sale or delivery or withholding of products; and may further provide that the member will pay all costs, premiums for bonds, expenses and fees in case any action is brought upon the contract by the association; and any such provisions shall
be valid and enforceable in the courts of this state.

(c) In the event of any such breach or threatened breach of such marketing contract by a member, the association shall be entitled to an injunction to prevent the further breach of the contract, and to a decree of specific performance thereof. Pending the adjudication of such an action, and upon filing a verified complaint showing the breach or threatened breach, and upon filing a sufficient bond, the association shall be entitled to a temporary restraining order and preliminary injunction against the member. (1921, C. 87, s. 17; C. S. §328o(y)).

Validity of Standard Contract.—The provisions of the standard contract made by the Tobacco Co-operative Marketing Association with its member, under the provisions of the act, including premiums for bonds, expenses, and fees, and equitable relief by injunction to prevent the further breach of such contract, by a member, of a decree of specific performance, can be had, and also pending the adjudication of such actions, a temporary restraining order against the member upon the filing of a verified complaint showing the breach or threatened breach, and upon filing a sufficient bond, the association shall be entitled to a temporary restraining order and preliminary injunction against the member. Tobacco Growers Co-Op. Ass'n v. Patterson, 187 N. C. 252, 121 S. E. 631.

A co-operative association formed under the provisions of this act, whereby its members agree to sell and deliver to it all of the tobacco owned and produced by him for his own use, acquired by him as landlord or tenant, being, among other things, for the purpose of steadying the market and enabling the association to purchase, process, store, and distribute properly its tobacco and compensate him for his labor, skill, etc., exists by virtue of a constitutional statute, and the provisions of its standard contract with its members are valid and enforceable. Tobacco Growers Co-Op. Ass'n v. Battle, 187 N. C. 250, 121 S. E. 629.

Remedies for Breach by Member.—Upon the breach by a member of a contract for the handling of his crop the recovery of liquidated damages and all cost of the action, including premiums for bonds, expenses, and fees, and equitable relief by injunction to prevent the further breach of such contract, by a member, of a decree of specific performance, can be had, and also pending the adjudication of such actions, a temporary restraining order against the member upon the filing of a verified complaint showing the breach or threatened breach, and upon filing a sufficient bond, the association shall be entitled to a temporary restraining order and preliminary injunction against the member. Tobacco Growers Co-Op. Ass'n v. Patterson, 187 N. C. 250, 121 S. E. 629.

Same.—Liquidated Damages.—The fact that the co-operative marketing contract provides for liquidated damages does not give the association an adequate remedy at law against its members otherwise selling their tobacco as provided in the marketing contract, as such would seriously menace the existence of the association for the purpose for which it was incorporated under the provisions of the statute. Tobacco Growers Co-Op. Ass'n v. Pollock, 187 N. C. 409, 121 S. E. 763.

Solely Specific Performance.—Injuries from the breach of contract by a member of a co-operative marketing association, formed under the provisions of chapter 87, Public Laws of 1921, to market its tobacco, etc., cannot be adequately compensated in damages, and the equitable remedy of specific performance as allowed by the statute shall be upheld by the courts. Tobacco Growers Co-Op. Ass'n v. Battle, 187 N. C. 260, 121 S. E. 629.

Same.—Extent of Injunctive Relief.—Upon an alleged breach on the part of the member the equitable remedy by injunction is available to the association. Tobacco Growers Co-Op. Ass'n v. Patterson, 187 N. C. 252, 121 S. E. 631. Where the injunctive remedy is sought upon the ground that the defendant had not become a member, and the plaintiff's evidence tends strongly to show to the contrary, it was held that the court should be continued to the hearing upon the principle that the plaintiff has established an apparent right to the relief sought, and that the writ is reasonably necessary to protect the property pending the inquiry. Tobacco Growers Co-Op. Ass'n v. Battle, 187 N. C. 260, 121 S. E. 629; Tobacco Growers Co-Op. Ass'n v. Spikes, 187 N. C. 367, 121 S. E. 636.

The temporary restraining order obtained under the provisions of the act to restrain the defendant from disposing of his tobacco in breach of the contract complained of was caused by the plaintiff's own default, or if the continuance of the temporary restraining order would cause greater injury than its dissolution by the court. Tobacco Growers Co-Op. Ass'n v. Blaund, 187 N. C. 355, 121 S. E. 636.

The fact that the member gave a lien on his crop for advances made for advertising does not deprive the rights of the association under the contract such that an injunction against selling the crops should be continued until the final hearing. Tobacco Growers Co-Op. Ass'n v. Harvey & Son Co, 189 N. C. 494, 127 S. E. 545.

The general denial by the association of owing the defend an accounting of anything received is not a sufficient ground of defense as to the account between them from information available to it, was insufficient against the defense that the defendant forced him to sell a small portion of crop to maintain his livelihood because of a failure of the association to pay for bulk of crop under contract; and an order of the Superior Court judge dissolving the restraining order upon defendant's showing a tender of payment for plaintiff's protection was proper under the evidence in this case. Tobacco Growers Co-Op. Ass'n v. Blaund, 187 N. C. 356, 121 S. E. 636.

Same.—Justification for Breach. — A penalty in a small sum sued to recover it is not enough to justify an attempt to prevent a member by the tobacco marketing association, under its constitutional statute, and for the failure to market the tobacco of his non-member tenant, is not of sufficient proportionate importance to justify an attempt to prevent the member from selling his tobacco, only to the initial process and does not, and is not intended to withdraw from the courts their constitutional right to pass upon the question of continuing the injunction to the final hearing, nor to withdraw from their power to pass upon the validity of the contract made by the Tobacco Co-operative Marketing Association, formed under approved principles of law and equity. Tobacco Growers Co-Op. Ass'n v. Patterson, 187 N. C. 252, 121 S. E. 631.

Right of Court to Continue Injunction to Final Hearing.—The right given to injunctive relief against a member breaching his contract, upon filing the bond and verified complaint showing the breach or threatened breach, is limited only to the initial process and does not, and is not intended to withdraw from the courts their constitutional right to pass upon the question of continuing the injunction to the final hearing, and to withdraw from their power to pass upon the validity of the contract made by the Tobacco Co-operative Marketing Association, formed under approved principles of law and equity. Tobacco Growers Co-Op. Ass'n v. Patterson, 187 N. C. 252, 121 S. E. 631.

Right of Member to Mortgage Crop. —In Tobacco Growers Co-Op. Ass'n v. Patterson, 187 N. C. 252, 121 S. E. 631, it was said: "It is true that a member may place a mortgage or crop lien on his crop for the current year for the purpose of enabling him to successfully cultivate and produce the same, the contract between plaintiffs and defendant clearly contemplates such a mortgage, and good policy requires that such a privilege should never be withdrawn."

The mortgagee or lien holder, for supplies furnished to produce the crop has a right to demand and receive of defendant, or to enforce delivery by any appropriate procedure, of a sufficient amount of the tobacco or other property incurred by defendant in his crop, which includes all supplies furnished, the same, the contract between plaintiffs and defendant clearly contemplates such a mortgage, and good policy requires that such a privilege should never be withdrawn."

In the event of any such breach or threat thereof will not be dissolved by reason of a defense set up by its member that the tobacco was the subject of a lien for supplies necessary for its cultivation. The restraining order at all times to be made a party of record, that authoritative and final disposition should be made of the matter. Tobacco Growers Co-Op. Ass'n v. Patterson, 187 N. C. 252, 121 S. E. 631.

Effect of Mortgage upon Injunction.—A preliminary order restraining a member of the co-operative association from disposing of his crop is subject to summary breach thereof will not be dissolved by reason of a defense set up by its member that the tobacco was the subject of a lien for supplies necessary for its cultivation. The restraining order at all times to be made a party of record, that authoritative and final disposition should be made of the matter. Tobacco Growers Co-Op. Ass'n v. Patterson, 187 N. C. 252, 121 S. E. 631.

Evasive Answer Respecting Breach.—In proceedings for injunctive relief by a co-operative marketing association wherein the plaintiff definitely alleges that the defendant had breached his contract and declares his purpose to dis-
receives the tenant's crop as payment for rent, etc. He is liable for as much as he receives. Tobacco Growers Co-op. Ass'n v. Bissett, 187 N. C. 180, 121 S. E. 446.

**Evasion of Contract for Fraud.**—In order to avoid a written contract, which was made under this section, for fraud for misrepresentations of a party or his authorized agent, it must not only be shown that the statements complained of were false, but among other things that the party was at the time ignorant of their falsity, and was induced thereby to his damage, and he must show facts sufficient to make out a case of fraud with all the material elements required in such instances. Simpson v. Tobacco Growers Co-op. Ass'n, 180 N. C. 180, 121 S. E. 446.

In order to render void for fraud in its procurement a tobacco marketing contract made in conformity with the provisions of our statute, it is required that the member seeking to do so must introduce evidence of the fraud he relies on, as well as allege it. Tobacco Growers Co-op. Ass'n v. Chilton, 190 N. C. 603, 130 S. E. 312; Simpson v. Tobacco Growers Co-op. Ass'n, 190 N. C. 603, 130 S. E. 507.

Where one as agent for the Association falsely represents to a prospective member certain material advantages that induce him to sign the membership contract, without affording him, an illiterate man, an opportunity to become informed as to its contents, and he, within a reasonable time afterwards, is informed of this misrepresentation, and requests the agent to take his name off the books as a member, and the agent who is the agent of the Association who made the false representations were made were not upon an equality as to the facts, and the law will avoid the contract for the fraud. The cases in which the representations were made were not upon an equality as to the facts, and the law will avoid the contract for the fraud. The cases in which the representations were made were not upon an equality as to the facts, and the law will avoid the contract for the fraud.

§ 54-158. Contracts and agreements with other associations.—Any association may, upon resolution adopted by its board of directors, enter into all necessary and proper contracts and agreements, and make all necessary and proper stipulations, agreements and contracts and arrangements with any other cooperative corporation, association, or associations, formed in this or in any other state, for the cooperative and more economical carrying on of its business, or any part or parts thereof. Any two or more associations may by agreement between them, unite in employing and using or may separately employ and use the same methods, means, and agencies for carrying on and conducting their respective businesses.

§ 54-159. Breach of marketing contract of cooperative association; spreading false reports about the finances or management thereof; misdemeanor.—Any person or persons, or any corporation whose officers or employees knowingly induces or attempts to induce any member or stockholder of an association organized hereunder to breach his marketing contract with the association, or who maliciously and knowingly spreads false reports about the finances or management thereof shall be guilty of a misdemeanor and subject to a fine of not less than one hundred dollars ($100) and not more than one thousand dollars ($1,000), for such offense and shall be liable to the association aggrieved in a civil suit in the penal sum of five hundred dollars ($500) for each such offense: Provided, that this section shall not apply to a bona fide creditor of any member or stockholder of such association, or the agents or attorney of any such bona fide creditor, endeavoring to make collection of the indebtedness.

§ 54-155. Interest in other corporations or associations. — An association may organize, form, operate, own, control, have interest in, own stock of, or be a member of any other corporation or corporations, or parts thereof, whether own stock or parts thereof, whether public or private, for the economical carrying on of its business, or any part or parts thereof. Any two or more associations may by agreement between them, unite in employing and using or may separately employ and use the same methods, means, and agencies for carrying on and conducting their respective businesses.

§ 54-156. Cooperative associations may form subsidiaries. —Nothing in this chapter shall prevent an association organizing, forming, operating, owning, controlling, having an interest in, owning stock of, or being a member of any other corporation (hereinafter referred to as a subsidiary corporation) from including or having included in the charter or by-laws of such subsidiary corporation provisions for the control or management of said subsidiary corporation by such association to such extent as shall be by votes of the board of directors of such association, and the majority of the stockholders of such subsidiary corporation, be declared to be for the best interests of said association and said subsidiary corporation respectively. Such provisions may be so included in any such charter or by-laws and may by way of
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Art. 1. Definitions.

§ 55-1. Definitions.—The following words and phrases where used in this chapter, unless differently defined or described, have the meanings and references stated below:

1. "Corporation" refers to a corporation which may be created and organized under this chapter, or under any other general or any special act.

2. "Certificate of incorporation" is the instrument filed by the incorporators and by which the corporation is formed.

3. The words "special act" refer to the act of the legislature enacted for the purpose of creating the corporation.

4. The word "charter" means either "certificate of incorporation" or "special act," together with all appropriate parts of this chapter and its amendments.

5. "Court," "superior court," or "judge of the superior court" means the judge of the superior court resident in the district or holding the courts of the district in which the corporation affected has its principal place of business.

6. "Receiver" as used in this chapter includes receivers and trustees appointed by the court, as herein provided. (Rev. ss. 1136, 1222, 1247; Code, s. 668; 1901, c. 9; ss. 7, 74, 111; C. S. 1113.)

Cross References.—As to constitutional provisions regarding corporations, see N. C. Constitution, Article VIII. As to the requirements of the certificate of incorporation, see § 55-3. As to jurisdiction of superior courts upon dissolution of a corporation, see § 55-154. As to receivers of corporations, see § 55-147 et seq.

In General.—A corporation, though very hard to define, has been said to be "an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence. See the famous case of Dartmouth College v. Woodward, 4 Wheat, 518, 636, 4 L. Ed. 429.

It has been described as an "association of persons," contracting a joint capital for a common purpose, with assignable shares of property or stock; as it is briefly expressed, it is an act of incorporation, and an amendment thereto may be treated as part thereof. Humphrey v. Pegues, 16 Wall. 244, 21 L. Ed. 326.

Private, Public and Quasi Public Corporations.—Corporations are private, where the property of the corporation is private, although the corporation is engaged in a quasi public business, such as a railroad corporation, and the fact that the state owns a portion of its stock does not change its character; public and quasi public corporations, are corporations exercising a public employment, and having duties to the public to perform. E. I. du Pont de Nemours & Co. v. E. I. du Pont de Nemours & Co., 103 U. S. 1, 26 L. Ed. 359; Central Transp. Co. v. Pullman's Palace Car Co., 139 U. S. 54, 34, 10 L. Ed. 147.

A Charter Defined.—A charter, is an instrument or authority from the sovereign power, bestowing rights or privileges; as it is briefly expressed, it is an act of incorporation, and an amendment thereto may be treated as part thereof. Humphrey v. Pegues, 16 Wall. 244, 21 L. Ed. 326.

Art. 2. Formation.

§ 55-2. How created.—Three or more persons who desire to engage in any business, or to form any company, society, or association, not unlawful, except railroads other than street railways, or banking or insurance, or building and loan associations, may be incorporated in the following manner only (except corporations created for charitable, educational or reformatory purposes that are to be and remain under the patronage and control of the state): Such persons shall, by a certificate of incorporation, under their hands and seals, set forth—

Strict Construction. — The requirements of this section should be strictly construed. Hill v. Lumber Co., 113 N. C. 123, 188, 18 S. E. 127.

Position of Corporators and Promoters. — The promoters of a corporation are held to the duties of trustees and the obligation of directors. They may not take a secret or undis-
closed profit in the organization by way of shares therein or otherwise. Goodman v. White, 174 N. C. 399, 93 S. E. 906.

When Powers Granted by Special Act.—When corporate powers are granted by a special, instead of a general act of the Legislature, there must be evidence of acceptance by the corporators and compliance with all the conditions precedent prescribed by law, in order to show affirmatively that the corporation is lawfully organized. McMullan v. Lumber Co., 153 N. C. 52, 55, 68 S. E. 936.

1. The name of the corporation. No name can be assumed which is already in use by (a) a domestic corporation, or (b) a foreign corporation or his or its assigns, may be permitted to use the name same name, or one similar thereto, of the corporation whose good will it has purchased. The prohibition of this paragraph shall extend to names so nearly resembling or deceptively similar to such existing corporate names as may be likely to mislead or deceive the public or tend to confusion of identity. The name adopted must end with the word "company," "corporation," "incorporated" or the abbreviation "inc.," and will not be accepted for filing unless approved by the secretary of state.

Cross References.—As to necessity of displaying the name of the corporation, see § 55-37. As to use of the word "trust" in a name, see §§ 53-127 and 55-12. As to use of the term "building and loan association" in a name, see § 54-112. As to use of the word "land and loan association," see § 54-45. As to use of the term "credit union," see § 54-90. As to restriction of use of name "mellonal" as a part of a corporate name, see § 54-112. As to limitation of use of term "corporative," see § 54-139.

Editor's Note.—Prior to the 1935 amendment this subdivision read as follows: "No name can be assumed already in use by another domestic corporation, or so similar as to create uncertainty or confusion, and the name adopted must end with the word 'company,' 'corporation' or 'incorporated.'" The 1939 amendment added the requirement as to approval by secretary of state, and substituted the part of the third sentence after the word "so" for the words "similar in sound or appearance to such existing corporate names as may be likely to mislead or cause uncertainty or confusion, the name adopted must end with the word 'company,' 'corporation' or 'incorporated.'"

Right to Name.—One corporation cannot prevent another from using in its corporate title a name to which others have a common right. Howe Scale Co. v. Wyckoff, 198 U. S. 118, 25 S. Ct. 609, 47 L. Ed. 972.

And in the absence of contract, fraud or estoppel, any man may use his own name, in all legitimate ways, and as the whole or a part of a corporate name. Id.

2. The location of its principal office in the state.

Cross Reference.—As to change in principal office, see § 55-34.

3. The object or objects for which the corporation is to be formed.

Corporation Limited to Objects Stated.—A charter of incorporation creating a company for the purpose of effecting a communication by a blank road between designated points, with its trackage, rolling stock, and apportioning tolls to the company to establish a stage line upon their road, nor to contract for carrying the United States mail. Wiswall v. General R. R. Co., 56 N. C. 183.

Need Not Use All Powers.—The fact that a corporation avails itself of only one of several privileges granted by its charter—that is, manufacture all the products it is permitted, may be said to limit its powers, directors and stockholders, or any class or classes of the latter. (Rev. 1137; Code, s. 677; 1885, cc. 19, 190; 1899, c. 170; 1891, c. 257; 1893, cc. 344, 318; 1897, c. 204; 1899, c. 618; 1901, c. 2, s. 8, cc. 6, 41, 47, 1903, c. 403, 1911, c. 213, s. 1; 1913, c. 5, s. 1; Const., Art. 8, s. 1; Ex. Sess. 1920, c. 55; 1924, c. 98; 1935, c. 166, 320; 1939, c. 222; C. S. 1114.)

Cross References.—As to the constitutional power of the Legislature to form corporations, see N. C. Constitution, art. VIII, c. 204; as to legislature's power to amend chapter and charters of corporations, see § 55-36. As to the requirements for incorporating banks, see § 53-2 et seq. As to the establishment of railroads, see § 59-6 et seq. As to corporations engaged in mining and manufacturing building and loan associations, see § 54-2; land and loan associations, see §§ 54-46 of credit unions, see §§ 54-76 et seq.; cooperative associations, see §§ 511 et seq.; marketing associations, see §§ 514 et seq.; hospital service corporations, see §§ 57-2.

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Under Dual Incorporation.—Where a corporation is incorporated under the laws of two states, all its powers in relation to land lying in one of them must be derived from the law of that state alone. Betsy v. Knowler, 4 Pet. 152, 167, 7 L. Ed. 253.

Liabilities. — A corporation cannot absolve itself from the performance of its obligations, without the consent of the legislature, and courts will not allow corporations to escape from them. See § 55-7. New York, etc., R. Co. v. Winans, 17 How. 30, 40, 15 L. Ed. 27.

§ 55-3. Requirements as to certificate of incorporation.—The certificate of incorporation shall be signed by the original stock subscribers, or a majority of them, and must be acknowledged before an officer duly authorized under the laws of this state to take the proof or acknowledgment of deeds. The certificate shall then be filed in the office of the secretary of state, and there remain on record, and he shall, if it is in accordance with law, cause it to be recorded in his office in a book to be kept for that purpose and known as the Corporation Book. Upon the payment of the organization tax and fees, the secretary of state shall certify under his official seal a copy of the certificate of incorporation and probates, which certified copy shall be forthwith recorded in the office of the clerk of the superior court of the county where the principal office of the corporation in this state is, or is to be, established, in a book to be known as the Record of Incorporations. The certificate, or a copy thereof, duly certified by the secretary of state, or by the clerk of the superior court of the county in which it is recorded, is evidence in all courts and places, and in all proceedings, of incorporation of the corporation purporting thereby to have been established. (Rev., s. 1139; Code, ss. 678, 679, 682; 1901, c. 2, s. 9; 1903, c. 343; C. S. 1115.)

Cross References.—As to taxes for filing the certificate, see § 55-158. As to amending the certificate, see §§ 55-30 and 55-31. As to the effect of errors or omissions in the certificate, see § 55-76. As to fees for recording, see § 55-159.

Record of Incorporations Admissible in Evidence.—Under the former wording of this section which provided that the incorporation or copies duly certified by the clerk should be admissible in evidence, the record of Incorporation's book was also admissible as prima facie evidence of the complete incorporation and organization of the corporation purporting thereby to have been established. (Rev., s. 1139; Code, ss. 678, 679, 682; 1901, c. 2, s. 9; 1903, c. 343; C. S. 1115.)

Cross References.—As to taxes for filing the certificate, see § 55-158. As to amending the certificate, see §§ 55-30 and 55-31. As to the effect of errors or omissions in the certificate, see § 55-76. As to fees for recording, see § 55-159.

Proof of Existence—By Reputation.—The existence of a corporation may be proved by reputation. Gulf States Steel Co. v. Ford, 171 N. C. 157, 91 S. E. 84. Existence or nonexistence is a fact and may be proved as other facts. Id.

Same—By Written Contract.—Where a written contract entered into between the parties furnishes evidence that the defendant was dealing with the plaintiff as a corporation, and the plaintiff's existence as a corporation is denied, the contract may properly be introduced upon this disputed fact. Otis Elevator Co. v. Cape Fear Hotel Co., 172 N. C. 319, 90 S. E. 253.

Same—Copies Prima Facie Evidence. — Copies of letters of incorporation or copies duly certified by the clerk to show prima facie the existence of a corporation, and it cannot avoid its liability for debts because in fact it had but an inchoate existence. Marshall v. Macon County Bank, 108 N. C. 639, 13 S. E. 182.

§ 55-4. When incorporators become corporation.—From the date the certificate of incorporation is filed in the office of the secretary of state, the stock subscribers, their successors and assigns, are a body corporate by the name specified in the certificate, subject to amendment and dissolution as provided in this chapter. (Rev., s. 1140; 1901, c. 2, s. 10; C. S. 1116.)

Cross Reference.—As to when a building and loan association becomes a body corporate, see § 54-56; a co-operative association, see § 54-114; a credit union, see § 54-78; a bank, see § 53-5.

Signing and Recording Articles Sufficient. — When corporation powers are sought to be exercised, there must be evidence of the acceptance by the corporators of the privileges conferred and compliance with all conditions precedent prescribed by law in order to show affirmatively that the corporation has been formed. Bow v. Cook, 115 N. C. 324, 325, 20 S. E. 453.

No Requirement for Stock Issue. — There is no requirement of the statute that the stock should be issued or paid up before a valid organization can be effected or corporate action taken. Fayetteville Street Rly. v. Aberdeen R. R., 142 N. C. 423, 454, 59 S. E. 455.

Adoption of By-Laws Not Necessary.—By signing and recording the articles of incorporation three or more persons become a body corporate and it is not necessary for a corporation de jure by the act of the corporators to adopt by-laws. Powell Brothers v. McMillan Lumber Co., 153 N. C. 52, 68 S. E. 936.

Date Corporation Begins to Do Business.—While incorporators become a body corporate from the date the certificate of incorporation is filed in the office of the secretary of state, there is no presumption that the corporation is organized and able to transact business with the common consent from which it begins to do business as a corporation being a question of fact to be proved as any other fact. Hamilton v. Wright, 174 N. C. 425, 43 R. 749.

De Jure and De Facto Existence. — A corporation de jure is said to exist when persons holding a charter have made substantial compliance with the provisions of the same, looking to its proper organization, while a corporation de facto is one where the parties having a charter or law authorizing it have in good faith made a colorable compliance with such requirements, and have proceeded in the exercise of corporate powers as if they were a part of them. Wood v. Staton, 174 N. C. 245, 93 S. E. 794.

If the corporation has acted as such and exercised its franchises, then it is a corporation de facto, and in such case any irregularities in its organization is immaterial. Whinney v. Wyman, 101 U. S. 392, 395, 25 L. Ed. 1030.

Same—Distinctions. — So far as the State is concerned, the existence of a corporation de jure and a corporation de facto is that the former, having made substantial compliance with the charter requirements looking to the proper organization, can successfully resist the suit instituted by the State or its officers for the direct purpose of annulling the charter, while the latter cannot; but as to private persons holding claims against them, the individual corporators, in either case, are not personally liable, and a corporation de facto is immaterial. Same—Cases.Certain—Cases of incorporators may be held liable for the corporation's obligations. Boushall v. Myatt, 167 N. C. 431, 54 S. E. 852. Each of the stock corporations that the one so formed shall issue certificates of stock or adopt by-laws. Powell Brothers v. McMillan Lumber Co., 153 N. C. 52, 68 S. E. 936.


§ 55-5. Incorporators act until directors elected. — Until directors are elected the signers of the certificate of incorporation shall have the direction of the affairs of the corporation, and may take proper steps to obtain the necessary subscription to stock and to perfect the organization of the corporation. (Rev., s. 1141; 1901, c. 2, s. 11; C. S. 1117.)

Subscribers May Release Member. — Under this section the management of a corporation, before the first directors are elected, vests entirely in the subscribers, and, before the rights of creditors have been supervised, the subscribers or stockholders may, by the consent of the board of directors and within the limits of the charter, release one from his subscription to the stock. Boushall v. Myatt, 167 N. C. 338, 83 S. E. 352.

§ 55-6. First meeting; notice.—The first meeting of every corporation shall be called by a notice, signed by a majority of the incorporators, designating the time, place, and purpose of the meeting, which notice shall be published at least two weeks before the meeting, in a newspaper of the county where the corporation is established; or the meeting may be called without publication,
§ 55-7

Death of incorporators; vacancy filled. — When one or more of the incorporators of any corporation die before the corporation has been organized pursuant to law, the survivor or survivors may, in writing, designate others who may take the place and act instead of the deceased, in the organization; and the organization so effected by their aid is as effectual in law as if it had been effected by all the original incorporators. (Rev., s. 1140; 1901, c. 2, s. 18; C. S. 1118.)

Cross References. — As to stockholders’ meetings generally, see § 55-105. As to meeting called by three stockholders, see § 55-106.

Notice of Meeting. — The strict requirements as to notice, being intended to protect stockholders, may be waived by them, and when they do waive it, the meeting and all proceedings are as valid as they would be had the full statutory notice been given. Ben. v. Cook, 115 N. C. 324, 325, 330, 20 S. E. 453.

Meeting outside of State. — Though the first meeting of stockholders may have been held outside of the State, that fact cannot be shown by the body assuming the powers of a corporation in order to avoid its liability, nor by its debtors for the purpose of evading their accountability under contracts made with it, but the State only can set up that fact. Tuckasegee Mining Co. v. Goodhue, 118 N. C. 981, 985, 24 S. E. 797.

§ 55-8. Errors or omissions in certificate of incorporation. — Whenever in the certificate of incorporation under any general law there is an error or omission in the recital of the act under which the corporation is created or in the statement of error or omission required to be stated therein, it is lawful for the corporation to correct the error or supply the omission in the following manner: The board of directors shall pass a resolution declaring that the error or omission exists and that the corporation desires to correct it, and shall call a meeting of the stockholders to take action upon the resolution. The stockholders’ meeting shall be held upon such notice as the by-laws provide, and in the absence of such provision, upon ten days notice, given personally or by mail. If two-thirds in interest of all the stockholders vote in favor of the correction of the error or omission, a certificate of their action shall be made and signed by the president and secretary under the corporate seal; which certificate shall be acknowledged as in the case of deeds of real estate, and, together with the written consent in person or by proxy of two-thirds in interest of all the stockholders of the corporation, shall be filed in the office of the secretary of state. Upon the filing thereof, in conformity with this section, the certificate of incorporation has the same force and effect as if it had been originally drafted in conformity with the amendment so made. (Rev., s. 1141; 1901, c. 2, s. 96; C. S. 1119.)

Cross References. — As to amendments generally, see §§ 55-51 et seq. As to amendments before payment of stock, see §§ 55-30.

§ 55-9. Street railways. — Corporations may be organized under the provisions of this chapter for the purpose of building, maintaining or operating street railways. The term street railways, wherever used in this chapter, includes railways operated either by steam or electricity, or other motive power, used and operated as means of communication between different points in the same municipality, or between points in municipalities lying adjacent or near to each other, or between the municipality in which is the home office of the company and the territory contiguous thereto, and such railways may carry and deliver freights. No such railway may operate a line extending in any direction more than one hundred miles from the municipality in which is located its home office, or in any city or town without the consent of the municipal authorities thereof. (Rev., s. 1138; 1901, c. 6, 41; 1903, c. 350; Ex. Sess. 1913, c. 70, s. 1; C. S. 1121.)

§ 55-10: Repealed by Session Laws 1943, c. 543.

§ 55-11. Public parks and drives. — Three or more persons may be incorporated under this chapter for the purpose of creating and maintaining public parks and drives. It is not necessary, however, to set forth in the certificate of incorporation of any corporation created for such purpose the amount of authorized capital stock, the number of shares into which the same is divided, the par value of such stock, or the amount of capital stock with which it will commence business. Any corporation created hereunder shall have full power and authority to lay out, manage, and control parks and drives within the state, under such rules, laws, and regulations as the corporation may prescribe, and shall have power to purchase and hold property and take gifts or donations for such purpose. It may hold property and exercise such powers and trust for any town, city, township, or county, in connection with which said parks and drives shall be maintained. Any corporation, city, town, or county, holding such property, may vest and transfer the same to any such corporation for the purpose of controlling and maintaining the same as public parks and drives under such regulations and subject to such conditions as may be determined upon by such city, town, township, or county. Such corporation may adopt through its board of directors; and it may hold property and exercise such powers and trust for any town, city, township, or county, in connection with which said parks and drives shall be maintained. Any city, town, township, or county, holding such property, may vest and transfer the same to any such corporation for the purpose of controlling and maintaining the same as public parks and drives. All such lands as the corporation may acquire in order to avoid its liability, nor by its debtors for the purpose of evading their accountability under contracts made with it, but the State only can set up that fact. Tuckasegee Mining Co. v. Goodhue, 118 N. C. 981, 985, 24 S. E. 797.

§ 55-12: Repealed by Session Laws 1943, c. 543.

§ 55-13: Certain religious, etc., associations deemed incorporated. — In all cases where a religious, educational or charitable association has been formed prior to January first, one thousand eight hundred and ninety-four, and has since said
§§ 55-14 to 55-25: Transferred to §§ 115-383 to 115-394.  
Editor's Note.—Acts 1943, c. 543, transferred these sections to chapter 115 to follow immediately after § 115-382 and directed that they be appropriately renumbered.

Art. 4. Powers and Restrictions.  
§ 55-26. Express powers.—Every corporation has power—
1. To have succession, by its corporate name, for the period limited in its charter, and when the charter contains no time limit, for a period of sixty years.
2. To sue and be sued in any court.
3. To make, use, and alter a common seal.
4. To purchase, acquire by devise or bequest, hold and convey real and personal property in or out of the state, and to mortgage the same and its franchises.
5. To elect and appoint, in such manner as it determines to be proper, all necessary officers and agents, fix their compensation, and define their duties and obligations. And when there devolves upon an officer or agent of a corporation such duties and responsibilities that a financial loss would result to the corporation from the death and consequent loss of the services of such officer or agent, the corporation has an insurable interest in, and the power to insure the life of, the officer or agent, for its benefit and in all cases where a religious, educational, or charitable corporation or institution shall be, or has been, named as beneficiary in any policy of life insurance by a friend, student, former student or any person who for any reason is loyal to such corporation or institution and has himself or herself paid the premiums on said policy, then such corporation or institution shall be deemed to have an insurable interest in the life of such person.
6. To conduct business in this state, other states, the District of Columbia, the territories, and in foreign countries, and keep offices in or out of the state.
7. To make by-laws and regulations, consistent with its charter and the laws of the state, for its own government, and for the due and orderly conduct of its affairs and management of its property.
8. To wind up and dissolve itself, or be wound up and dissolved, in the manner hereafter mentioned.
9. To sell, transfer and convey any part of its corporate property in the course of its regular business.
10. To sell, transfer and convey any part of its corporate real or personal property when authorized so to do by its board of directors.
11. To sell, transfer and convey all of its corporate property when authorized so to do by its board of directors and approved by a two-thirds vote of the stock entitled to vote at any stockholders meeting, notice of which contains notice of the proposed sale: Provided, paragraph nine, and eleven of this section shall not be construed as authorizing a voluntary corporation to sell or convey all of its property otherwise than under the terms prescribed in its charter, or as authorizing the sale of stock in bulk, in violation of the Bulk Sales Law. (Rev. c. 1128; Code, ss. 663, 666, 691, 692, 693; 1839, c. 159; 1901, c. 2. s. 1; 1909, c. 507, s. 1; 1925, c. 235; 1929, c. 298; 1929, c. 269; 1939, c. 279; C. S. 1126.)

I. Editor's Note.  
II. Suits by and against Corporations.  
III. The Common Seal.  
IV. Rights as to Property.

Cross References.  
As to powers of banking and loan associations, see § 54-2; of land and loan associations, see § 54-46; of credit unions, see § 54-82 et seq.; of co-operative associations, see § 54-124 et seq.; of marketing associations, see §§ 54-151 and 54-152.  
As to powers of banks, see §§ 54-33 et seq.  
As to power of insurance companies to purchase or sell real estate, see §§ 58-76.  
As to powers of railroads and other carriers, see § 60-37 et seq.  
As to power of corporate eminent domain, see §§ 60-1 et seq.  
As to powers of a municipal corporation, see § 160-2.  
As to powers of consolidation of corporations, see §§ 55-150 to 55-170.  
As to corporate conveyance and when same is void as to torts, see § 55-40.  
As to mortgaged property of public service corporations subject to execution, subject to execution, see §§ 55-44.  
As to corporate directors and officers, see §§ 55-48 et seq.  
As to election of directors, see §§ 55-112 and 55-113.  
As to dissolution, see §§ 55-121 et seq.

I. EDITOR’S NOTE.  
Previous to 1925 this section enumerated 8 general powers. By chapter 235, Laws 1925 paragraph 9 containing an additional power with several provisos was added, and the 1929 amendment added another proviso thereto. The 1939 amendment struck out such paragraph as amended and inserted the present paragraphs 9, 10 and 11 in lieu thereof. See discussion of former paragraph 9 in 3 N. C. Law Rev. 137.  

II. SUITS BY AND AGAINST CORPORATIONS.  
Must Be in Corporate Name.—A suit against a corporation must be brought in its corporate name, and not against its officers or agents. Young v. Barden, 90 N. C. 424; Britain v. Newland, 19 N. C. 363. However, in case of insolvency, where a receiver has been appointed, he may sue in his own name or in that of the corporation. Smathers v. Bank, 115 N. C. 410, 413, 47 S. E. 893; Davis v. Mfg. Co., 114 N. C. 321, 19 S. E. 371.  

Mislabeled Immaterial.—A misnomer does not vitiate, provided the identity of the corporation with that intended is obvious. The fact that an action is brought as deeded, Asheville Division v. Astor, 92 N. C. 579, 584, or in a judgment, or in a criminal proceeding, McCrea v. Starr, 5 N. C. 352.  

Suits by Governmental Agencies.—The general authority to sue and be sued conferred on corporations by this section, has reference only to private and quasi public corporations, and not to corporations like the state prison, which are merely governmental agencies. As to these the authority to sue must be expressly given. Moody v. State’s Prison, 128 N. C. 12, 13, 38 S. E. 131.  

Same—State Highway Commission.—This section giving corporations the right to sue and be sued, does not apply to the State Highway Commission, a governmental
agency of the State, but only to private and quasi-private corporations. Carpenter v. Atlantic, etc., Ry., Co., 184 N. C. 414, 114 S. E. 693.

Suits against Cities and Towns. — As to cities and towns, their officers, and their agents, they are "broader authority" to "take, and be sued," it is equally well settled that this suability does not create any liability for damages caused by the torts of their officers and agents when acting in a governmental capacity, so-called "municipal corporations" to which acts and omissions should be referred; C. 146, 37 S. E. 187, and numerous cases there cited. Moody v. State's Prison, 128 N. C. 12, 13, 16, 38 S. E. 131.

Suits against Counties. — As to counties, we have an unbroken series of cases where the act was used or was ministerially done; in such cases and for such causes of action as are authorized by statute, and such cases do not embrace liabilities for negligence, the court will not infer the adoption of the corporate seal for that purpose. Bailey v. Hassell, 184 N. C. 169, 170, 173, 174, 115 S. E. 597, 601, 608. The simple word "seal," with a scroll adopted as the seal of the corporation engaged in the operation of a cotton mill had no such authority or power as was intended by the legislature, in Suits against Cities and Towns, at regular meetings of the corporation, confer that power upon the directors.


LIABILITY FOR Slander. — A corporation may be held liable for slander when the defamatory words are uttered by express authority of the company or by one of its officers or agents in the course of his employment, and authority for their utterance is found in any of the charters, by-laws, when consistent with its charter, determines by vote of the majority of shares or amount of interest be re- moved to, and to alter or renew the same at will is frequently con- sidered relevant and sufficient circumstances. Cotton v. Fisher Products Co., 177 N. C. 56, 97 S. E. 712. Cited in Independence Trust Co. v. Keesler, 206 N. C. 12, 16, 171 S. E. 533.

III. THE COMMON SEAL.

An Inherent Power. — The power to have a common seal and to alter or renew the same at will is frequently conferred on corporations by statute, but such a power is one of the "obligations" imposed by the charter of incorporation when not expressly conferred 14 C. J. § 404, p. 334. Bailey v. Hassell, 184 N. C. 450, 454, 115 S. E. 166, 168.

Any Device May Be Used. — While it is required for the sufficiency of the deed of a corporation to convey its lands that the corporate seal should be affixed to the instrument, any device used for the corporate seal will be sufficient, provided it is impressed in good faith upon the deed or by the corporation, and had been adopted by proper action of the corporation for that purpose. Bailey v. Hassell, 184 N. C. 450, 115 S. E. 166.

The simple word "seal," with a scroll adopted as the seal of a corporation and used by it on a deed to its lands according to resolutions of the stockholders and directors thereof at separate meetings held for the purpose, when all were present, is sufficient. Bailey v. Hassell, 184 N. C. 459, 115 S. E. 166.

IV. RIGHTS AS TO PROPERTY.

Corporation Not Stockholders Own Property. — The property of a corporation belongs to it, and not to the stockholders. They can have an interest in such property through their shares in the corporation, and in no other way. The state is like any other stockholder. Marshall v. Western N. C. Railroad Co., 92 N. C. 322.

Same. — Where a State is a stockholder. — Where the state is a stockholder in a railroad company, it is bound by the provisions of the charter in the same manner as an individual. It has no advantage as a stockholder on account of its sovereignty, for, by becoming such, it lays aside its character as a sovereign and places itself on a footing of equality with the individual stockholders. Marshall v. Western N. C. Railroad Co., 92 N. C. 322.

May a Corporation Exist for a Certain Number of Years? — Although the existence of a corporation be limited to a certain number of years, yet it is capable of holding estates in fee. Asheville Division v. Aston, 92 N. C. 578, 579.

Same. — Effect of Suspension upon Suspension of Business. — A corporation, chartered for the purpose of promoting temperance, does not forfeit real estate which it has purchased because it ceases to pursue the objects for which it was incorporated. Andrews v. Asheville Division v. Aston, 92 N. C. 578, 579.

Adverse Possession. — A corporation may acquire land by adverse possession when the corporation, by showing sufficient adverse possession for the statutory period, Cross v. Seaboard Air Line R. Co., 172 N. C. 119, 95 S. E. 14.

Ejectment and Trespass Will Lie. — Corporations, in contemplation of the law, are capable of having actual possession of real estate for all purposes, even when supposed to the contrary in the distant past, it is now settled that the actions of ejectment and trespass lie against them. Young v. Barden, 95 N. C. 424, 425.


Same. — Quasi Public Corporation. — A strictly private corporation can lawfully sell any of its property, real or personal, just as an individual can, but such is not the case with corporations which are quasi public and have duties to perform in which the public is interested. Barcello v. Hadgood, 118 N. C. 712, 713, 24 S. E. 124.

Same. — Same. — Same. — Any quasi public corporation cannot be authorized for the purpose of mining and milling ores has the right, by implication of law, to buy and sell real estate essential to the successful prosecution of its business. Barcello v. Hadgood, 118 N. C. 712, 713, 24 S. E. 124.

Right to Dispose of Franchise. — The franchise or the right of being a corporation, unlike the property and powers and privileges of a governmental corporation, is not transferred to another corporation without express authority and provision therefor, pointing out how it may be effected. New Orleans, etc., R. Co. v. Delamore, 114 U. S. 501, 508, 5 S. Ct. 1099, 29 L. Ed. 244. As to public corporations, cannot, without the consent of the legislature, transfer its franchise to another corporation, and abnegate the performance of its duties to the public, imposed upon it by its charter or for the consideration for the grant of it or of the connection with the company. Central Transp. Co. v. Pullman's Palace Car Co., 139 U. S. 24, 49, 11 S. Ct. 478, 35 L. Ed. 55.

Right to Mortgage Property. — Corporations other than railroad companies have a general power to mortgage their property, and to acquire and hold lands and buildings in such manner as to them is best suited. In the charter, the right to mortgage being a natural result of the right to incur an indebtedness. Antietam Paper Co. v. Chronicle Pub. Co., 182 N. C. 1341, 1342, 1343, 19 S. E. 558.

Right to Mortgage Franchise. — Power of Sale. — The power given to mortgage the franchises of the corporation must necessarily include the power to bring it to sale with the power to make the sale effectual as a means of transferring the property. The right of the corporation to mortgage is too well settled to require citation of authority. Wicksburg Waterworks Co., 202 U. S. 453, 464, 26 S. Ct. 600, 10 L. Ed. 1102.

Where Powers Exceeded. — Where a corporation takes a conveyance of lands for use beyond its charter powers, the deed is not void, but only voidable upon the objection of the State. Cross v. Seaboard Air Line R. Co., 172 N. C. 119, 95 S. E. 144.

V. THE OFFICERS; CONDUCTING BUSINESS; BY-LAWS AND DISSOLUTION.

Power to Insure Life of Officer. — A manufacturing corporation engaged in the operation of a cotton mill had no implied power to insure the life of its president, at least under the provisions of the charter. Garrett v. Bear, 144 N. C. 23, 25, 56 S. E. 479; Ex Parte Schollenberger, 96 U. S. 369, 377, 24 L. Ed. 853, Waite, C. J.

§ 55-27. By-laws. — A corporation may, by its by-laws, when consistent with its charter, determine the manner of calling and conducting all meetings; the number of members that constitute a quorum, and if the quorum is not so determined by the corporation, a majority in interest of the stockholders, represented either in person or by proxy, constitutes a quorum; the number of shares that will entitle the members to one or more votes; the mode of voting by proxy; the mode of selling shares for the nonpayment of assessments; the tenure of office of the several officers, and all matters connected with the management of the business. Any of the offices shall be filled by election by the directors.
By-laws made by the directors under power so conferred may be altered or repealed by the stockholders. (Rev. ss. 1145, 1146; Code, s. 664; 1901, c. 2, ss. 12, 13; C. S. 1127.)

Cross References.—As to power to make by-laws, see § 55-26, paragraph 7. As to by-laws of insurance companies, see § 58-72. As to by-laws of building and loan associations, see § 54-2; of a land and loan association, see § 54-52; of a credit union, see § 54-77; of a cooperative association, see § 54-116; of a marketing association, see § 54-136. As to power to determine, by by-law, the number of shares a stockholder must hold to qualify as director, see § 55-48.

Extension of Limits by By-Laws Act. The principle by which a shareholder in a corporation is bound by a corporate resolution, regularly passed pursuant to its charter, is only by reason of its by-laws, and not of the charters. Power to determine, by by-law, the status and rights as a shareholder and not where he deals independently with it as one of its customers in the line of its business. Cardwell v. Garrison, 179 N. C. 476, 103 S. E. 124.

By-Law to Sell Defaulting Subscriber's Stock. — Under this section a corporation is empowered to provide by its by-laws for the sale of shares of a subscriber who makes default in paying the assessments. Elizabeth City Cotton Mills v. Dunstan, 121 N. C. 12, 27 S. E. 1901.

Strangers Must Have Notice. — The by-laws of the corporation are not evidence for it against strangers who deal with it, unless brought home to their knowledge and assented to by them. Smith v. N. C. R. R. Co., 68 N. C. 107.

§ 55-28. Implied powers.—In addition to the powers enumerated in §§ 55-26 and 55-27 and the powers specified in its charter, every corporation, its officers, directors and stockholders, possess all the powers and privileges contained in this chapter so far as they are necessary or convenient to the attainment of the objects set forth in such charter, and shall be governed by the provisions of this chapter so far as they are applicable to and not inconsistent with such charter; and no corporation may possess or exercise any other corporate powers, except such incidental powers as are necessary to the exercise of the powers so given. Nothing in this chapter shall authorize or empower corporations organized under this chapter to lease, operate, maintain, manage or control any railroad except street railways. (Rev., s. 1174; 1901; c. 6; C. S. 1128.)

Cross References.—As to powers of street railways, see §§ 55-9. As to power of the legislature to amend or repeal corporate charters, see § 55-35.

In General. — Corporations possess by legal implication such powers as are essential to the exercise of the powers expressly conferred and necessary to attain the main objects for which they were formed. Barcello v. Hapgood, 118 N. C. 712, 713, 24 S. E. 124.

Charter Subsequent to General Law Prevails. — Where a charter was granted to a corporation after the passage of a general law and the charter confers powers conflicting with the general law, then by this section the provisions of the charter shall prevail over the ultra vires Power Co. v. Power Co., 171 N. C. 248, 256, 88 S. E. 349.

Ultra Vires Acts. — It is true, as held by numerous courts, including our own, that the doctrine of ultra vires has been very much modified in recent years, and many contracts made in the course of business, especially when executed and benefits are received or liabilities are incurred, will be upheld and enforced which were formerly declared ultra vires. Chen v. Bank, 125 N. C. 57, 38 S. E. 253; Womack Fr. Corp. 142.

Same.—State May Bring Action. — This modification of the doctrine does not confer the right in an appropriate case, of the State to enjoin a threatened transaction, Victor v. Louise Cotton Mills, 148 N. C. 107, 61 S. E. 648, 650.

Same.—Stockholder May Bring Action. — If the act of the corporation be ultra vires, any one or more stockholders may by some appropriate method call it in question and, unless by having consented to or acquiesced in it he is barred, have relief. Victor v. Louise Cotton Mills, 148 N. C. 107, 110, 61 S. E. 648; Littler v. Fayetteville, 149 N. C. 65, 62 S. E. 738.

Same.—Law Governing. — When the question of ultra vires arises, the validity of a corporate contract is to be determined by the lex loci contractus, not the lex fori. Eastern Building, etc., Ass’n v. Bbaugh, 185 U. S. 114, 121, 22 S. Ct. 566, 46 L. Ed. 830.

Conclusion of Law. — The question of whether acts are ultra vires a corporation is a conclusion of law from the facts stated. Spencer v. Railroad, 137 N. C. 107, 117, 49 S. E. 96.

§ 55-29. Banking powers not conferred by this chapter.—No corporation created under the provisions of this chapter shall have the power to carry on the business of discounting bills, notes or other evidences of debt, of receiving deposits of money, of buying gold or silver bullion or foreign coins, of buying and selling bills of exchange, or of issuing bills, notes or other evidences of debt, upon loan, or for circulation as money; but in the transaction of its business it may make and take in and dispose of bank notes, and may make any other such banking powers as it may need or deem necessary. Cardwell v. Garrison, 179 N. C. 476, 103 S. E. 124.

Cross References.—As to banks and banking in general, see Chapter 53.

Cited in Independence Trust Co. v. Keesler, 206 N. C. 12, 17, 173 S. E. 53.

§ 55-30. Amendments before payment of stock. —The incorporators of a corporation, before the payment of any part of its capital, may file with the secretary of state an amended certificate of incorporation, duly signed and acknowledged by the incorporators named in the original certificate, changing the original certificate of incorporation, in whole or in part, which amended certificate takes the place of the original one, and when recorded in the proper county is deemed to have been filed and recorded on the date of filing and recording the original certificate. The officers are entitled to the same fees for filing and recording the amended certificate of incorporation as if it were original; but there shall be charged no additional organization tax, except when the certificate is amended by increasing the capital stock, in which event such tax shall be paid upon the increase. (Rev., s. 1174; 1901, c. 2, s. 38; C. S. 1128.)

Cross References.—As to the original certificate of incorporation, see § 55-3. As to taxes for filing, see § 55-158.

Subscriber Released. — Any fundamental change in the charter of a corporation relieves a non-assenting subscriber from liability upon his stock. Bank v. City, 85 N. C. 433.

§ 55-31. Amendments, generally.—A corporation, whether organized under a special act or general laws, and which might now be created under the provisions of this chapter, may, in the manner set out below—

1. Change the nature or relinquish one or more branches of its business, or extend its business to such other branches as might have been inserted in its original certificate of incorporation.

2. Change its name.

3. Extend its corporate existence.

4. Increase or decrease its capital stock.

5. Change the par value of the shares of its capital stock.

6. Create one or more classes of preferred stock.

7. Make any other desired amendment. In all cases the certificate of amendment can contain

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only such provisions as could be lawfully and properly inserted in an original certificate of incorporation filed at the time of making the amendment.

The board of directors shall pass a resolution declaring that the amendment is advisable, and call a meeting of the stockholders to take action thereon; the meeting shall be held upon such notice as the by-laws provide, and in the absence of such notice, upon ten days notice, given personally or by mail; if the holders of a majority of the shares of stock with voting powers vote in favor of the amendment, a certificate thereof shall be signed by the president and secretary, under the corporate seal, acknowledged as in the case of deeds to real estate, and this certificate, together with the written assent, in person or by proxy, of said stockholders, shall be filed and recorded in the office of the secretary of state. Upon such filing the secretary of state shall issue a certified copy thereof, which shall be recorded in the office of the clerk of the superior court of the county in which the original certificate of incorporation is recorded, and thereupon the certificate of incorporation is amended accordingly. The certificate of the secretary of state, under his official seal, that such certificate of amendment and assent have been filed in his office, is evidence of the amendment in all courts and places.

A corporation which cannot now be created under the provisions of this chapter may, except as otherwise provided by law, in like manner increase or decrease its capital stock, or change its name, or extend its corporate existence: Provided, that before the Secretary of State shall issue a certificate of such amendment to any corporation possessing powers, franchises, privileges, or immunities, which could not be obtained under this chapter, he shall forthwith transmit to the Commissioner of Banks or the Utilities Commission, as the case may be, a copy of said certificate and shall not issue or record the same until duly authorized so to do by the Commissioner of Banks or the Utilities Commission, as the case may be, as provided for the issuing of certificates of incorporation of banks in the chapter entitled, 'Banks', provided that nothing herein shall be construed to require the increase of the capital stock of a bank renewing its charter over the capital of such bank at the time such renewal is applied for.

Any corporation organized on or after March 4, 1925, may insert a provision in its charter that the corporation has continued to act and do business as a corporation or organization of the State of North Carolina whose period of existence fixed in its charter has expired and of which corporation has hereafter be created by amendment of the charter or otherwise entitled to dividends or shares in distribution of assets in priority to any class of preferred stock already outstanding or stock not with the consent of the holders of record of two-thirds (or such greater amount as may be specified in the charter) of the number of shares of such outstanding preferred stock having voting powers: Provided, that the provisions of this paragraph shall not apply to banks and building and loan associations. (Rev., ss. 1175, 1178; 1893, c. 380; 1899, c. 618; 1901, c. 2, ss. 29, 30, 37; 1903, c. 516; 1925, c. 118, ss. 1, 24; 1927, c. 142; 1931, c. 243, ss. 4, 5, 1933, c. 134, ss. 7, 8; 1941, c. 97, s. 5; C. S. 1913.)

Cross References.—As to amendments by charitable, educational, penal, or reformatory corporations, see § 55-33. As to amendment of certificate of incorporation of building and loan association, see § 54-4.

§ 55-32. Indissolvent omission to file amendment extending corporate existence.—Any private corporation chartered under the general laws of the State of North Carolina whose period of existence fixed in its charter has expired and which corporation has continued to act and do business as a corporation, but has through inadvertence, omitted to file an amendment extend-
ing the period of its corporate existence, may at any time after the expiration of the period of corporate existence set forth in its original charter, file an amended certificate in the office of the Secretary of State as provided by § 55-31 to extend or renew its corporate existence, as provided for in the amended certificate; provided, this section shall not serve to impair the validity of any contract or vested right in existence at the time of the filing of said amended charter. All acts of such a corporation, purporting to be the acts of the corporation, done or performed after the expiration of its period of existence and before the amendment to its charter, shall be legal and valid as the acts and deeds of said corporation. (1929, c. 271; 1935, c. 6.)

Editor's Note.—Prior to the amendment of 1935 this section contained a seven-year limitation after the expiration of the original period in which an amended certificate should be filed. This provision was omitted.

§ 55-33. Amendments by charitable, educational, penal, reformatory, etc., corporations.—A charitable, educational, social, ancestral, historical, penal, or reformatory corporation not under the patronage or control of the state, and any corporation, without capital stock, organized for the purpose of aiding in the work of any church, religious society or organization, or fraternal order whether organized under a special act or general laws, may change its name, extend its corporate existence, change the manner in which its directors, trustees or managers are elected or appointed, abolish its present method of electing such officers and create a different method of election, and generally reorganize the manner of conducting such corporation, and make any other amendment of its charter, desired, in the following manner: The board of directors, trustees, or managers shall pass a resolution declaring that the amendment is advisable, and call a meeting of trustees, managers, and directors to take action thereon. The meeting shall be held upon such notice as the by-laws provide, and in the absence of such provision, upon ten days notice given personally or by mail. If two-thirds of the directors, trustees, or managers of the corporation vote in favor of the amendment, a certificate thereof shall be signed by the president and secretary under the corporate seal, acknowledged as provided in the case of deeds to real estate, and being chapter two, public laws of nineteen hundred and eighty of the public laws of eighteen hundred and one, are declared to be valid in all respects, whether such amendments were made in accordance with the provisions of chapter three hundred and eighty of the public laws of eighteen hundred and thirty-one, as synonymous with the words '"principal office,'" as used in this section and sections 55-2, par. 2 and 55-105. Roberson v. Johnson Lumber Co., 153 N. C. 120, 122, 68 S. E. 1064.

§ 55-34. Change of location of principal office.—The board of directors of a corporation organized under the laws of this state may, by resolution adopted at a regular or special meeting by a two-thirds vote of its members, change the location of the principal office of the corporation in the state. A copy of the resolution, signed by the president and secretary of the corporation and sealed with the corporate seal, shall be filed in the office of the secretary of state. No certificate need be filed of the removal of an office from one point to another in the same town, city, or township. (Rev. s. 1176; 1901, c. 2, s. 61; C. S. 1135.)

"Principal Place of Business." — The words "principal place of business," as used in section 1-79 must be regarded as synonymous with the words "principal office," as used in this section and sections 55-2, par. 2 and 55-105. (Roberson v. Johnson Lumber Co., 153 N. C. 120, 122, 68 S. E. 1064.)

§ 55-35. Curative act; amendments prior to 1901.—All amendments to the plan of incorporation of any corporation organized under the provisions of the general laws of North Carolina prior to the passage of the act entitled "An act to revise the corporation law of North Carolina," being chapter two, public laws of nineteen hundred and one, and one hundred and eighty of the public laws of eighteen hundred and thirty-one, or in accordance with the provisions of chapter two of the public laws of nineteen hundred and one; but no amendment shall be validated by this section unless it is an amendment of such nature as is authorized to be made under the provisions of chapter two of the public laws of nineteen hundred and one. (Rev. s. 1248; 1905, c. 316; C. S. 1134.)

§ 55-36. Amendment or repeal of this chapter; a part of all charters.—This chapter may be amended or repealed by the legislature, and every corporation is bound thereby; but such amendment or repeal shall not take away or impair any remedy against the corporation, or its officers, for any liability which has been previously incurred. This chapter and all amendments are a part of the charter of every corporation formed hereunder, so far as the same are applicable and appropriate to the objects of the corporation. (Rev. s. 1190; 1901, c. 2, s. 7; C. S. 1135.)

§ 55-37. Name must be displayed.—The name of every corporation must be at all times conspicuously displayed at the entrance of its principal office in this state, and in default thereof for sixty days the corporation is liable to a penalty of one hundred dollars, to be recovered with costs, by the state, in an action to be prosecuted by or under the direction of the attorney-general. (Rev. s. 1242; 1901, c. 2, s. 50; C. S. 1190.)

§ 55-38. Resident process agent.—Every corporation having property or doing business in this
state, whether incorporated under its laws or not, shall have an officer or agent in the state upon whom process in all actions or proceedings against it can be served. A corporation failing to comply with the provisions of this section is liable to a forfeiture of its charter, or to the revocation of its license to do business in this state. In the latter event, process in an action or proceeding against the corporation may be served upon the secretary of state by leaving a true copy thereof with him, and he shall mail the copy to the president, secretary or other officer of the corporation upon whom, if residing in this state, service could be made. For this service to be performed by the secretary, he shall receive a fee of fifty cents, to be paid by the party at whose instance the service was made. (Rev., s. 1843; 1901, c. 5; C. S. 1137.)

Cross References.—As to service of process upon a corporation, see § 1-97, paragraph 1. As to service of process upon foreign insurance companies, see § 58-153. As to foreign corporations generally, see § 55-117 et seq. As to service of process against a foreign corporation in an action within the jurisdiction of the state courts, see § 55-131. As to service of summons in action for dissolution, or for appointment of a receiver, see § 55-139.


Strict Compliance Not Required. — Formal compliance with the statutory requirements for domesticating these corporations and the appointment of process agents is not required, but it is sufficient if such corporations doing business in the state have been continuously for the statutory period subject to valid service of process, so as to confer jurisdiction on our courts to render binding judgments in personam against them. Anderson v. United States Fidelity Co., 174 N. C. 417, 418, 93 S. E. 948.

A Federal Land Bank created by act of Congress and deriving its right to own property and to do business in the State of North Carolina through a Federal statute is not a foreign corporation exercising such functions under express or implied authority of this State, and this section is not applicable to such corporation, and our courts acquire no jurisdiction over it by such service. Leggett v. Federal Land Bank, 204 N. C. 151, 167 S. E. 557.

Jurisdiction Over Foreign Corporation.—A foreign corporation created and existing outside the State of North Carolina and not by or through any agent of such corporation or person authorized to act for it in this state, constitutes "doing business in the State of North Carolina" if it transacts business in this state and not having domesticated in North Carolina, must be engaged in business within the state in order to give our courts jurisdiction over it. Goldey v. Morning News, 190 N. C. 314, 318, 129 S. E. 605.

The fact that nonresident defendant corporation had samples, order blanks and stationery in the state was held insufficient to show that defendant had property in the state for the purpose of service of process on it by service on the Secretary of State under the provisions of this section. Ploot v. Michael, 214 N. C. 655, 200 S. E. 429.

Transitory Cause of Action Arising in Another State.—In an action by a nonresident plaintiff against a nonresident bus corporation, doing business in this state, to recover for personal injuries alleged to have been sustained through negligence of defendant occurring in Virginia, service of process upon defendant corporation in this state, where facts therein appearing, the general criteria being that a foreign corporation is doing business in this state if it transacts business in this state, it was held that service of process upon such corporation upon compliance with its provisions in respect thereto. Luncelord v. Commercial Travelers Mutual Accident Assn., 190 N. C. 314, 129 S. E. 805.

The meaning of the phrase "doing business in this state" as used in this section is not susceptible to an all embracing definition, but the phrase means those activities of a foreign corporation which may be had on such corporation upon compliance with its provisions in respect thereto. Parris v. Fisher & Co., 219 N. C. 292, 13 S. E. (2d) 541.

It cannot be held that the issuance of one or more policies of fire insurance, by a corporation, created and existing under the laws of another state, and not authorized to do business in this state, gives such corporation jurisdiction in this state. In Fisher v. Ins. Co., 192 N. C. 115, 119, 133 S. E. 424.

In determining the question whether a foreign corporation is doing business within a state, so as to be subject to its jurisdiction, and, to the end that such jurisdiction may be exercised, subject to service of process from its courts, in accordance with statutory provisions for such service, it has been generally held that the foreign corporation must have entered the state and must have been within the state during the time such business was transacted. Ivy River Land, etc., Co. v. National Fire, etc., Co., 192 N. C. 115, 119, 133 S. E. 424.

A foreign banking corporation which sends its agents here for the purpose of investigating and looking after the property of its bank or branches situated here, and acts in this state the business it was created and authorized to act for it in this state, constitutes "doing business in this State" as used in this section. Ivy River Land, etc., Co. v. Virginia Trust Co., 206 N. C. 564, 174 S. E. 441.

Where nonresident defendant corporation employed a soliciting agent who took orders and forwarded them to home office in another state, it was held that defendant entered into it in the state where the home office was situated and that evidence failed to show that defendant was doing business in this state, and that it may have been served with summons under the provisions of this section. Smith v. Finance Co., 207 N. C. 567, 177 E. 181.

Section on Insurance Company.—In Fisher v. Ins. Co., 192 N. C. 115, 119, 133 S. E. 424, the court held that this method of service on an insurance company is not restricted to that method as prescribed by section 58-153 but that it may be made also in the manner prescribed by this section. Pardue v. Atlantic Greyhound Corp., 220 N. C. 815, 18 S. E. (2d) 367.

Merger of Express Companies.—An express company conveyed its property, used in transportation, for its appraised value to the American Express Company formed at the suggestion of the Directors of the American Express Co., under government control, retaining property of very large value, so that it remained perfectly solvent, and continued to do business in the manner of its original organization. McAllister v. American Ry. Exp. Co., 179 N. C. 556, 103 S. E. 929.

Doing Business Here Is Acceptance of Section. — Where foreign corporations come into the state to do business after the enactment of a statute providing a method of personal service on them, reasonably calculated to give them full notice of the pendency of suits against them, the statutory provisions are regarded as conditions on which they are allowed to do business within the state, and their doing so hereafter is an acceptance by them of the statutory method of service. For this service to be performed by or through any agent of such corporation or person authorized to act for it in this state, constitutes "doing business in this state" as used in this section. Ploot v. Michael, 214 N. C. 655, 200 S. E. 429.
§ 55-39. Process agent in county where principal office located; service on inactive corporations.—Every corporation chartered under the other act or law pertaining to the service of summons or process, but shall be in addition thereto. The extraordinary powers of a corporation, such as that of selling or leasing the corporate property, where it exists, and other property which is transferable by deed, must be regarded as affecting the standing of corporate mortgages whenever executed. 9 N. C. Law Rev. 363. Some of the cases treated here were subject to torts committed by such corporation prior to the execution of said deed, if persons injured, or their representatives, commence proceedings or actions to enforce their claims against said corporation within sixty days after the registration of said act as real estate law. [Rev. s. 1130; Code, s. 685; 1891, c. 118; 1893, c. 93, s. 2; 1899, c. 235, s. 17; 1901, c. 2, s. 2; 1903, c. 660, s. 1; 1905, c. 114; 1929, cc. 28, 199, 256; 1931, c. 238; 1943, c. 219, s. 1; C. S. 1138.) I. In General. II. The Seal. III. Filing and Practice. IV. Former Provisions as to Creditors. Cross References. As to probate of corporate conveyances, see §§ 47-41. As to validation of corporate probates, see §§ 47-70 to 47-75 and § 55-41. As to probate of corporate deeds when the corporation has ceased to exist, see § 47-16. As to probates before stockholders in building and loan association, see § 47-9.

I. IN GENERAL.

Editor's Note.—The Act of 1929, c. 28, inserted the words "public service" in the last sentence of this section. Public Laws of 1929, c. 189 provided that such amendatory act should not affect existing litigation, and Chapter 256 provided that it should be construed to apply only to instruments executed after its ratification. The Act of 1901 which became effective April 2, 1901, was so revised as to make it applicable to all existing public service companies, must be regarded as affecting the standing of corporate mortgages whenever executed. 9 N. C. Law Rev. 363. Some of the cases treated here were decided prior to these amendments.

The 1943 amendment inserted the second sentence. Purpose of Section. — The primary purpose of this section is to impose restraints upon insolvent corporations, and disable them from borrowing money and conveying their property to secure it, whereby present liabilities might go unpaid. Traders National Bank v. Lawrence Mfg. Co., 96 N. C. 298, 307, 3 S. E. 363.

Applies Generally. — By this section the Legislature expressed a general intention with regard to a general subject matter, namely, selling, leasing, and Chapter 256 provided that it should be construed to apply only to instruments executed after its ratification. The Act of 1901 which became effective April 2, 1901, was so revised as to make it applicable to all existing public service companies, must be regarded as affecting the standing of corporate mortgages whenever executed. 9 N. C. Law Rev. 363. Some of the cases treated here were decided prior to these amendments.

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to an agent designated in the resolution of the body, either by his official title or by his name. Barcello v. Haygood, 118 N. C. 712, 714, 730, 24 S. E. 124.

Hence a mortgage deed executed according to the provi- sion that it must be signed by the corporate seal and attested by the corporate seal was a valid deed. Traders National Bank v. Mfg. Co., 10 N. C. 439, 440, 44 S. E. 861.  

**Order Method of Execution Permissible.** — The statutory method of alienation by corporations, like that provided by this section is not exclusive of the common law mode of conveyance, and does not prohibit other methods of execution. Barcello v. Haygood, 118 N. C. 712, 713, 730, 24 S. E. 124.  

**Sixty Day Provision Mandatory.** — Under this section the action should be commenced within sixty days after the registration of the mortgage. Joyce v. Reflector Co., 176 N. C. 274, 275, 97 S. E. 44.  

**Judgment for Tort Committed before Transfer.** — Under this section as construed with §§ 47-18 and 47-20, an absolute sale is authorized. Fisher v. Bank, 132 N. C. 769, 777, 44 S. E. 601 where it was held that the mortgage being a chattel mortgaged by a well-known corporation, a conveyance of the mortgage is a conveyance of a personal chattel, and does not prohibit other methods of execution. Bason v. Mining Co., 90 N. C. 417.

**An instrument purporting to be the deed of a corporation, signed by the president and two members of the corporation, accompanied by delivery to the purchaser, is not void as to a judgment for the corporation. Caldwell v. Morganton Mfg. Co., 112 N. C. 339, 23 S. E. 475. See Clark v. Hodge, 116 N. C. 761, 21 S. E. 562.**

**When Private Seal of Officer Used.** — An instrument purporting to be the deed of a corporation, signed by the president and two members of the corporation, attested by its secretary, and its common seal to be affixed, with the signatures and seal, is properly executed as a common law deed. Bason v. Mining Co., 90 N. C. 417.  

**An instrument purporting to be the deed of a corporation, signed by the president and two members of the corporation, accompanied by delivery to the purchaser, is not void as to a judgment for the corporation. Caldwell v. Morganton Mfg. Co., 121 N. C. 339, 28 S. E. 475.**

When a corporate act must be executed by an instrument under seal and the corporation has adopted a common seal, the corporation speaks through and by its seal. Withrell v. Murphy, 154 N. C. 82, 69 S. E. 748.  

**A conveyance by a corporation of its property in trust for the benefit of the stockholders and duly witnessed, but there is no common seal attached, and the probate recites that it is "acknow-ledged..." signed by the president and two stockholders, such probate is insufficient and does not authorize registration, and is ineffectual to pass title as against creditors. Duke v. Mark-ham, 113 N. C. 100, 7 S. E. 1001.**

An instrument purporting to be the deed of a corporation, signed by the president and two members of the corporation, but not having the common seal of the corporation attached, is not a conveyance by the corporation; nor is it a conveyance by the president and two stockholders. Caldwell v. Morganton Mfg. Co., 112 N. C. 339, 23 S. E. 475.  

When a corporate act must be executed by an instrument under seal and the corporation has adopted a common seal, the corporation speaks through and by its seal. Withrell v. Murphy, 154 N. C. 82, 69 S. E. 748.  

**When a corporate act must be executed by an instrument under seal and the corporation has adopted a common seal, the corporation speaks through and by its seal. Withrell v. Murphy, 154 N. C. 82, 69 S. E. 748.**

**When Private Seal of Officer Used.** — An instrument purporting to be the deed of a corporation, signed by the president and two members of the corporation, attested by its secretary, and its common seal to be affixed, with the signatures and seal, is properly executed as a common law deed. Bason v. Mining Co., 90 N. C. 417.

**An instrument purporting to be the deed of a corporation, signed by the president and two members of the corporation, accompanied by delivery to the purchaser, is not void as to a judgment for the corporation. Caldwell v. Morganton Mfg. Co., 121 N. C. 339, 28 S. E. 475.**

When a corporate act must be executed by an instrument under seal and the corporation has adopted a common seal, the corporation speaks through and by its seal. Withrell v. Murphy, 154 N. C. 82, 69 S. E. 748.  

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§ 55-43. Conditional sale contracts.—Contracts, in writing, for the purchase of personal property by corporations, providing for a lien on the property or the retention of the title thereto by the vendor as a security for the purchase price, or any part thereof, are sufficiently executed if signed in the name of the corporation by the president, secretary or treasurer in his official capacity, and may be acknowledged and ordered to registration as is provided by law for the execution, acknowledgment and registration of deeds by natural persons. (1909, c. 335, s. 1; C. S. 1139.)


§ 55-44. Mortgaged property subject to execution for labor, clerical services, and torts.—Mortgages of public service corporations upon their property or earnings cannot exempt said property or earnings from execution for the satisfaction of any judgment obtained in courts of the State against such corporation for labor and clerical services performed, or torts committed, whereby any person is killed or any person or property injured. (Rev., s. 1131; Code, s. 1255; 1879, c. 101; 1897, c. 334; 1901, c. 2, s. 3; 1915, c. 201, s. 1; 1929, cc. 29, 256; 1931, c. 238; C. S. 1140.)

I. In General.

II. Relation to Other Sections.

III. Effect on Mortgages.

IV. Certain Judgments Preferred.

A. Labor Performed.

B. Torts Committed.

Cross References.

As to power of corporation to mortgage its property, see § 55-36, paragraph 4. As to when corporate conveyances are void as to torts, see § 55-40. As to wages being a prior lien upon the insolvent of a corporation, see § 55-136. As to execution against a corporation, see § 55-140 et seq.

I. IN GENERAL.

Editor’s Note.—It must be noted in studying the cases under this section that there were formerly included the words "for material furnished." These words were stricken out in 1941.

Under the section as formerly constituted it was held that coal is "material furnished." Pocahontas Coal Co. v. Hender-son, Elec., etc., Co., 118 N. C. 232, 24 S. E. 22. Steam Engine and boiler were "material furnished" where it did not appear that they were necessary to the conduct of the business. James v. Lumber Co., 122 N. C. 157, 29 S. E. 358. A mortgage is now not posted to a judgment for material furnished. Cheserokee v. Sanatorium, 134 N. C. 245, 46 S. E. 494; Cox v. New Bern Lighting & Fuel Co., 152 N. C. 166, 67 S. E. 477.

The words "clerical services" were added to the section by ch. 201, Laws of 1915.

The Act of 1915 inserted the words "public service" before "corporations" in line two of this section. Public Laws of 1929, c. 256 provided that such amendatory act should be construed to only apply to instruments executed after its ratification. The Act of 1929, c. 2, 1931, except as to pending litigation, repealed the last amendment and consequently the section, limited to public service companies, must be regarded as affecting the standing of corporate mortgages whenever executed. 9 N. C. Law Rev. 363.

The Act of March 15, 1929, was not intended to affect instruments already executed before the act became law, and the corporation must institute an action to affect the standing of a mortgage if a receiver has taken charge of the property. Helsabeck v. Vass, 196 N. C. 603, 146 S. E. 204.

Applying Only to Property Within State.—This section can only operate on property within the State. Fidelity Insurance Trust, etc., Deposit Co. v. Norfolk & W. Ry. Co., 114 Fed. 193, 88 S. C. 1023.

Does Not Create a Lien.—This section neither creates nor provides for the creation of a lien. It does not seem to provide against prior judgment liens, whether taken upon a prior or subsequent debt; nor does it provide for an absolute lien for unpaid wages. Moorehead Bluffs Hotel Co. v. Pick & Co., 176 N. C. 274, 97 S. E. 44. It simply wipes out a mortgage as against a judgment for tort, so that the judgment creditor may proceed to collect his judgment as if there were no such mortgage made. Clemence v. King, 152 N. C. 456, 460, 67 S. E. 1023.

The section confers no lien or priority. It simply wipes out a mortgage as against a judgment for tort, so that the judgment creditor may proceed to collect his judgment as if there were no such mortgage made. Moorehead Bluffs Hotel Co. v. Pick & Co., 176 N. C. 274, 97 S. E. 44. It simply wipes out a mortgage as against a judgment for tort, so that the judgment creditor may proceed to collect his judgment as if there were no such mortgage made. Clemence v. King, 152 N. C. 456, 460, 67 S. E. 1023.

Same—Example.—This section confers no lien on the products of a cotton factory corporation in favor of one furnishing coal used in their manufacture, but only the right to enforce their claims by judgment and execution, as against the holders of mortgages upon the corporate property. Norfleet v. Tarboro Cotton Factory, 172 N. C. 833, 89 S. E. 785.

Priorities.—This section creates a priority in favor of those performing labor or rendering clerical services only from the time a judgment has been entered by a court of competent jurisdiction ascertaining the amount and declaring the priority, and when so established it relates back and becomes prior to that of general creditors of the corporation under a prior registered judgment. Helsabeck v. Vass, 196 N. C. 603, 146 S. E. 204.

Same—Purchaser at Foreclosure Sale.—A notice at a foreclosure sale of the property of a corporation under a mortgage that the employees of the corporation claim a priority under the provisions of this section, does not affect the title conveyed to the purchaser at the sale, but the claims of the employees claiming judgment priority may maintain the superiority of their claims to those of the purchaser, but the purchaser is entitled to be heard. Dial v. Chatham, 70 F. (2d) 21, 23.

Judgments Not Superior Except as Provided in This Section.—Judgments against a corporation for its obligations arising on a contract are not superior to the lien of a prior registered judgment. But when the judgment is not in the hands of a receiver, or by prorating with the mortgage creditors if a receiver has taken charge. Clemence v. King, 152 N. C. 456, 460, 67 S. E. 1023.

The Act of February 13, 1929, was not intended to affect instruments already executed before the act became law, and the corporation must institute an action to affect the standing of a mortgage if a receiver has taken charge of the property. Helsabeck v. Vass, 196 N. C. 603, 146 S. E. 204.
Picked him is entitled to any preference for "labor performed" as all rights and interests of the lessee were ended by the lease. And where the road is in the hands of receivers, any rights as against a subsequent judgment for a tort by the corporation for labor performed to keep it "a going concern," though the labor done or materials furnished do not add to the value of the property superior to a mortgage given by the lessor before the act was passed as the Act was passed in 1879. If it were for liabilities existing prior to making the mortgage, they would have been provided by section 55-44 and accepted meaning. It implies continued exertion of the judgment, against the lessee of a railroad, a lien on the property of the lessee to secure a debt, takes subject to laborers' lien under Sec. 44-1—The mechanics' lien, under section 44-1 has no preference over a prior registered mortgage. Cox v. New Bern Lighting & Fuel Co., 152 N. C. 164, 167, 67 S. E. 477.

III. EFFECT ON MORTGAGES.

Refers to Mortgage of Corporation Itself.—This section expressly refers to a mortgage given by the corporation itself, and not to mortgages on the corporate property acquired by a stranger and registered before the formation of the corporation. Roberts v. Bowen Mfg. Co., 169 N. C. 27, 53 S. E. 45.

This section does not directly invalidate the mortgages, but notwithstanding the attempted alienation, exposes the corporate property to execution issued upon a judgment recovered upon the causes of action mentioned. Traders National Bank v. Lawrence Mfg. Co., 96 N. C. 298, 306, 3 S. E. 38.

Property Acquired Subject to Prior Mortgage.—This section, which gives to judgments against corporations for labor performed and torts committed priority over prior mortgages in the corporation, has no application where the corporation acquired the property subject to such prior mortgage. Humphrey Brothers v. Buell-Crocker Lumber Co., 174 N. C. 514, 519, 93 S. E. 971; Walker v. Linden Lumber Co., 147 N. C. 503, 50 S. E. 760.


Prior Claim.—A mortgage of the legal title of property of a corporation, in the corporation, has no application where the corporation acquired the property subject to such prior mortgage. Humphrey Brothers v. Buell-Crocker Lumber Co., 174 N. C. 514, 519, 93 S. E. 971.

Judgment against Lessee.—This section does not make a judgment, against the lessee of a railroad, a lien on the property of the lessor greater than the judgment given before the lease. And where the road is in the hands of receivers, appointed in a suit to foreclose the mortgages, the judgment creditor has no right to payment from earnings of the road as all rights and interests of the given lien were vested by the receiver. Hampton v. Norfolk & W. Ry. Co., 127 Fed. 662.

IV. CERTAIN JUDGMENTS PREFERRED.

A. Labor Performed.

Meaning of Labor.—The word "labor" in legal parlance and as used in this section has a well defined, understood, and settled meaning. It implies the performance of a more onerous and inferior kind, usually and chiefly (prior to the addition of the word "clerical" in the section) consisting of the performance of mechanical labor. Moore v. Industrial Co., 138 N. C. 304, 305, 59 S. E. 697.

Foreman Included.—A foreman is a laborer, and the money paid him is entitled to any preference for "labor performed" which is given his co-laborers whom he supervised and with whom he worked. Moore v. Industrial Co., 138 N. C. 304, 305, 59 S. E. 697; Cox v. New Bern Lighting & Fuel Co., 152 N. C. 164, 167, 67 S. E. 477.

Services Need Not Add Value of Plant.—Debts of a corporation for labor performed to keep it "a going concern," have a priority over a mortgage previously recorded, although the labor done or materials furnished do not add to the value of the plant or enhance its value. Pochantos Coal Co. v. Henderson Electric, etc., Co., 118 N. C. 232, 24 S. E. 22.

What Services Excluded.—"Labor performed," as used in this section, does not embrace such services as per-
and all other fixtures, appliances and appurtenances belonging to or operated by any of said companies. (Rev., s. 1143.)

Cross References.—As to acquisition and condemnation of property by any of said companies, see § 55-1 et seq. As to power of eminent domain in the North Carolina Rural Electrification Authority, see § 117-2, paragraph g. As to right of eminent domain generally, see § 40-1 et seq.

§ 55-46: Repealed by Session Laws 1943, c. 545.

§ 55-47. Actions by attorney-general to prevent ultra vires acts, etc.—In the following cases the attorney-general may, in the name of the state, upon his own information, or upon the complaint of a private party, bring an action against the offending parties for the purpose of—
1. Restraining by injunction a corporation from assuming or exercising any franchise or transacting any business not allowed by its charter.
2. Restraining any person from exercising corporate franchises not granted.
3. Bringing directors, managers, and officers of a corporation, or the trustees of funds given for a public or charitable purpose, to an account for the management and disposition of the property confided to their care.
4. Removing such officers or trustees upon proof of gross misconduct.
5. Securing, for the benefit of all interested, the said property or funds.
6. Setting aside and restraining improper alienations of the said property or funds.
7. Generally compelling the faithful performance of duty and preventing all fraudulent practices, embezzlement, and waste. (Rev., s. 1197; Code, ss. 607, 680; 1901, c. 2, s. 107; C. S. 1143.)

Cross Reference.—As to action by the attorney general to dissolve a corporation, see § 55-126.

Editor's Note.—For article on Powers and Duties of Attorney General, see 16 N. C. Law Rev. 97.

Application. — This section applies when the purpose of the action is not to dissolve a corporation but to preserve it in order that its useful functions may be performed and at the same time that it may not be able to abuse its powers or transcend them. Attorney General v. R. R., 28 N. C. 456, 464.

The above case was decided under the old R. S., ch. 26.


Art. 5. Directors and Officers.

§ 55-48. Directors.—The business of every corporation shall be managed by its directors, who must be at least three in number, and at all times bona fide stockholders or the guardian of a bona fide stockholder, or the executor or administrator of the estate of a deceased bona fide stockholder, or a director in a corporation which is a bona fide stockholder, or the trustee of funds given for a public or charitable purpose, to an account for the management and disposition of the property confided to their care.


Same.—May Loan Money to Corporation. — While a director of a corporation may lend it money when needed for its benefit, and take a lien upon the corporate property as security for its repayment, provided the transaction be open and entirely fair and capable of strict proof as to its bona fides, yet where a corporation is insolvent a director who is a creditor can not, upon a debt theretofore existing, be charged with a like duty, usually the care that he shows in the conduct of his affairs is not peculiarly suited to a creditor. Besselle v. Brown, 177 N. C. 65, 97 S. E. 743.

Care Required of Directors. — A director, who is also a creditor of a corporation, cannot prefer himself as a creditor over other creditors in the application of its assets to the security or payment of its debts. Hill v. Lumber Co., 113 N. C. 173, 18 S. E. 107; Bank v. Cotton Mills, 115 N. C. 507, 20 S. E. 765; Melver v. Young Hardware Co., 144 N. C. 478, 483, 57 S. E. 169.

Powers of Directors. — It is well settled that the directors of a corporation, unless they are specially restrained by the charter or by-laws, have the power to borrow money with which to conduct its business and to secure payment by mortgage on the corporate property. Wall v. Lumber Co., 113 N. C. 173, 18 S. E. 107; Bank v. Cotton Mills, 115 N. C. 507, 20 S. E. 765; Melver v. Young Hardware Co., 144 N. C. 478, 483, 57 S. E. 169.

Liens of Directors. — Where the directors of a corporation made a bona fide sale of property to it, for value and free from fraud, judgments against the corporation for the price paid for the stock or against bookkeeping errors made by the directors against the corporate property. Caldwell v. Robinson, 179 N. C. 518, 233, 103 S. E. 75.

Rights of Directors to Security. — Where a corporation is taking mortgage upon corporate property, when the corporation is in default, the directors, occupying a fiduciary relation, are not permitted to secure themselves against pre-existing
§ 55-49. Officers, agents, and vacancies.—Every corporation organized under this chapter shall have a president, secretary, and treasurer, to be chosen either by the directors or stockholders, as by the by-laws direct, and they shall hold office until others are chosen and qualified in their stead; the president shall be chosen from among the directors; the secretary shall record all the votes of the corporation and directors in a book to be kept for that purpose, and perform such other duties as are assigned to him; the treasurer may be required to give bond for the faithful discharge of his duty in such sum, and with such surety or sureties, as are required by the by-laws. Any two of these offices may be held by the same person, if the body electing so determine. The corporation may have such other officers and agents, who shall be chosen in the manner and hold office for the terms, and upon the conditions, prescribed by the by-laws or determined by the board of directors. Any vacancy occurring among the directors, or in the office of president, secretary or treasurer, shall be filled in the manner provided for in the by-laws; in the absence of such provision the vacancy shall be filled by the board of directors. (Rev. ss. 1149, 1150, 1151; 1901, c. 2, ss. 15, 16, 17; C. S. 1145.)

Cross References.—As to release of mortgage to a corporation by corporate officer, see § 45-42. As to arrest in civil cases, see § 1-410. As to oath of corporate being made by signature of corporate officer, see § 1-411. As to officers of a corporation who may be held individually liable, see § 1-412. As to special corporate powers, see § 46-21.

Officers Must Act in Good Faith. — The officers of the company had no right to take advantage of their knowledge of the financial condition of the corporation, for them, secretly, if not with the knowledge, of the corporation. The corporation had the right to an inspection of its books. It is not necessary that the corporation must make the inspection, but the officers of the corporation, when such inspection is required by law, have a duty to make it. If they fail to make such inspection, the corporation has the right to have its books audited by a competent accountant, so that its financial status may be ascertained. Upon refusal or failure of the corporation to the auditor to make the auditing, the auditor may apply to the judge of the district, or to the judge holding the courts of the district, in which the corporation has its residence, either at chambers or term time, at any place in the district, and the judge shall appoint an auditor and require the books to be examined at the expense of the corporation. The officers of the corporation shall render to the auditor an account of the sum of money laid out in the course of the auditor's business, and give him access to all of the assets, books, papers, etc., relating to the affairs of the corporation, in order that a proper audit may be made. Upon completion of the audit the auditor shall render a statement to the corporation, and to the petitioning stockholder or stockholders. (1911, c. 174, s. 1; 1913, c. 76, s. 1; C. S. 1146.)

This section is primarily concerned with the protection of the rights of minority stockholders, and has reference to private corporations as distinguished from municipal, public, or quasi public corporations. Cole v. Farmers Bank, etc., Co., 221 N. C. 249, 20 S. E. (2d) 54.

It applies to banking corporations since the statute embraces all domestic corporations organized for profit in which the beneficial interest and pro rata ownership are represented by shares of stock. Cole v. Farmers Bank, etc., Co., 221 N. C. 249, 20 S. E. (2d) 54.

Sufficient Number of Signatures.—The fact that an interlocutory motion of plaintiff stockholders for an audit of defendant corporation under this section was denied because there was not a sufficient number of signatures did not bar the plaintiff from seeking such an audit. Cole v. Farmers Bank, etc., Co., 221 N. C. 249, 20 S. E. (2d) 54.

§ 55-49. CH. 55. CORPORATIONS—DIRECTORS

§ 55-49. Corporations are liable for their promise to pay the claim is properly presented. Beck v. Wilkins-Ricks Co., 186 N. C. 210, 119 S. E. 235.

Individual Liability of Officers. — Where officers of a corporation make a contract for the corporation to perform a particular service in case of its insolvency and receivership, in favor of its re-
§ 55-52. Forfeiture of corporate charter and organization of new corporation.—Wherever a corporation created under the laws of the state of North Carolina has, on account of failure to make reports to the different state authorities, for such a length of time as to lose its charter and where thereafter, under the laws of the state of North Carolina, a new charter is issued, in the same name as the original corporation, and on behalf of the same corporation, such new corporation shall succeed to the same properties, to the same rights as the original corporation before losing its charter on account of neglect hereinbefore mentioned.

Whenever such new corporation shall have been created, under the laws of this state, all the title, rights and emoluments to the property held by the original corporation shall inure to the benefit of the new corporation and the new corporation shall issue its stock to the stockholders in the defunct corporation, in the same number and with the same par value as held by the stockholders of the defunct corporation.

Such new corporation shall have the rights and privileges of maintaining any action or cause of action which the defunct corporation might maintain, bring or defend and to all intents and purposes the new corporation shall take the place of the defunct corporation to the same intent and purposes as if the defunct corporation had never expired by reason of its failure to make the reports hereinbefore referred to. (1933, c. 124.)

Editor's Note.—See 11 N. C. Law Rev. 211, for criticism and interpretation of this section.

§ 55-53. Secretary of state may call for special reports.—The secretary of state has power to call for special reports from corporations, of the same character as their regular reports, at such times as he may deem the public interest requires, but no fees shall be charged for filing these special reports. (Rev., s. 1153; C. S. 1149.)

§ 55-54. Secretary of state to publish list of corporations created.—The secretary of state shall annually compile and publish from the records of his office a complete alphabetical list of the original and amended certificates of incorporation filed during the preceding year, together with the location of the principal office of each in this state, the name of the agent in charge thereof, the amount of authorized capital stock, the amount with which business is to be commenced, the date of filing the certificate, and the period for which the corporation is to continue; but the secretary of state and the Commissioner of Banks or the Utilities Commission, as the case may be, shall confer and arrange the statistics so as to prevent the same facts being embodied in the reports of both departments. (Rev., s. 1244; 1901, c. 2, s. 104; 1911, c. 211, s. 10; 1913, c. 198, s. 5; 1931, c. 243, ss. 4, 5; 1933, c. 134, ss. 7, 8; 1941, c. 97, s. 5; C. S. 1150.)

§ 55-55. Liability of officers failing to make reports or making false reports.—If any of the officers neglect or refuse to make any report required of them by law for thirty days after written request so to do by a creditor or stockholder of the corporation, they are jointly and severally liable to the person demanding such report, for the amount of his debt if he is a creditor, or for the amount of his loss if he is a stockholder. If any report or certificate made, or any public notice given, by the officers in pursuance of the provisions of this chapter, is false in any material representation, all the officers who signed the same, knowing it to be false, are jointly and severally liable for all the debts of the corporation contracted while they were stockholders or officers thereof, as a penalty enforceable in the courts of this state only. (Rev., ss. 1154, 1163; 1901, c. 2, ss. 27, 56; C. S. 1151.)

§ 55-56. Liability for fraud.—In case of fraud by the president, directors, managers, or stockholders, in a corporation, the court shall adjudge personally liable to creditors and others injured thereby the directors and stockholders who were concerned in the fraud. (Rev., s. 1155; Code, s. 586; 1901, c. 2, s. 107; C. S. 1132.)

While directors of a corporation are not insurers or guarantors and therefore liable for its debts, yet they are trustees and fiduciaries and are answerable for losses attributable to their bad faith, misconduct, or want of care. Townsend v. Williams, 117 N. C. 330, 23 S. E. 461.

Officer Cannot Appropriate Corporate Business.—A corporate officer cannot for himself take business from the corporation. Brite v. Penny, 157 N. C. 110, 72 S. E. 964.

Action by Creditor or Stockholder.—It is settled that an action can be brought by a creditor or stockholder against the officers, including directors, of a corporation, for losses resulting from their fraud or negligence, without having first applied to the corporation to bring such action. Solomon v. Bates, 118 N. C. 311, 24 S. E. 478; White v. Kinead, 149 N. C. 415, 63 S. E. 109; Braswell v. Pamlico Ins., etc., Co., 159 N. C. 628, 75 S. E. 813.

Action in Alleged Fraudulent Merger.—In an action against a corporation charged to be fraudulently in possession of the assets of another corporation which had been merged into it, the officers of the corporation are not necessary parties. Friedenwald Co. v. Asheville Tobacco Works, 117 N. C. 544, 23 S. E. 490.

§ 55-57. Joint and several liability of officers, etc., contribution.—When the officers, directors or stockholders of a corporation are liable to pay its debts, or any part thereof, any person to whom they are liable has a right of action against any one or more of them. And any such officer, director or stockholder has the right of equitable contribution in any action for that purpose against any other officer, director or stockholder who is liable with him for any amount which he has been compelled to pay as provided in this section. (Rev., s. 1156; 1901, c. 2, s. 90; C. S. 1153.)

Corporation Need Not Be Joined.—The directors of a corporation are jointly and severally liable for their torts, and the corporation itself can be joined or not, at the election of the plaintiff, in an action to enforce that liability. Solomon v. Bates, 118 N. C. 311, 24 S. E. 478; White v. Kinead, 149 N. C. 415, 63 S. E. 109.

Neither a corporation nor its trustee in bankruptcy was a necessary party defendant to a suit for the defendants' wrong as officers of the corporation in misappropriating the plaintiff's money and notes. Virginia-Carolina Chemical Co. v. Floyd, 158 N. C. 455, 74 S. E. 465.

§ 55-58. Officers paying may enforce exoneration against corporation.—An officer, director or stockholder who pays a debt of a corporation for which he is made liable by the provisions of this chapter may recover the amount paid, in an action against the corporation for money paid for its use, in which action only the property of the corporation is liable to be taken, and not the property of any stockholder, except as provided in the pre-
§ 55-59. Assets of corporation first exhausted.— No sale or other satisfaction shall be had of the property of a director or stockholder for a debt of the corporation of which he is director or stockholder until judgment be obtained therefor against the corporation and execution thereon returned unsatisfied, or until it is shown to the court that the corporation has no property available for the satisfaction of the indebtedness. (Rev., s. 1158; 1901, c. 2, s. 92; C. S. 1155.)

§ 55-60. No personal liability on corporate manager or partnership.— Any corporation created under this chapter which is a member of a partnership may have its interests in such partnership managed, and may be engaged in or have charge of the management and affairs of such partnership, by and through any of its officers, directors, stockholders, agents and servants, and no such person acting as manager of the interests of such partnership may have its interests in such partnership, whether as executive, member of an executive committee or board, employee or otherwise, shall be personally subject to any liability for the debts of such partnership or such corporation. (1933, c. 354, s. 2.)

Art. 6. Capital Stock.

§ 55-61. Classes of stock.— Every corporation has power to create two or more kinds of stock of such classes, with such designations, preferences, and voting powers or restrictions or qualifications thereof as are prescribed by those holding a majority of its outstanding capital stock entitled to vote; and the power to increase or decrease the stock as herein elsewhere provided applies to all or any of the classes of stock; and the preferred stock may, if desired, be made subject to redemption at the option of the corporation, strictly speaking, at an amount in money or property subscribed and paid in or secured to be paid in by the shareholders, and always remains the same unless changed by proper legal authority, while its capital is a broader term and includes all funds, securities, credits, and property of every kind whatever belonging to the corporation, though the words are often used interchangeably in revenue statutes. Person v. Board, 184 N. C. 499, 115 S. E. 336.


Meaning of "Trust Fund."— The term "trust fund," as used in various decisions of the courts in reference to the assets of a corporation, does not imply that upon the insolvency of a corporation, its assets will be administered strictly as a trust for the benefit of all creditors pro rata, but that whenever proceedings under the statute are had, and the court takes charge of the assets through its receiver, it will make equitable distribution, among all the creditors, of all the assets not subject to prior liens or rights. Merchants National Bank v. Newton Cotton Mills, 115 N. C. 499, 115 S. E. 355, 20 S. E. 2d 747.

The preferred stock forms a part of the capital stock of the corporation, under this section, entitled to all rights of the stockholder subject to the terms and conditions on which their stock was issued. Kistler v. Caldwell Cotton Mills Co., 205 N. C. 809, 813, 172 S. E. 373.

A preferred stockholder of a corporation is not a creditor of the corporation, and must be confined to his rights as a stockholder. Weaver Power Co. v. Elk Mountain Mill Co., 154 N. C. 766, 69 S. E. 747.

Liability of Preferred Stockholders—Rights of Creditors.— This section fixes the authority of the corporation to issue its preferred stock and the priorities thereof are all subject to the prior rights of general creditors, but the corporation to give the preferred stockholders a lien upon its realty in the nature of a mortgage or deed of trust under the provisions of its charter is ineffectual as to the prior creditors. Ellington v. Supply Co., 196 N. C. 764, 147 S. E. 307.

Cited in Windsor Redrying Co. v. Garley, 197 N. C. 56, 147 S. E. 676.

§ 55-62. Stock to be paid in money or money's worth; issue for labor or property.— Nothing but money shall be considered as payment for any part of the capital stock of any corporation organized under this chapter, except as herein provided in case of the purchase of property or labor performed by the corporation, which corporation may issue stock for labor done or personal property or real estate, or leases thereof, and, in the absence of fraud in the transaction, the judgment of the directors as to the value of such labor, property, real estate or leases shall be conclusive. (Rev., ss. 1159, 1160; 1901, c. 2, ss. 19, 53; 1903, c. 660, ss. 2, 3; C. S. 1157.)

Cross Reference.—As to no par value stock issued for services, see § 55-74.

Purposes to Prevent Fraud.— This section was passed in order that such subscriptions may respect integrity and not become a means of deceiving those who

Cross Reference.—As to no par value stock issued for services, see § 55-74.
deal with the corporation. Goodman v. White, 174 N. C. 399, 401, 93 S. E. 906.

Effect of Charter Provision.—A provision in the charter of a corporation, even though it do not that the capital stock "shall be issued as full-paid stock," does not prevent shares of stock to be issued to stockholders without payment for it by them in money, or its equivalent in property at an honest valuation. Clavon v. Cross, 109 N. C. 159, 12 S. E. 657.

Judgment of Directors Arbitrary.—This section makes the judgment of the board of directors, in fixing the value of property of its subscribers to its shares of stock to be ac-
ceded to or taken, to be conclusive. There shall be no evidence of fraud therein, a judgment as of nonsuit is properly granted. Goodman v. White, 174 N. C. 497, 499, 93 S. E. 906.

Cash Payment Unnecessary.—It is not essential to a bona fide subscription to stock in a corporation that there be a present payment in cash by the subscriber or that he be solvent; a subscription is considered bona fide whenever made by one who subscribes in good faith, with reasonable expectation and apparent prospect of being able to pay assessments on his stock as they may thereafter be called for. Boushall v. Myatt, 167 N. C. 128, 81 S. E. 352.

Conditional Substitution.—A subscription to stock of a corporation may be made on condition that there shall be no liability until the corporation has received actual subscriptions to its capital stock in the amount of the specified amount. Alexander v. North Carolina, etc., Trust Co., 135 N. C. 124, 71 S. E. 69; citing Queen City Printing, etc. Co. v. McAden, 131 N. C. 478, 480, 48 S. E. 427, 428, 16 S. E. 408; Kelly v. Oliver, 113 N. C. 442, 443, 18 S. E. 689.

Illegal Payment.—Under this section a transaction whereby the subscriber is required, for the purpose of obtaining the right to a certain stock, to become a stockholder in a company, and let the company that he was promoting take it over as soon as it was incorporated, and pay his note, and also issue to him stock as the consideration, was illegal. Goodman v. White, 174 N. C. 174, 73 S. E. 324.

Cited in Windsor Redrying Co. v. Gurley, 197 N. C. 55, 61, 147 S. E. 675.

§ 55-63. Stock issued for property; how value ascertained; how stock reported.—Any corpora-
tion formed under this chapter may purchase any property necessary for its business, and issue stock to the amount of the value thereof in payment thereof. The stock so issued shall be full-paid stock, and not liable to any further call, nor shall the holder thereof be liable for any further payment under any of the provisions of this chapter. A certificate of actual fraud the judgment of the directors as to the value of the property shall be conclusive.

In all statements and reports of the corporation to be published or filed, this stock shall not be stated or reported as being issued for cash paid to the corporation, but shall be reported in this respect according to the facts. (Rev. s. 1161; 1901, c. 2, s. 35; C. S. 1159.)

Cross Reference.—As to non par value stock issued for property, see § 55-74.

Burden of Fraud.—In an action by the receivers of an insolvent corporation to compel the payment of a subscrip-
tion to stock issued for property acquired by the corpora-
tion for the conduct of the business, evidence tending to show that there was no genuine valuation of the property by the directors, knowingly made, is strong evidence of fraud, and may be conclusive thereof. Whitlock v. Alexander, 160 N. C. 570, 571, 134 S. E. 447.

Proceedings Where Property Overvalued.—Although a margin may be allowed for an honest difference of opinion as to value, a valuation grossly excessive, knowingly made, while its acceptance may bind the corporation, is a fraud on creditors, and they may proceed against the stockholders individually in the interest of the corporation is upon the person who alleges payment. Goodman v. White, 174 N. C. 399, 401, 93 S. E. 906.

Construction companies building rail-
roads, etc., may take stock therein; how issued, valued, and reported.—Corporations having for their object the building or repairing of railroads, water, gas or electric works, tunnels, bridges, viaducts, canals, hotels, wharves, piers, or any like works of internal improvement or public use, may subscribe for, take, pay for, hold, use and dispose of stock or bonds in any corporation formed for the purpose of constructing, maintaining and operating any such public works; and the directors of any such corporation formed for the purpose of constructing, maintaining and operating any public work of the description aforesaid may accept in payment of any such subscription, or purchase, real or personal property, necessary for the purposes of such corporation, or work, labor and services performed, or materials furnished to, or for, such corporation to the amount of the value thereof, and from time to time issue upon any such subscription or purchase, in such installments of proportions as such directors may agree upon full-paid stock, in full or partial perfor-
manence of the whole, or any part of such sub-
scription or purchase, and the stock so issued shall be full-paid stock, and not liable to any further call, nor shall the holder thereof be liable for any further payments. And in all statements and reports of the corporation to be published or filed, this stock shall not be stated, or reported, as being issued for cash paid to the corporation, but shall be reported and published in this respect according to the fact. (Rev. s. 1172; 1901, c. 2, s. 35; C. S. 1159.)

§ 55-68. Liability for unpaid stock.—Where the capital stock of a corporation has not been paid in and the assets are insufficient to satisfy its debts and obligations, each stockholder is bound to pay on each share held by him the sum necessary to complete the amount of such share, as fixed by the charter, or such proportion of that sum as is required to satisfy such debts and obligations; but no person holding stock in any corporation in this state as executor, administrator, guardian, curator, or trustee, or as collateral security, is personally subject to any liability as a stockholder of the corporation; but the person pledging the stock is considered as holding that same, and is liable as a stockholder accordingly, and the estate and funds in the hands of such executor, adminis-
tor, guardian, or trustee, is liable in like manner, and to the same extent, as the testator or intestate, or the ward, or the person interested in such fund, would have been had he been living and competent to act and hold the stock in his own name. (Rev. s. 1162; 1893, c. 471; 1901, c. 2, s. 22; C. S. 1160.)

In General.—Both under general principles of corporate law, as applied to the subject, and by this section, stockholders of an insolvent corporation are liable pro rata for their unpaid subscriptions to an amount necessary to liqui-

Unpaid Balances to Be Collected.—The capital stock, paid in by subscribers, of a corporation being a trust fund for the benefit of creditors, is the duty of the courts, at the suit of creditors, to require unpaid subscriptions to be col-

In case of insolvency any unpaid balance may, by proper proceedings, be made available to the extent required for the
§ 55-66

CH. 33. CORPORATIONS—CAPITAL STOCK

§ 55-69


Suspension of Enterprise.—The mere fact, alone, that a proposed corporate enterprise has been suspended affords a subscriber to the stock no excuse for not paying his subscription according to his agreement. Raleigh Imperial Co. v. Andrews, 176 N. C. 280, 96 S. E. 1032. Decree affirmed, 178 N. C. 332, 15 S. E. 514.

Agreement Contrary to Section.—No agreement or arrangement between a corporation and its stockholders, whereby the latter are to be released from indebtedness on their subscriptions, will be valid or of any force as against creditors. Marshall Found-y Company v. Killian, 99 N. C. 500, 6 S. E. 680; Heggie v. Building and Loan Ass'ng, 107 N. C. 581, 591, 12 S. E. 275. See also, Gilmore v. Southern Ry. Co., 52 N. C. 361.

Stockholder Estopped.—Where a person has agreed to become a stockholder in a corporation and has enjoyed the benefits and privileges of membership thereof, in a suit by the corporation to recover on a deficiency of subscription, it is set up as a defense that the corporation was not legally organized. Wadesboro Cotton Mills Co. v. Burns, 114 N. C. 351, 19 S. E. 238; Academy v. Lindsey, 25 N. C. 476; Navigation Co. v. Neal, 10 N. C. 320, 337; R. R. v. Thompson, 52 N. C. 378; Marshall Found-y Co. v. Killian, 99 N. C. 501, 6 S. E. 680.

Set-Offs.—The claims of anyone against a corporation may be set off against the claims of the corporation against him by the corporation. Vaughan-Robertson Drug Co. v. Grimes-Mills Drug Co., 173 N. C. 502, 92 S. E. 376. Nor can he credit himself with amounts he paid on another subscription.

Cited in Windsor Redrying Co. v. Gurley, 197 N. C. 56, 59, 147 S. E. 676.

§ 55-66. Decrease of capital stock.—The decrease of capital stock may be effected by—
1. Retiring or reducing any class of the stockholders.
2. Drawing the necessary number of shares by lot for retirement.
3. The surrender by every stockholder of his shares and the issue to him in place thereof of a decreased number of shares.
4. The purchase at not above par of certain shares for retirement.
5. Retiring shares owned by the corporation.
6. Reducing the par value of shares.

When a corporation decreases the amount of its capital stock as above provided, the certificate decreasing the same shall be published at least once a week for three successive weeks in a newspaper published in the county in which the principal office of the corporation is located, the first publication to be made within fifteen days after the decrease has been regularly authorized by the stockholders. In default of such publication the directors of the corporation are jointly and severally liable for all debts of the corporation contracted before the filing of the certificate, and the stockholders are also liable for such sums as they respectively receive of the amount so reduced. No such decrease of capital stock decreases the liability of any stockholder whose shares have not been fully paid, for debts of the corporation theretofore contracted. (Rev. ss. 1164; 1901, c. 2, s. 32; 1939, c. 221; C. S. 1161.)

Cross References.—As to action to compel issuance of duplicate certificate, see § 55-97. As to procedure when corporation in which last stock is held merges with another, see § 55-166.

Editor's Note.—The first sentence in this section formerly read, "Every stockholder shall have a certificate signed by the president or vice-president of the corporation, and certifying the number of shares owned by him in such corporation." A corporation may issue a new certificate of stock in the place of any certificate theretofore issued by it, alleged to have been lost or destroyed, and the directors authorizing such issue of a new certificate may require the owner of the certificate to prove his identity, or the identity of his legal representatives, to give the corporation a bond, in such sum as they may direct, as an indemnity against any claim that may be made against the corporation. A new certificate may be issued without requiring any bond when, in the judgment of the directors, it is proper to do so. (Rev. ss. 1165, 1166; 1885, c. 265; 1901, c. 2, s. 94; 1927, c. 173; C. S. 1162.)

Cross References.—As to action to compel issuance of duplicate certificate, see § 55-97. As to procedure when corporation in which last stock is held merges with another, see § 55-166.

Editor's Note.—The first sentence in this section formerly read, "Every stockholder shall have a certificate signed by the president or vice-president of the corporation, certifying the number of shares owned by him." The present first sentence was added by ch. 173, Public Laws 1927.

Nature of Stock Certificate.—A certificate of stock is simply a written acknowledgment by a corporation of the interest of the holder in its property and franchises. It has no value except that derived from the company issuing it; and its legal status is in the nature of a chose in action. Person v. Board, 184 N. C. 499, 115 S. E. 356.


Certificate Unnecessary.—Issuance of stock certificates is unnecessary either to the existence of the corporation or to confer title to the stockholder. Powell Bros. v. McConnell, 157 N. C. 52, 68 S. E. 926.

Reissue.—Application of Last Sentence.—The last sentence of this section, relative to the reissue of stock to supply lost certificates, is not the stock itself, but constitutes only prima facie evidence of the ownership of the number of shares. Mischenheimer v. Alexander, 162 N. C. 226, 78 S. E. 161, citing Cook on Corporations (6th Ed.) § 13; Clark on Corporations, p. 260.


§§ 55-68 and 55-69: Repealed by Public Laws 1941, c. 353, s. 24. DeLETED by authority of Session Laws 1943, c. 15, s. 3.
§ 55-70. Assessments, sale, and notice.—The directors of a corporation may, from time to time, make assessments upon the shares of stock subscribed for, not exceeding, in the whole, the par value thereof, remaining unpaid; and the sums assessed may be paid to the treasurer at such times and by such installments as the directors direct, the directors having given thirty days notice of the assessment and of the time and place of payment, either personally, by mail, or by publication in a newspaper published in the county where the corporation is established. If the time or place of payment is not fixed in the articles of incorporation, the treasurer, when ordered by the board of directors, shall sell, at public auction, such share or shares of the delinquent owner as will pay any assessment due from him, with interest, and all necessary incidental charges, and shall transfer the share or shares sold to the purchaser, who is entitled to a certificate therefor. The treasurer shall give notice of the time and place appointed for the sale, and of the sum due on each share, by advertising the same once a week for three successive weeks before the sale in a newspaper published in the county where the principal office of the corporation is located, at the courthouse door, and at the place of payment, and to the last known postoffice address of the delinquent stockholder. (Rev., s. 1169, 1170, 1171; 1901, c. 2, § 3, 23, 24, 25; C. S. 1165.)

Assessment as Incumbrance.—Acceptance of an offer of sale of corporation stock cannot be enforced when the proposed purchaser was unaware at the time that there had been an assessment made upon the shares; the usual implied warranty of title applies to such sales. Martin v. McDonald, 168 N. C. 232, 84 S. E. 258.

Setting Aside Sale.—Where the plaintiff's stock has been wrongfully sold, after a legal tender, he is entitled to a mandamus for the issue to him of his certificate of stock upon payment of the amount due on the stock with interest, to the date of tender and cost of advertisement. Wilson v. Tel. Co., 139 N. C. 395, 52 S. E. 62.

Cited in Windsor Redying Co. v. Guerry, 197 N. C. 56, 58, 147 S. E. 676.

§ 55-71. One corporation may purchase stock, etc., of another.—A corporation may purchase stock, securities or other evidences of indebtedness created by another corporation or corporations of this or any other state, and while owner of such may exercise all the rights, powers and privileges of ownership. (Rev., s. 1173; 1903, c. 660, s. 3; C. S. 1166.)

Cross References.—As to power of corporation to purchase its own stock, see § 55-111. As to lack of power to vote its own stock, see § 55-113. Corporation May Purchase Its Own Stock.—A corporation, unless restrained by some provision of its organic law, may purchase its own stock from holders thereof, and the latter are entitled to all rights of other creditors of the corporation for the protection and enforcement of their demand for payment. Blalock v. Kernersville Mig. Co., 110 N. C. 99, 100, 14 S. E. 90.


§ 55-72. Mutual corporations may create stock.—A mutual corporation, upon the consent in writing of all its members, may provide for and create a capital stock and may provide for the payment of the stock, and fix and prescribe the rights and privileges of the stockholders therein not inconsistent with law. (Rev., s. 1245; 1901, c. 2, s. 105; C. S. 1167.)

Cross Reference.—As to mutual associations in general, see § 54-111 et seq.

Art. 7. Capital Stock without Nominal or Par Value.

§ 55-73. Corporations which may create shares without nominal or par value. Classes of stock or debentures.—Any corporation heretofore or hereafter organized under the laws of this State, whether under a special act of Legislature or otherwise, except banks, trust companies and insurance companies, may create a capital stock and may provide for the issue to him of his certificate of incorporation, articles of association, charter or any amendment thereof, create shares of stock with or without nominal or par value, and may create two or more classes of stock or debentures, any class or classes of which may be with or without nominal or par value, with such designations, preferences, voting powers, restrictions and qualifications as shall be fixed in such certificate of incorporation, articles of association, charter or amendment thereof, or by resolution adopted by those holding two-thirds of the outstanding capital stock entitled to vote. Subject to any provisions so fixed, every share without nominal or par value shall equal every other such share. (1921, c. 116, s. 1; 1925, c. 362, s. 1; C. S. 1167(a)).

Editor's Note.—This law as passed in 1921 was the first legislation in this state permitting the issuance of non-nominal or non-par value stock in corporations. It grew out of a previous demand to overcome the difficulties in financing corporations, whose stock is either above or below par value, resulting in misrepresentations and misunderstanding, arising through the difference between the actual value and face value of stock, and from the blue sky laws which prohibit the sale of new stock unless the actual value and par value correspond, and that new stock be sold at its actual value. (For a detailed description of these hardships, see 1 N. C. L. Rev. 26.)

New York was the first state to pass such laws (1912), but since that time over half of the states have enacted them. Along with the many advantages of the law are many objections to it and it might be said that the wisdom of such legislation is yet speculative. The article in the Law Review, cited supra, gives an excellent discussion of such problems.

The N. C. Law Review, vol. 3, p. 135, gives an interesting discussion of the changes effected by the 1925 amendment. The first section was stricken and reenacted in the form in which it now appears, several changes having been made.

The provision permitting two thirds of those holding the outstanding capital stock entitled to vote, to create stock with or without par value and fix its status with respect to voting, preference, etc., was inserted. It is pertinent to point out here an apparent inconsistency between this provision and section 55-61 as amended by the acts of 1925 seven days before this statute was passed.

Prior to the 1925 amendment, section 55-61 provided that a two-thirds vote of the outstanding capital stock was necessary to create new stock, including preferred stock. The 1925 amendment changed the two-thirds requirement to a majority vote, except as to banks and building and loan associations) and further provided that no stock should be created in priority to any existing preferred stock without a two-thirds vote. Therefore, there is an apparent conflict between the provisions of sections 55-61, requiring a majority vote, and the provisions of this section, requiring a two-thirds vote for the creation of stock "with or without per value."

The 1925 amendment also inserted the provision that any "class or classes of stock, with or without per value," was a reference to "special acts of the legislature" and the words "charter" and "designations."

§ 55-74. Stock issues; payment for stock; terms and manner of disposition.—The provisions of law relating to the issuance of stock
with par value shall apply to the issuance of stock without nominal or par value, and such corporation may issue and dispose of its authorized shares without nominal or par value for such consideration and on such terms and in such manner as may be determined or approved from time to time by the board of directors, subject to such conditions or limitations as may be contained in the certificate of incorporation, articles of association, charter, or any amendment thereto, or as may be contained in any vote of the holders of a majority of the stock of the corporation, such consideration to be in the form of cash, property, tangible or intangible, services or expenses. Any and all shares without nominal or par value issued for the consideration determined or approved in accordance with the provisions of this section shall be fully paid and not liable to any further call or assessment thereon, nor shall the subscriber or holder be liable for any further payments. (1921, c. 116, s. 2; 1925, c. 263, s. 2; C. S. 1167(b).)

Editor's Note.—The 1925 amendment struck out this section and enacted it in 1921 and revised it. While the section is made more comprehensive generally, the most important change is that the stockholders are now given power to prescribe the consideration, terms and manner of issue and disposal of the stock whereas formerly they exercised such power only with respect to an increase in capital stock.

In some respects, at least, this section is very similar to the corresponding section of the New Jersey Statute. Recpecting the similar provision of the New Jersey Statute which provides for fixing the selling price of the stock, Wickersham on "Stock without Par Value" on page 16, says, "This provision is important. The corporation may now issue its stock for what it can get for it, provided proper corporate action is taken. It is no longer bound by the par consideration rule, nor to seek evasions of that rule for its legitimate purposes."

Although the consideration for the stock is fixed as prescribed in this section, it must be remembered that the right to fix such values is statutory and therefore subject to the statutory limitation. The price must be fixed with at least some relation to value and courts of equity would probably refuse to protect stockholders from the issuance of stock for consideration as shall be fixed by the corporation for its legitimate purposes.

The revisal also subdivided the section into paragraphs.

The Act of 1931 struck out the words "such" and "herefore organized" formerly appearing before and after the word corporation in line one of this section, and inserted after the word "whether" the word "organized."

As to the rights of minority stockholders who object to the exchange of stock with, for stock without par value, see Wickersham on "Stock without Par Value," sections 24-29, pages 58-73.

§ 55-77. Tax on certificate of incorporation or amendments.—The tax upon the certificate of incorporation, or extension or renewal or corporate existence, or increase of capital stock without nominal or par value shall be the same as if each share of stock had a par or face value of one hundred dollars. (1921, c. 116, s. 5; C. S. 1167(c).)

Cross References.—As to the taxes required, see § 55-158. As to provision for taxing the non par value shares of a foreign corporation, see § 55-118.

Editor's Note.—For a discussion of problems arising in connection with the constitutionality of this section, see Wickersham, "Stock without Par Value," and 17 N. C. L. Rev. 346.

§ 55-78. Intent or purpose of law.—The intent and purpose of this article is to require a share of stock to be treated and represented, subject to lawful preferences, rights, limitations, privileges, and restrictions as a mere evidence of an aliquot part or divisional interest in the assets and earnings of the corporation issuing the same, whatever the extent or value of such assets or earnings may be, to the end that misrepresentation or misunderstanding arising through the difference between actual value of a share of stock and the value appearing on the face of the certificate.
therefor may be eliminated. (1921, c. 116, s. 6; C. S. 1167(f).)

§ 55-79. Laws applicable to corporations.—Except as otherwise provided by this article, corporations issuing shares without any par or face value under the provisions hereof shall be and remain subject to the laws of the state now or hereafter in force relating to the formation, regulation, or reorganization rights, powers, and privileges of such corporations, and all other laws applicable thereto. (1921, c. 116, s. 7; C. S. 1167(g.).)

§ 55-80. Provision for future exchange of par value stock for non-par value stock.—Any corporation heretofore or hereafter organized under the laws of this State, whether under a special act of Legislature or otherwise, except banks, trust companies, and insurance companies, may, in its original certificate of incorporation, articles of association, charter, or any amendment thereof, provide for the exchange of its shares to be issued with nominal or par value for an equal or different number of outstanding shares without nominal or par value. (1929, c. 338, s. 1.)

Cross Reference.—As to railroads, see also § 60-11.


§ 55-81. How title to certificates and shares may be transferred.—Title to a certificate and to the shares represented thereby can be transferred only:

(a) By delivery of the certificate indorsed either in blank or to a specified person by the person appearing by the certificate to be the owner of the shares represented thereby, or

(b) By delivery of the certificate and a separate document containing a written assignment of the certificate or a power of attorney to sell, assign, or transfer the same or the shares represented thereby, signed by the person appearing by the certificate to be the owner of the shares represented thereby. Such assignment or power of attorney may be either in blank or to a specified person.

The provisions of this section shall be applicable although the charter or articles of incorporation or code of regulations or by-laws of the corporation issuing the certificate and the certificate itself, provide that the shares represented thereby shall be transferable only on the books of the corporation or shall be registered by a registrar or transferred by a transfer agent. (1941, c. 333, s. 1.)

Cross References.—As to the sale of shares of stock of a foreign corporation held by a life tenant, see § 55-119. See also § 55-99.

Editor's Note.—For comment on this enactment, see 19 N. C. L. Rev. 469. The cases annotated here were decided under former § 1164.

In General.—Although shares of stock are personal property and are transferable on the books of the corporation as provided by the by-laws, such provision, if it is held, can be of no practical benefit to those not connected with the corporation, because they have “no means of knowing whether the transfer has been made or not.” Castellio v. Jenkins, 186 N. C. 166, 172, 119 S. E. 202.

Transfer on Books Not Necessary.—It is well settled that the requirement of this section as to entering transfers of stock upon the books of the corporation is for the protection of the corporation, and that the failure to enter such transfer upon the corporate books has no effect upon the legality of the transfer as between the parties themselves. Grissom v. Sternberger, 10 Fed. (2d) 765, 766 citing numerous cases.

Duty of the Corporation.—It is the duty of the corporation to protect persons interested, such as contingent remaindermen or legatees when the corporation has knowledge of the contents of the will, from an unauthorized transfer of stock. Wooten v. Railroad, 128 N. C. 119, 38 S. E. 298; Baker v. Railroad, 173 N. C. 365, 92 S. E. 170.

Holder Has Preference.—The holder of the stock either as a purchaser or a pledgee has the preference over an attaching creditor although the transfer of the stock has not been entered on the books of the corporation. Breckly v. Candler, 169 N. C. 16, 20, 84 S. E. 1039.

Corporation May Trade in Own Stock.—Shares of stock are declared by § 55-80 to be personal property, and may be sold or purchased by the corporation which has created them. Byrd v. Tidewater Power Co., 205 N. C. 589, 591, 172 S. E. 182.

Transfer of Title.—Where the holder and owner of stock surrenders the certificates to the corporation and directs the corporation to transfer same on its books, the transferee acquires title which is perfected by the surrender or delivery of the new certificate to him. Jones v. Waldroup, 17 N. C. 178, 7 S. E. (2d) 366.

§ 55-82. Powers of those lacking full legal capacity and of fiduciaries not enlarged.—Nothing in this article shall be construed as enlarging the powers of an infant or other person lacking full legal capacity or of a trustee, executor or administrator, or other fiduciary, to make a valid indorsement, assignment or power of attorney. (1941, c. 333, s. 2.)

§ 55-83. Corporation not forbidden to treat registered holder as owner.—Nothing in this article shall be construed as forbidding a corporation to:

(a) To recognize the exclusive right of a person registered on its books as the owner of shares to receive dividends, and to vote as such owner, or

(b) To hold liable for calls and assessments a person registered on its books as the owner of shares. (1941, c. 333, s. 3.)

§ 55-84. Title derived from certificate extinguishes title derived from a separate document.

The title of a transferee of a certificate under a power of attorney or assignment not written upon the certificate, and the title of any person claiming under such transferee, shall cease and determine if, at any time prior to the surrender of the certificate to the corporation issuing it, another person, for value in good faith, and without notice of the prior transfer, shall purchase and obtain delivery of such certificate with the indorsement of the person appearing by the certificate to be the owner thereof, or shall purchase and obtain delivery of such certificate and the written assignment or power of attorney of such person, though contained in a separate document. (1941, c. 333, s. 4.)

§ 55-85. Delivery of certificate by one without authority or right of possession.—The delivery of a certificate to transfer title in accordance with the provisions of § 55-81, is effectual, except as provided in § 55-87, though made by one having no right of possession and having no authority from the owner of the certificate or from the person purporting to transfer the title. (1941, c. 333, s. 5.)

§ 55-86. Indorsement effectual in spite of fraud, duress, mistake, revocation, death, incapacity or lack of consideration or authority.—The indorsement of a certificate by the person appearing by the certificate to be the owner of the shares
§ 55-87. CH. 55: and the transfer thereof rescinded, unless,
the possession of the certificate may be reclaimed
ment or delivery of a certificate.
§ 16.)
force specifically such right to reclaim the posses-
to enforce his rights.
injury, or has been guilty of laches in endeavoring
in § 55-87, though the indorser or transferor;
represented thereby is effectual, except as provided
the obligation, if any, imposed by such promise
shall be determined by the law governing the for-
formation and performance of contracts. (1941, c.
353, s. 10.)
§ 55-91. Warranties on sale of certificate.—A
person who for value transfers a certificate, in-
cluding one who assigns for value a claim secured
by a certificate, unless a contrary intention appear,
warrants;
(a) that the certificate is genuine,
(b) that he has a legal right to transfer it, and
(c) that he has no knowledge of any fact which
would impair the validity of the certificate.
In the case of an assignment of a claim secured
by a certificate, the liability of the assignor upon
such warranty shall not exceed the amount of the
claim. (1941, c. 353, s. 11.)
§ 55-92. No warranty implied from accepting
payment of a debt.—A mortgagee, pledgee, or other
holder for security of a certificate who in good
faith demands or receives payment of the debt for
which such certificate is security, whether from a
party to a draft drawn for such debt, or from any
other person, shall not by so doing be deemed to
represent or to warrant the genuineness of such
certificate, or the value of the shares represented
thereby. (1941, c. 353, s. 12.)
§ 55-93. No attachment or levy upon shares
unless certificate surrendered or transfer enjoined.
—No attachment or levy upon shares of stock for
which a certificate is outstanding shall be valid un-
til such certificate be actually seized by the officer
making the attachment or levy, or be surrendered
to the corporation which issued it, or its transfer
by the holder be enjoined. Except where a certifi-
cate is lost or destroyed, such corporation shall not
be compelled to issue a new certificate for the stock
until the old certificate is surrendered to it. (1941,
c. 353, s. 13.)
Cross Reference.—As to attachment of shares of stock, see
§§ 1-458 to 1-460.
§ 55-94. Creditor's remedies to reach certifi-
cate.—A creditor whose debtor is the owner of a
certificate shall be entitled to such aid from courts
of appropriate jurisdiction, by injunction and other-
wise, in attaching such certificate or in satisfying
the claim by means thereof as is allowed at law or
in equity, in regard to property which cannot
readily be attached or levied upon by ordinary
legal process. (1941, c. 353, s. 14.)
§ 55-95. No lien or restriction unless indi-
cated on certificate.—There shall be no lien in
favor of a corporation upon the shares represented
by a certificate issued by such corporation and
there shall be no restriction upon the transfer of
shares so represented by virtue of any by-laws of
such corporation, or otherwise, unless the right of
the corporation to such lien or the restriction is
stated upon the certificate. (1941, c. 353, s. 15.)
§ 55-96. Alteration of certificate does not di-
vest title to shares.—The alteration of a certificate,
whether fraudulent or not and by whomsoever
made, shall not deprive the owner of his title to
the certificate and the shares originally represented
thereby, and the transfer of such a certificate shall
convey to the transferee a good title to such cer-
tificate and to the shares originally represented
thereby. (1941, c. 353, s. 16.)
§ 55-97. Lost or destroyed certificate.—Where a certificate has been lost or destroyed, a court of competent jurisdiction may order the issue of a new certificate therefor on service of process upon the corporation and on reasonable notice by publication, and in any other way which the court may direct, to all persons interested, and upon satisfaction of proof of such loss or destruction and upon the giving of a bond with sufficient surety to be approved by the court to protect the corporation or any person injured by the issue of the new certificate from any liability or expense, which it or they may incur by reason of the original certificate remaining outstanding. The court may also in its discretion order the payment of the corporation's reasonable costs and counsel fees.

The issues of a new certificate under an order of the court as provided in this section, shall not relieve the corporation from liability in damages to a person to whom the original certificate has been or shall be transferred for value without notice of the proceedings or of the issuance of the new certificate: Provided, nothing in this section shall prevent the issuance of a new stock certificate in the place of a lost or destroyed certificate in accordance with the provisions of § 55-67. (1941, c. 353, s. 17.)

Cross References.—As to the issuance of duplicate certificates, see also §§ 55-67 and 55-68. As to procedure when corporation in which stock is held merges with another, see § 55-166.

Editor's Note.—The case annotated here was decided under former § 1163.

Loss Question of Fact.—Where a stockholder in an unincorporated company loses his certificate of stock and sues his company for a reissue and the allegation of loss is denied, an issue of fact is raised for trial by jury and it must be submitted to them. Hendon v. North Carolina R. Co., 152 N. C. 184, 34 S. E. 227.

§ 55-98. Rules for cases not provided for by this article.—In any case not provided for by this article, the rules of law and equity, including the law merchant, and in particular the rules relating to the law of principal and agent, executors, administrators and trustees, and to the effect of fraud, misrepresentation, duress, or coercion, mistake, bankruptcy, or other invalidating cause, shall govern. (1941, c. 353, s. 18.)

§ 55-99. Interpretation of article.—This article shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it. (1941, c. 353, s. 19.)

§ 55-100. Definition of indorsement.—A certificate is indorsed when an assignment or a power of attorney to sell, assign, or transfer the certificate or the shares represented thereby is written on the certificate and signed by the person appearing by the certificate to be the owner thereof, and of the shares represented thereby, until and unless he indorses the certificate to another specified person, and thereupon such other specified person is the person appearing by the certificate to be the owner thereof until and unless he indorses the certificate to another specified person. Subsequent special indorsements may be made with like effect. (1941, c. 353, s. 21.)

§ 55-102. Other definitions.—(1) In this article, unless the context or subject matter otherwise requires—

"Certificate" means a certificate of stock in a corporation organized under the laws of this state or of another state whose laws are consistent with this article.

"Delivery" means voluntary transfer of possession from one person to another.

"Person" includes a corporation or partnership or two or more persons having a joint or common interest.

To "purchase" includes to take as mortgagee or as pledgee.

"Purchaser" includes mortgagee and pledgee.

"Shares" means a share or shares of stock in a corporation organized under the laws of this state or of another state whose laws are consistent with this article.

"State" includes state, territory, district and insular possession of the United States.

"Transfer" means transfer of legal title.

"Title" means legal title and does not include a merely equitable or beneficial ownership or interest.

"Value" is any consideration sufficient to support a simple contract. An antecedent or pre-existing obligation, whether for money or not, constitutes value where a certificate is taken either in satisfaction thereof or as security therefor.

(2) A thing is done "in good faith" within the meaning of this article, when it is in fact done honestly, whether it be done negligently or not. (1941, c. 353, s. 22.)

§ 55-103. Article does not apply to existing certificates.—The provisions of this article apply only to certificates issued after March 15, 1941. (1941, c. 353, s. 23.)

Editor's Note.—This act became effective March 15, 1941.

§ 55-104. Name of article.—This article may be cited as the Uniform Stock Transfer Act. (1941, c. 353, s. 26.)

Art. 9. Meetings, Elections and Dividends.

§ 55-105. Place of stockholders' and directors' meetings.—The meetings of the stockholders of every corporation of this state shall be held at the principal office in this state. The directors may hold their meetings, and have an office and keep the books of the corporation (except the stock and transfer books) outside the state. Every corporation shall maintain a principal office in this state, have an agent in charge thereof. (Rev., s. 117; 1901, c. 2, s. 49; C. S. 1168.)

Cross References.—As to first meeting of a corporation, see § 55-6. As to the stock and transfer books, see § 55-107. As to power of court to compel corporation to bring its books into the state, see § 55-109. As to changing the location of the principal office, see § 55-34.

Where Charter Provision Contrary.—Although the act incorporating a company provided that Norfolk, Virginia, should be the place of its principal office, it was held in Simmons v. Norfolk & Baltimore, etc., Co., 115 N. C. 147, 18 S. E. 117, that it is the duty of a corporation to keep its principal place of business, its books and records and its principal officers within the state which incorporates it, to an extent necessary to the fullest jurisdiction and visitorial

Scope of Meetings.—The scope of a special meeting of stockholders is limited to the purpose stated in the notice thereof; business action beyond this scope is void unless a new purpose is consented to or subsequently ratified. Asbury v. Mooney, 173 N. C. 454, 92 S. E. 267.

Must Act in Meeting.—It is essential to the validity of the acts of stockholders of a corporation that they should be assembled in their representative capacity as they are not permitted to discharge any of their duties as stockholders unless so organized. Hill v. Railroad, 143 N. C. 593, 55 S. E. 854, citing Duke v. Markham, 105 N. C. 131, 10 S. E. 1017.

Same—Individual Assent Invalid.—The assent of a majority of stockholders, expressed elsewhere than at a meeting of the stockholders, as where the assent of each is given separately and at different times to a person who goes around to them privately, does not bind the company. Duke v. Markham, 105 N. C. 151, 10 S. E. 1017.

Necessity for Notice.—In order to protect the rights of minorities the law requires that notice of the meetings of the stockholders of a corporation shall be given to every shareholder, either by the method prescribed in the charter or by-laws or by express notice; but where it appears that every person interested had express notice and participated in a meeting, there is no necessity for proving a compliance with such notice. Benbow v. Cook, 115 N. C. 325, 620 S. E. 453.

Meetings of Directors.—To make the proceedings of a meeting of the directors of a corporation regular, it must be at a stated time provided for in the articles of incorporation, or by-laws or held after notice to all of the directors. First Nat. Bank v. Asheville, etc., Lumber Co., 116 N. C. 827, 11 S. E. 948.

Same—Necessity for Notice.—The acts of the majority of the directors at a meeting held at an unusual time and place, without notice to the other directors, are not valid. First Nat. Bank v. Asheville, etc., Lumber Co., 116 N. C. 827, 11 S. E. 948.

§ 55-106. Meeting called by three stockholders.—When, for any reason, a legal meeting of the stockholders of any corporation cannot be otherwise called, three stockholders with voting power may call such meeting by publishing in a newspaper published in the county in which the principal office in this state is located ten days notice of the time, place and purposes of the meeting, and mailing this notice to all stockholders whose postoffice addresses are known or can be ascertained. A meeting so called is a legal meeting of the corporation, and if there are no officers present, the stockholders may elect officers for the meeting; and the secretary of the meeting shall record the proceedings thereof in the minute book of the corporation. (Rev., s. 1190; 1901, c. 2, s. 51; C. S. 1169.)

§ 55-107. Transfer and stock books.—Every corporation shall keep at its principal and registered office in this state the transfer books, in which the transfer of stock shall be registered, and the stock books, which shall contain the names and addresses of the stockholders, and the number of shares held by them respectively, and shall at all times during the usual hours for business be open to the examination of every stockholder. These books shall be the only evidence as to who are the stockholders entitled to examine them, and to vote at elections. In case the right to vote upon any share of stock is questioned, the stock books of the corporation shall be referred to, to ascertain who are the stockholders, and in case of a discrepancy between the books, the transfer book shall control and determine who are entitled to vote. (Rev., ss. 1180, 1181; 1901, c. 2, ss. 35, 45; C. S. 1170.)

§ 55-108. Directors to produce books at election.
time that the voter can "cumulate" his votes. Bridgers v. Staton, 150 N. C. 216, 217, 63 S. E. 892.

The right to cumulative voting is not given generally, but only in the election of officers. It could not apply to other matters, as the motion to adjourn, for instance, where there is only one proposition and nothing to "cumulate" upon. Bridgers v. Staton, 150 N. C. 216, 217, 63 S. E. 892.

Voting Trust Illegal.—An agreement which deprives the stockholders of the right to vote is contrary to public policy and void. Harvey v. Improvement Co., 118 N. C. 693, 24 S. E. 489; Sheppard v. Rockingham Power Co., 150 N. C. 776, 777, 64 S. E. 894.

Saxey—Not a Proxy.—An agreement pooling stock in a corporation which creates a voting trust, with absolute powers to decide upon matters arising for a period exceeding three years cannot be considered as a proxy authorized by this section for a proxy is only good for the period of three years. Sheppard v. Rockingham Power Co., 150 N. C. 776, 777, 64 S. E. 894.


§ 55-111. Stock held by fiduciary, pledgor, life tenant, or corporation.—Every person holding stock as executor, administrator, guardian or trustee, or in any other representative or fiduciary capacity, may represent it at all meetings of the corporation, and may vote it as a stockholder, with the same effect as if the absolute owner thereof, unless the instrument creating the trust provides to the contrary. Every person who has pledged his stock as collateral security may represent it at all such meetings, and may vote it as a stockholder, unless in the transfer to the pledgee on the books of the corporation he has expressly empowered the pledgee to vote it, in which case only the pledgee or his proxy may represent and vote said stock. Where stock is owned by, or has been transferred on its record by, a tenant at all meetings of the corporation may represent it and vote the stock in person or by proxy, in the same manner and with the same effect as if he were the absolute owner thereof. Shares of stock of a corporation belonging to the corporation cannot be voted directly or indirectly. (Rev., ss. 1185, 1186, 1187; 1901, c. 2, ss. 42, 43; 1905, c. 174, 67 S. E. 892; 1914, c. 174, 67 S. E. 892.)

Cross Reference.—As to power of a corporation to purchase its own stock, see §§ 55-66 and 55-71.

When Trustee May Vote.—When the terms and provisions of a will, bequeathing a life interest in certain shares of stock in a corporation, provide that in the event of a death of the life tenant the shares are to be held and controlled by trustees therein named as executors and trustees, the trustees may vote the same in the stockholders' meetings under this section and the provisions of this section cannot issue to voting for the shares of the life tenant has no application. Haywood v. Wright, 152 N. C. 421, 422, 67 S. E. 962.

Assignee Empowered to Vote.—A written agreement assigning stock in a corporation with authority to vote, reserving to the assignee who retains possession the right to all dividends, amounts only to a proxy. Bridgers v. Staton, 150 N. C. 216, 217, 63 S. E. 892.


§ 55-112. Election of directors.—All elections for directors shall be by ballot, unless otherwise provided in the charter or by-laws, and a majority of the issued and outstanding stock must be present in person or by proxy; the persons receiving the greatest number of votes shall be the directors. (Rev., ss. 1182; 1901, c. 2, ss. 39; 1927, c. 138; C. S. 1175.)

Cross Reference.—As to directors in general, see § 55-41. As to power of the directors, see § 55-51.

Editor's Note.—This section formerly contained this additional provision: "The polls must remain open one hour, unless all the stockholders are present in person or by proxy and have sooner voted, or unless all the stockholders have voted by proxy before this meeting; this sentence was stricken out by ch. 138, Public Laws 1927.

Effect of Motion of Adjournment.—When a motion to adjourn a stockholders' meeting has been carried, and a sufficient number have withdrawn to reduce the number of those present below a majority of all the stock issued and outstanding, an election of officers cannot be lawfully held without adjournment to a future meeting, though the adjournment was carried by an illegal vote. Bridgers v. Staton, 150 N. C. 216, 63 S. E. 892.

§ 55-113. Failure to hold election.—If the election for directors of a corporation is not held on the day designated by the charter or by-laws, the directors shall cause the election to be held as soon thereafter as is convenient. No failure to elect directors at the designated time shall work any forfeiture or dissolution of the corporation; and if the directors fail or refuse for thirty days after receiving a written request for such election from those owning one-tenth of the outstanding stock, to call a meeting for the election, the judge of the district, or the judge presiding in the courts of the district, in which the principal office of the corporation is located, may, upon the application of any stockholder and on notice to the directors, order an election or make such other order as the judge deems advisable. The provisions for the issue and hearing of injunctions shall, as far as applicable, govern such hearing. (Rev., ss. 1188; 1901, c. 2, ss. 46; C. S. 1176.)

Mandamus Cannot Issue.—A mandamus sought under the provisions of this section and the following section cannot issue to compel the reconvening of the stockholders for the election of directors because of an illegal adjournment to a certain date by unlawful voting of stock, when that date has passed but the provisions of this section should be followed. Bridgers v. Staton, 150 N. C. 216, 217, 63 S. E. 892.

When Meeting Ordered by Judge.—A meeting of the stockholders of a corporation, ordered, upon application, by the judge in accordance with the provisions of this section, must be composed of a majority of shares held twenty days before such meeting, as it appears from the stock book, or, in case of a discrepancy, the transfer book of the corporation. Bridgers v. Staton, 150 N. C. 216, 217, 63 S. E. 892.

Dissolved in re Hotel Raleigh, 207 N. C. 521, 527, 177 S. E. 648.

§ 55-114. Jurisdiction of superior court over corporate elections.—Whenever there shall be any dispute with reference to the election of directors by the stockholders of any corporation in the hands of a receivership, or whenever there shall be any dispute with reference to the election of officers of any corporation by directors or stockholders, if the stockholders elect the officers, the resident or presiding judge of the district may, after ten days' notice to the stockholders, or to the directors as the case may be, hear at chambers, in the county in which the principal office of the corporation is situated, evidence in the form of affidavits as to dispute, and may continue from time to time such hearing for the purpose of establishing facts with reference thereto to his satisfaction; and upon the completion of his hearing may order a new election or may declare the result of the election so held, or may continue the directors or officers, as the case may be, until a new election shall be held: Provided, however, that no order shall be entered temporarily affecting the status of the corporation. With reference to notice, evidence, and the findings by the judge hearing the same, the proceedings shall
be, as far as possible, the same as in injunctions. (Rev., s. 1189; 1901, c. 2, s. 47; 1935, c. 413; 1957, c. 347; C. S. 1177.)

Cross References.—As to power of superior court to compel corporation to comply with the provisions of this section, see § 55-144.

Editor's Note.—Prior to the 1937 amendment this section also provided that in the appointment of receivers, which was inserted by the 1937 amendment.

Failure to Elect Directors.—A proceeding based upon the failure of stockholders of a corporation to elect directors at any annual meeting held for that purpose is a proceeding under this section, and notice in writing signed by complainant served on the adverse parties by the sheriff thereof shall be equivalent to the notice designated for the hearing of the complaint conferred jurisdiction upon the judge of the superior court over the parties and subject-matter of the proceeding, and the conditions precedent to proceedings under this section shall be applicable. In re Hotel Raleigh, 207 N. C. 521, 177 S. E. 648.

In this proceeding the corporation is neither a necessary nor a proper party, nor may its rights be affected, and the judgment shall be, as far as possible, the same as in injunctions. (Rev., s. 1191; 1901, c. 2, s. 52; C. S. 1178.)

§ 55-115. When dividend declared.—The directors of every corporation created under this chapter shall, in January of each year, unless some specific time for that purpose is fixed in its charter, or by-laws, and in that case at the time so fixed, after reserving, over and above its capital stock paid in, as a working capital for the corporation, whatever sum has been fixed by the stockholders, declare a dividend among its stockholders of the whole of its accumulated profits exceeding the amount reserved, providing for the payment in dividends of the full net profits, the company showing at the end of 1941 a surplus of $38,000 on a capital of $7,800. Amick v. Coble, 222 N. C. 484, 23 S. E. 2d 854.

Mandamus to Compel Dividends.—Where, under the provisions of this section, the accumulated profit of a private corporation in excess of the working capital has been ascertained, the directors are without authority to expend that surplus upon the working capital, and unless the directors have declared and paid dividends therefrom in accordance with the requirements of the statutes, mandamus will issue to compel such distribution. Cannon v. Wiscassett Mills Co., 195 N. C. 119, 141 S. E. 344.

Stock Dividend May Be Declared.—The issuance of paid-up stock as a dividend cannot be contested by an existing creditor, nor by one who has notice of the facts, since it withdraws nothing from the corporation or in any way depletes its assets. Whitlock v. Alexander, 160 N. C. 463, 466, 76 S. E. 556.


Declared Dividend Is Debt.—A dividend declared by and due from a private corporation is a debt due to the shareholder, and is recoverable as such. Trustees v. North Carolina R. Co., 221 N. C. 392.

Debt Can Not Be Deduced from Dividend.—A bank has no right to retain out of the dividends upon the stock the balance due to its stockholder. Attorney General v. State Bank, 21 N. C. 545.

An action to compel declaration of a dividend can not be maintained where the stockholder has not applied to the directors, and must allege that the directors refused to entertain such application. Winstead v. Hearne Bros. & Co., 173 N. C. 606, 611, 92 S. E. 613, citing 2 Cook on Corps., § 684, p. 209.

§ 55-116. Dividends from profits only; directors' liability for impaing capital.—No corporation may declare and pay dividends except from the surplus or net profits arising from its business, or when its debts, whether due or not, exceed two-thirds of its assets, nor may it reduce, divide, withdraw, or in any way pay to any stockholder any part of its capital stock except according to this chapter; provided, a public service corporation doing business in any part of the state may sell, issue, and dispose of any part of its surplus or net profits arising from its business except when its debts, whether due or not, exceed three-fourths of its assets; provided, further, that any corporation, other than a public service corporation, which is a member of a partnership may declare and pay dividends from the surplus or net profits arising from its business when the sum of the corporation's separate debts, whether due or not, and that part of the partnership debts which is the same proportion of all the partnership debts, whether due or not, as the corporation's interest in the partnership assets is of all such assets, does not exceed two-thirds of the corporation's assets, and in such calculation the amount of its interest in the partnership assets shall be considered. In case of a violation of any provision of this section, the directors under whose administration the same occurs are jointly and severally liable, at any time within six years after paying such dividend, to the corporation and its creditors, in the event of its dissolution or insolvency, to the full amount of the dividend paid, or capital stock reduced, divided, withdrawn, or paid out, with interest on the same from the time such liability accrued. Any director who was absent when the violation occurred, or who dissent from the act or resolution by which it was effected, may exonerate himself from such liability by causing his dissent to be entered at large on the minutes of the directors at the time the action was taken or immediately after he has had notice of it. (Rev., s. 1192; Code, s. 681; 1901, c. 2, ss. 33, 52; 1927, c. 121; 1933, c. 354, s. 1; C. S. 1179.)

Cross References.—As to officer's liability for fraud, see §§ 55-56. As to joint and several liability of directors, see § 55-57.

Editor's Note.—The first proviso in the first sentence was added by ch. 121, Public Laws of 1927.

The second proviso, relating to dividends by corporation holding membership in partnership, was inserted by Public Laws 1931, c. 354.

§ 31 N. C. Law Rev. 212, for criticism of this section.
Surplus or net profits, as used in this section, are what remains after deducting from the present value of all the assets, including the capital stock, the liabilities of the corporation, including the capital stock. Cannon v. Wiscasset Mills Co., 195 N. C. 119, 125, 141 S. E. 344.

Where Charter Exempts Stockholder from Liability.—The charter provisions, that "no stockholder of the corporation shall be individually liable for debt, liability, contract, tort, omission, or engagement of the corporation or any other stockholder thereof," does not make the corporation the just and equitable principle embodied in this section holding the stockholders who are directors liable for a joint tort or misfeasance committed by them to the prejudice of creditors. McVey v. Young Hardware Co., 144 N. C. 474, 479, 57 S. E. 169.

Fraudulent Representation that Dividend is Earned.—Evidence that the corporation had induced the defendant to purchase, by falsely representing a dividend would be credited upon his notes given for the shares, is in effect a representation that the corporation had earned the dividend as represented in this section; and it may be received as a circumstance of fraud, together with other evidence tending to establish it. Seminole Phosphate Co. v. Johnson, 185 N. C. 419, 124 S. E. 839.

The declaration of a dividend and issuance of stock for it, by an excessive overvaluation of property or by an excessive valuation of profits, is prima facie evidence that the unearned increment would be evidence from which fraud could be inferred, and in extreme cases it might be regarded as conclusive. Whitlock v. Alexander, 160 N. C. 467, 161 S. E. 796.

Liability of Director.—A director of a corporation who has not brought himself within the provisions of this section, exonerating him from liability for the payment of dividends to himself or to any other stockholder of the benefit, does not apply to any director of the business with the right to justify it, or its debts exceed two-thirds of its assets, etc., is liable, in the case of the trustee in bankruptcy of such corporation, for the amount of such debts, and the proper court costs and charges, not exceeding the amount of the dividends unlawfully declared. Claypool v. McIntosh, 182 N. C. 109, 108 S. E. 483.

Question of Fraud for Jury.—The question as to actual fraud in issuing a stock dividend must be referred to a jury. Whitlock v. Alexander, 160 N. C. 465, 475, 76 S. E. 538.

Repurchase of Stock.—This section was held inapplicable to suit by receiver against directors for repurchase of stock by corporation in Thompson v. Shepherd, 203 N. C. 310, 165 S. E. 796.

Art. 10. Foreign Corporations.

§ 55-117. Powers existing independently of permission to do business.—A corporation created by another state of the United States, or by any foreign state, kingdom, or government, may acquire by devise or otherwise, and may hold, mortgage, lease, and convey real estate in this state as executor, administrator, guardian, in charge of such office, the character of the business in such corporation, or any other stockholder thereof, does not apply to railroad, banking, express or telephone companies excepted, shall file in the office of the secretary of state a copy of its charter or articles of incorporation, but in no case less than forty dollars nor more than five hundred dollars: and also a filing fee of five dollars. Provided that the tax upon shares of stock without nominal or par value shall be the same as if each share of stock had a par or face value of one hundred dollars. Such corporation may withdraw from the state upon filing in the office of the secretary of state a statement signed by its president and secretary and attested by its corporate seal, setting forth the fact that such corporation desires to withdraw, and upon payment to the secretary of state of a fee of five dollars. Every corporation failing to comply with the provisions of this section shall forfeit to the state five hundred dollars, to be recovered, with costs, in an action to be prosecuted by the attorney-general, who shall prosecute such actions whenever it appears that this section has been violated. This section does not apply to railroad, banking, express or telephone companies which, prior to March 9, 1915, had been licensed to do business in this state, or continue involved in the business in this state, having a regularly appointed agent upon whom service of process could be made, located in this state. All acts of the Secretary of State domesticating foreign corporations without nominal or par value shares of stock and taxing the same as provided in the proviso are hereby validated. (Rev., s. 1914; 1901, c. 2, s. 57; 1903, c. 76; 1915, c. 263; 1935, c. 44; 1959, c. 57; C. S. 1181.)
Cross References—As to service of process and appointment of agent, see §§ 1-97, paragraph 1, 1-98, 55-38, and 7-143. As to venue, see § 1-80. As to foreign insurance companies, see §§ 38-149 et seq. As to foreign building and loan associations, see §§ 1-105. As to foreign security and loan corporations in this state, see § 55-10. As to taxation, see §§ 105-122 and 105-250.

Editor's Note.—One extremely important question which has arisen under this section is in regard to the effect of non-compliance by foreign corporations, particularly whether after compliance they have a right to sue in the federal courts on the ground of diverse citizenship. This question arose in 1903 in Debnam v. Tel. Co., 100 N. C. 831, 36 S. E. 269 and it was decided that the purpose of this section was to require all corporations doing business in the state to become domesticated by this domicile procedure was an act to require the corporation not to become a foreign corporation, and that the corporation could not remove a cause, when sued in the state courts, to a federal court, on the ground of diverse citizenship. This ruling was upheld in Douglass Co. v. Honeycutt, 204 N. C. 219, 167 S. E. 810. In 1900 in the case of Debnam v. Tel. Co., 126 N. C. 831, 36 S. E. 713, it was decided that the purpose of this section was to require all corporations doing business in the state to become domesticated by this domicile procedure was an act to require the corporation not to become a foreign corporation, and that the corporation could not remove a cause, when sued in the state courts, to a federal court, on the ground of diverse citizenship. This ruling was upheld in Douglass Co. v. Honeycutt, 204 N. C. 219, 167 S. E. 810.

The amendment of 1935 increases the amount payable on every one thousand dollars of capital stock from twenty to twenty-five dollars and the maximum as five hundred instead of two hundred and fifty dollars. The changes occur in the second sentence of the section.

This section requires that the address added the proviso after the second sentence, provided: "All acts of the secretary of state domesticating foreign corporations without nominal or par value shares of stock and taxing the same as provided for in this section shall be validated."

For comment on 1897 amendatory act, see 17 N. C. Law Rev. 546.

In General.—Although this section excludes insurance companies from its operation, the statutes will be construed in relation to their subject-matter. The exception in this section is because insurance companies are exclusively dealt with elsewhere. (Coles v. North Carolina Ins. Co. v. Lawrence, 204 N. C. 707, 169 S. E. 636.)

Exercise of Police Power.—There is nothing in the U. S. or State Constitution which prohibits the state, in the exercise of its police power, from the exclusion of foreign corporations doing business in the state without compliance. Minnesota v. Blue Bird Auto, 280 U. S. 375, 50 S. E. 2d 376.

The restriction of the constitution is that the license tax must not interfere with interstate commerce or be otherwise invalid. Pittsburg Life, etc., Co. v. Young, 172 N. C. 331, 187 S. E. 726.

Property Not Removed to State.—This section requiring "domestication" enables plaintiffs to get personal service upon a foreign corporation, but does not remove its property to the State nor the sites of its debts created elsewhere. Stuewe Bros. v. Aetna Fire Ins. Co., 125 N. C. 221, 35 S. E. 471.

Effect of Non-Compliance.—From the character of this section and its evident purpose the contracts of a foreign corporation doing business in the State without compliance are not avoided, but the penalty alone is enforceable, and by action as the statute prescribes. Miller v. Howell, 184 N. C. 119, 123, 113 S. E. 621; Ober & Sons Company v. Kattenstein, 169 N. C. 439, 76 S. E. 476. And in such a case where State sues for the penalty, Blackwell's Tobacco Co. v. American Tobacco Co., 144 N. C. 352, 363, 57 S. E. 5; Ober & Sons Company v. Kattenstein, supra.

If the State, in addition to the penalty, has desired to render invalid the contract and to deny a recovery thereon, it would have so enacted, as it has done in regard to gambling. Tobacco Trustee Co. v. Kattenstein, 160 N. C. 439, 441, 76 S. E. 2d.

How Charter Proven.—The charter of a foreign corporation may be proven in this State by exhibiting a copy duly certified by the Secretary of State or the Secretary of the State in which the corporation was created. Barcelo v. Ignace, 118 N. C. 712, 714, 24 S. E. 124.

Right to Sue and Be Sued.—Where a foreign corporation has submitted to domestication in this State by filing its certificate of incorporation with the Secretary of State and by otherwise complying with the provisions of this section, it thereby acquiesces the right to sue and be sued in the courts of this State as a domestic corporation, and where it brings action on a note in the county of its designated residence the defendants are not entitled to remove to the county of their residence as a matter of right. Smith-Douglass Co. v. Honeycutt, 204 N. C. 219, 167 S. E. 810. Cited in Ward v. Southern Sand & Gravel Co., 33 F. (2d) 771.

§ 55-119. Sale of shares of stock held by life tenant.—The shares of the capital stock of a foreign corporation, in which any person owns a life estate, may be sold by an order in a special proceeding, unless prohibited by the instrument under which the estate was created, or by the State nor the situs of its debts created elsewhere. The clerk of the Supreme Court shall have power to make, from time to time, appropriate orders for the sale of said shares of stock, and for handling, securing and investing the net proceeds of such sales. In lieu of the payment to the life tenant of the income and profits on the net proceeds of sale, the clerk may order the present cash value of the life tenant's share, ascertained as by law provided, to be paid to the life tenant absolutely, out of said proceeds, and order the balance thereof to be invested and kept invested for the remaindermen, or paid over to a trustee appointed for the purpose, after the trustee shall have qualified by filing with the clerk an undertaking, to be approved by him, payable to the State of North Carolina, for the benefit of the remaindermen, in a sum double the amount of the balance of the net proceeds aforesaid, and conditioned for the prompt forthcoming and payment of the principal and interest or income thereof, and the faithful performance of duty and compliance with the orders of court relating thereto. The orders aforesaid shall be approved by the judge of the Superior Court residing in or holding the court of the district, where such approval is now required by law. (1925, c. 59.)

§ 55-120. Secretary of state directed to require domestication of all foreign corporations doing business in state.—The secretary of state is hereby directed to require that every foreign corporation doing business in North Carolina, as permitted under the provisions of § 55-117, shall file in the office of the secretary of state a copy of its charter or articles of agreement, in the manner required by § 55-118, and all amendments thereto, and otherwise fully comply with the provisions of said law, including the payment to the secretary of state of fees fixed by said law for the privilege of doing business in said state and domestication thereof. The secretary of state is authorized and empowered to employ such assistants as shall be deemed necessary in his office for the purpose of carrying out and enforcing the provisions of this section, and for making such investigations as shall be necessary to ascertain foreign corporations now doing business in North Carolina which [ 467 ]
may have failed or hereafter fail to domesticate as required by law. (1937, c. 343.)

Art. 11. Dissolution.
§ 55-121. Voluntary, generally.—When in the judgment of the board of directors it is deemed advisable and for the benefit of a corporation that it be dissolved, the board, within ten days after the adoption of a resolution to that effect by a majority of the whole board, at a meeting called for that purpose, of which meeting every director shall have received three days notice, shall cause notice of adoption of such resolution to be mailed to each stockholder residing in the United States, to his last known postoffice address, and also, beginning within said ten days, cause a like notice to be published in a newspaper published in the county wherein the corporation has its principal office, at least once a week for four successive weeks, next preceding the time appointed for the same, of a meeting of the stockholders to be held at the office of the corporation, to take action upon the resolution. The stockholders' meeting thus called may, on the day appointed, by consent of a majority in interest of the stockholders present, locate and hold in any place within the county wherein the corporation has ceased to transact business and fails to dissolve itself as provided by law, a meeting to settle up and adjust its business and affairs. Upon the timely filing in the office of the secretary of state of an affidavit of the manager or publisher of such newspaper that a dissolution take place, their consent, to the adoption of a resolution to that effect, and the written assent of such resident stockholder. White v. Kincaid, 149 N. C. 415, 419, 63 S. E. 109.

Motive Generally Immaterial.—When a corporation lawfully proceeds to wind up its affairs in accordance with this section, the motive underlying the act, however reprehensible or malicious, is not, as a rule, relevant to the inquiry; and the courts will not undertake to interfere with the honest exercise of discretionary powers vested by statute in the management of the corporation, so long as the stockholders, when no time was fixed for its duration, upholding and extending this power of voluntary dissolution as established by the better considered decisions on the subject. White v. Kincaid, 149 N. C. 415, 419, 63 S. E. 109.

Same—Directors Are Trustees.—The directors of a corporation in proceedings for dissolution, under this section, are trustees in the sense that they must act faithfully in their judgment for the benefit of the corporation and in furtherance of its interest, and not for the purpose of unjustly enriching themselves or the individual stockholders, a judgment as of the directors concurred in by two-thirds in interest of the stockholders. White v. Kincaid, 149 N. C. 415, 419, 63 S. E. 109.

Liquidation to Escape Judgment.—An attempted liquidation by a corporation, to escape judgment for the refund of money wrongfully distributed, is in fraud of creditors. Chatham v. Realty Co., 180 N. C. 500, 105 S. E. 329.

Suits Pending Dissolution.—Where it appears in an action that the indebtedness sought to be recovered was claimed to be due a corporation, and that the suit was instituted by the individual stockholders, a judgment as of the corporation is proper, whether the corporation was voluntarily dissolved or not, and the judgment, as between the corporation and the proper party plaintiff being the corporation or a receiver appointed therefor, is to the corporation. Worthington v. Gilmers, 190 N. C. 128, 129 S. E. 157.

§ 55-122. Liability of stockholders.—The stockholders of a corporation chartered under the laws of this state are individually liable for all taxes, costs and fees for the dissolution of the corporation, and the attorney-general is authorized to enforce the provisions of this section by suit in the name of the state, or of the Attorney-General, or of any one of the stockholders, or of the corporation, and the superior court of the county in which the principal office of the corporation is located, for the recovery of all taxes required by the Revenue Laws of the State of North Carolina. (Rev. s. 1195; 1901, c. 2, s. 34; 1941, c. 195; C. S. 1182.)
dent stockholders, accompanied by such affidavit, is sufficient to dissolve the corporation. If no stockholder of such corporation is found within the state the secretary of state has authority to declare the charter of the corporation forfeited, and shall publish annually in his corporation report a list of the corporations whose charters have been so forfeited. (1909, c. 730, s. 1; C. S. 1183.)

Cross Reference.—As to liability for unpaid stock, see § 55-65.


§ 55-123. Voluntary, before payment of stock.—The incorporators named in a certificate of incorporation, before the payment of any part of the capital stock, and before beginning the business for which the corporation was created, may surrender all their corporate rights and franchises, by filing in the office of the secretary of state a certificate, verified by oath, that no part of the capital stock has been paid and such business has not been begun, and surrendering all rights and franchises. Thereupon the corporation is dissolved. (Rev., s. 1177; 1901, c. 2, s. 35; C. S. 1184.)

§ 55-124. Involuntary, at instance of private persons.—Corporations may be dissolved by civil action, instituted by the corporation, a stockholder, or creditor, or by authority of the attorney-general in the name of the state, in the following cases:

1. For any abuse of its powers to the injury of the public or of its stockholders, creditors, or debtors.
2. For nonuser of its powers for two or more consecutive years.
3. When it is insolvent, or suspends its ordinary business for want of funds, or is in imminent danger of insolvency, or has forfeited its corporate rights.
4. Upon any conviction of the company of a persistent criminal offense. (Rev., s. 1196; Code, s. 694; 1901, c. 2, s. 73; C. S. 1183.)

Cross Reference.—As to involuntary dissolution of a bank, see § 53-19.

Editor's Note.—The provision in the next section, that the stockholder instituting the dissolution proceeding must own one-fifth or more of the stock, does not apply to proceedings under this section. Lasley v. Mercantile Co., 179 N. C. 390, 177 S. E. 207.

Nor is it necessary that the stockholder allege or prove that he first made application to the directors or management to take action in the matter for this relates to suits for the purpose, though the corporation itself may be insolvent. Jones v. A. & W. Ry. Co., 193 N. C. 590, 177 S. E. 707.

§ 55-125. Involuntary, by stockholders.—When stockholders owning one-fifth or more in amount of the paid-up common stock of any such corporation apply to the judge of the superior court holding the courts for the county in which the principal place of business of the corporation is situated, by petition containing a statement that for three years next preceding the filing of the petition, which time shall begin to run from three years after it has begun business, the net earnings of the corporation have not been sufficient to pay in good faith an annual dividend of four per cent on the paid-up stock of the corporation, over and above the salaries and expenses authorized by its by-laws and regulations, or that the corporation has paid no dividend for six years preceding said application; or whenever stockholders owning one-tenth or more in amount of the paid-up common stock of any such corporation apply to the judge of the superior court as aforesaid by petition containing a statement that the corporation has paid no dividend on the common stock for ten years preceding said application, and that they desire a dissolution of the corporation, the judge shall make an order requiring the officers of the corporation to file in court, within a reasonable time, inventories showing all the real and personal estate of the corporation, a true account of its capital stock, the names of the stockholders, their residences, the number of shares belonging to each, the amount paid in upon said shares and the amount still due thereon, and a statement of all the encumbrances on the property of the corporation and all its contracts which have not been fully satisfied and canceled, specifying the place and residence of each creditor, the sum owing to each, the nature of the debt or demand, and the consideration thereof, and any other information of the corporation. Upon the filing of the inventories, accounts and statements, the court shall enter an order requiring all persons interested in the corporation to appear before a referee to be appointed by the court, at a time and place named in the order, service of which may be made by publication for such time as may be deemed proper by the court, and show cause why the corporation should not

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be dissolved. If it appears to the court that the statements contained in the petition are true, the court may adjudge a dissolution of the corporation and shall appoint one or more receivers, who shall have the powers of receivers conferred by this chapter for the winding up the affairs and distribution of the assets of the corporation. If it appears to the court that the corporation is insolvent or in imminent danger of insolvency, the court may appoint a temporary receiver of the corporation pending dissolution. No suit shall be brought for the dissolution of a corporation under the provisions of this section until each and all of the petitioners have owned their stock for the term of two years prior to the institution of the action; nor shall any such suit be brought for the period of three years after a final judgment upon a prior petition as herein provided. (1913, c. 147; 1915, c. 137, s. 1; C. S. 1186.)

Editor's Note.—The provision for dissolution, upon the application of stockholders owning one-tenth or more of the paid-up common stock, when the corporation has paid no dividends for ten years preceding, was added by Laws of 1913, ch. 157. In regard to this amendment the court said in Winstead v. Hearne Bros., 173 N. C. 575, 97 S. E. 613: "This amendment would appear to be inconsistent with the six-year clause of the original act, and to require ten years’ complete suspension of dividends on the common stock of a corporation before application can be made for a receiver on that ground."

The constitutionality of this section providing for the dissolution of a corporation is not attacked. It can successfully assailed in an action thereunder to dissolve a corporation organized subsequent to its enactment. Kistler v. Caldwell Cotten Mills Co., 205 N. C. 809, 172 S. E. 373.

Application of stockholders owning one-tenth or more of the paid-up common stock, when the corporation has paid no dividends for ten years preceding, was added by Laws of 1913, c. 147; 1915, c. 137, s. 1; C. S. 1186.

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An information, filed by the Attorney-General, for the purpose of having the charter of an incorporation declared to be forfeited, though it need not be expressed in technical language, yet it must set out the substance of a good cause of forfeiture in its essential circumstances of time, place and overt acts. Attorney General v. Petersburg, etc., R. Co. 28 N. C. 456.

Area of Rural Community Misrepresented.—The right of action is given the Attorney-General, on the relation of the State, to annul a certificate of incorporation of a rural community when the petition upon which the Secretary of State has issued the certificate misrepresents that the area of the community to be incorporated extended only to that of "one school district," under the provisions of this section authorizing the Attorney-General to bring action when a certificate has been issued for a purpose of having the charter of an incorporation declared to be void on the ground of "a fraudulent suggestion or concealment of a material fact by the persons incorporated, or by some of them, or with their knowledge or consent," etc. State v. Rural Community, 192 N. C. 861, 109 S. E. 576.

§ 55-127. Forfeiture or dissolution for failure to organize or act. — When a charter has been granted creating a corporation, and the incorporators for two years neglect to organize and act, the charter is forfeited, and a corporation chartered under the laws of this State for that purpose. Boyd v. Redd, 120 N. C. 335, 27 S. E. 488.

§ 55-128. Forfeiture for nonuser by hydro-electric companies. — All waterpower, hydro-electric power, and water companies or corporations organized in this state shall be required to begin active work in making their proposed development within two years after their organization and diligently to prosecute their work on the same until it has been completed; and a failure to begin the work or development within the time, and to diligently prosecute work on the same until its completion, as herein provided, shall be legal grounds for declaring their charter rights or to dissolve, in the manner provided in this chapter, the secretary of state shall report their knowledge or consent, etc. State v. Rural Community, 192 N. C. 861, 109 S. E. 576.

§ 55-129. Involuntary, by bankruptcy. — When a corporation chartered under the laws of this state is adjudged bankrupt under the laws of the United States or when it shall be made to appear to a judge of the superior court that all of the assets of the corporation of whatever kind or character have been lost to the stockholders by reason of foreclosure, assignment, or execution under judgment, and that the corporation is therefore unable to conduct the business for which it was organized, the charter of the corporation is forfeited without further action, unless the stockholders determine by appropriate resolutions to continue the corporate existence of the corporation after the adjudication in bankruptcy, foreclosure, assignment, or sale under execution, and furnish the secretary of state with a duly certified copy of the resolutions, all within six months after the adjudication, foreclosure, assignment or final sale under execution. The stockholders of a bankrupt corporation whose existence is continued by the foregoing procedure must pay all privilege taxes which have accrued against the corporation since the adjudication, together with a fee of one dollar allowed the secretary of state for recording and filing the certificate provided for in this section. (1915, c. 134, ss. 2, 3; 1931, c. 310; C. S. 1190.)

Editor's Note.—Under this section prior to the Act of 1931, corporate charters were automatically forfeited by an adjudication of bankruptcy unless the stockholders took certain specified actions within a given time after the corporation was organized, if they for two consecutive years cease to act, then this disuse of their corporate privileges and powers is a forfeiture of the charter. If, after thirty days notice by the secretary of state, the corporation fails to surrender its corporate rights or to dissolve, in the manner provided in this chapter, the secretary of state shall report it to the attorney-general, who shall institute an appropriate action for its dissolution. (Rev., s. 1246; Code, s. 688; 1901, c. 2, s. 106; C. S. 1188.)

§ 55-130. When franchises forfeited by neglect, etc., corporation dissolved; costs. — If it is adjudged that a corporation against which an action has been brought has forfeited by neglect, abuse, or surrender, its corporate rights, privileges and franchises, judgment shall be rendered that the corporation be excluded from such rights, privileges and franchises, and that it be dissolved. If judgment is rendered in such action against a corporation, or against persons claiming to be a corporation, the court may cause the costs to be collected by execution against the persons making the claim, or by attachment or process against the directors or other officers of the corporation. (Rev., ss. 1209, 1210; Code, ss. 617, 618; C. S. 1191.)

§ 55-131. Service of summons in action for dissolution. — In an action for the dissolution of a corporation, or for the appointment of a receiver thereof, the summons must be served on the corporation by service on an officer or agent upon whom other process can be served, and shall be served on the stockholders, creditors, dealers and any others interested in the affairs of the company by publishing a copy at least weekly for two successive weeks in some newspaper printed in the county in which the corporation has its principal place of business, or if there is no such newspaper published, by posting a copy of the summons at the door of the courthouse of such county, and publishing a copy for the time and in the manner aforesaid in a newspaper published nearest the county seat of the county in which the corporation has its principal place of business or in a newspaper published in the city of Raleigh. This publication is sufficient service on all the stockholders, creditors of, or dealers with, the corporation, and upon the corporation, if no officer can after due diligence be found in the state and it has no process agent in the state; and all
§ 55-132. Corporate existence continued three years. — All corporations whose charters expire by their own limitation, or are annulled by forfeiture or otherwise, shall continue to be bodies corporate for three years after the time when they would have been so dissolved, for the purpose of prosecuting and defending actions by or against them, and of enabling them gradually to settle and close their concerns, to dispose of their property, and to divide their assets; but not for the purpose of continuing the business for which the corporation was established. The superior court of the county in which the principal office of said corporation is located may, upon petition of said corporation, continue the corporate existence for the purposes of winding up the affairs, for such time as the court may deem proper. The provisions hereof shall also apply to corporations whose affairs have not on March 30, 1939, been wound up. (Rev., s. 1200; Code, s. 667; 1901, c. 2, s. 58; 1919, c. 230, s. 1; C. S. 1193.)

Cross Reference.—As to the status of corporation which has been merged with another, see § 55-166.

Editor's Note.—The 1939 amendment substituted the last two sentences for the last sentence of this section.

In General.—This section expressly extends the life of the corporation for three years after dissolution, for the purpose of winding up its affairs. Smathers v. Bank, 135 N. C. 410, 413, 47 S. E. 90.

It covers cases of forfeiture not nearly so horrendous as bankruptcy. Sisk v. Old Hickory Motor Freight, 222 N. C. 691, 424 S. E. (2d) 488.

Purpose.—The provisions of this section are free from any ambiguity. The mischief to be remedied was the confusion possibly resulting from the abrupt dissolution of the corporation, and the measure adopted was the continuation of the corporate character solely for the purpose of winding up its affairs. General Electric Co. v. West Asheville Imp. Co., 73 Fed. 386, 388.

Commentary with § 55-129.—It was not the intention of this section and § 55-129 to bring about a situation in which a corporation could be alive to its assets, but dead to its obligations. To enjoy the security of an indestructible estate inventus during the time corporate existence is continued by statute for the purpose of suing and being sued. Sisk v. Old Hickory Motor Freight, 222 N. C. 611, 634, 424 S. E. (2d) 489.

Applies to All Corporations.—This section is not a provision of the charter of a particular corporation but a general provision of law applying to all corporations, and the purpose of the section is not to give it any special or pro tanto. Indeed, the repeal makes it applicable actwise to the particular corporation, as a sort of statutory letters of administration, which before the repeal it was a passive provision. General Electric Co. v. West Asheville Imp. Co., 73 Fed. 386, 388.

Under this section, a corporation continues for three years to be a body corporate, to dispose of its property and dividing its assets, and to perform all duties. — On the dissolution in any manner of a corporation, unless otherwise directed by an order of the court, the directors are trustees thereof, with full power to settle the affairs, collect the outstanding debts, sell and convey the property, and, after paying its debts, divide any surplus money and other property among the stockholders. The trustees have power to meet and act under the by-laws of the corporation, and, under regulations to be made by a majority, to prescribe the terms and conditions of the sale of such property, and they may sell all or any part for cash. They cannot give credit, or take mortgages or bonds for part of the purchase money for all or any part of the property. They have no power to sell for and recover the said debts and property in the name of the corporation, and are unable in the same name for the debts owing by it, and are joint and severally responsible for such debts only to the amount of property of the corporation which comes into their possession as trustees. Vacancies in the board of directors may be filled in accordance with the provisions of the by-laws of the corporation or the stockholders may fill such vacancies at a regular or duly called meeting. (Rev., ss. 1201, 1202; Code, s. 667; 1901, c. 2, ss. 59, 60; 1919, c. 250, s. 2; C. S. 1194.)

Cross Reference.—As to directors in general, see § 55-48.

Editor's Note.—The 1939 amendment added the last sentence of this section.

Remedy Must Be Pursued within Three Years. — The statutory remedy is exclusive of all others, and must be pursued within the three years, and a failure to proceed within that period will be a complete defense, not only to the corporation, but to the stockholders; and to individuals, who, by its charters or acts of the board of directors, are made individually responsible in the event of its insolvency. VonGlahn v. DeRossett, 81 N. C. 468.

Where a corporation is actually dissolved, the lapse of more than three years from dissolution, will serve as complete defense to actions against it. Standard Trust Co. v. Commercial National Bank, 240 Fed. 303, 306.

Same.—Only Applies Where Charter Expired.—This provision has no application to a case where a corporation had continued its business but its charter had not expired or been annulled. Heggie v. Building & Loan Assn., 107 N. C. 581, 592, 12 S. E. 275.

Hence the action of a judgment creditor is not barred in three years after the corporation has ceased to do business but its charter had not expired or been annulled. Heggie v. Building & Loan Assn., 107 N. C. 581, 12 S. E. 275.

Secured from Dissolved Corporation.—Where the certificate of the probate of a deed from a corporation, dissolved under certificate of the secretary of state, made within the time allowed by this section, recites as a fact judicially found that the deed was made in the name of the corporation, by the order of the directors, the trustee’s objection that it was not executed in the method required by sec. 55-133, is untenable; and the signature of the agent in charge, if made upon the mistake that he was in law the assignee of the mortgage, is only surplusage, and harmless. Lowdermilk v. Butler, 182 N. C. 502, 109 S. E. 571.


Section Does Not Apply to Merger.—Where an old corporation is, by a transfer of all its property, franchises and privileges, merged into a new corporation, with the same stockholders and directors as the old, with all the liabilities of the old corporation, this section does not apply so as to make the old corporation a necessary party to the action. In re New Friedewald Co. v. Ashe- ville Tobacco, etc., Co., 117 N. C. 546, 23 S. E. 490.

No Equity Jurisdiction.—This section and the two following sections, which continue the existence of defunct corporations for three years after the corporation was established, for the purpose of bringing and defending suits and closing their general business, oust the former equity jurisdiction for the appointment of a receiver, at the instance of creditors to wind up the corporate affairs. VonGlahn v. DeRossett, 81 N. C. 468.


§ 55-133. Directors to be trustees; powers and duties. — On the dissolution in any manner of a corporation unless otherwise directed by an order of the court, the directors are trustees thereof, with full power to settle the affairs, collect the outstanding debts, sell and convey the property, and, after paying its debts, divide any surplus money and other property among the stockholders. The trustees have power to meet and act under the by-laws of the corporation, and, under regulations to be made by a majority, to prescribe the terms and conditions of the sale of such property, and they may sell all or any part for cash. They cannot give credit, or take mortgages or bonds for part of the purchase money for all or any part of the property. They have no power to sell for and recover the said debts and property in the name of the corporation, and are unable in the same name for the debts owing by it, and are jointly and severally responsible for such debts only to the amount of property of the corporation which comes into their possession as trustees. Vacancies in the board of directors may be filled in accordance with the provisions of the by-laws of the corporation or the stockholders may fill such vacancies at a regular or duly called meeting. (Rev., ss. 1201, 1202; Code, s. 667; 1901, c. 2, ss. 59, 60; 1919, c. 250, s. 2; C. S. 1194.)
Confession of Judgment in Director's Favor.—A confession of judgment by an insolvent corporation in favor of a director who is a creditor, and upon a debt theretofore existing, is void as against other creditors. Hill v. Lumber Co. v. Grimes, 155 N. C. 566, 68 S. E. 567.


§ 55-134. Jurisdiction of superior court.—When a corporation is dissolved, in any manner whatsoever, the superior court, on application of a creditor or stockholder, may either continue the directors as trustees or appoint one or more persons receivers of the corporation. The court has jurisdiction of the application, and of all questions arising in the proceedings thereon, and may make, at any place in the district, any orders, injunctions, or decrees therein as justice and equity require. The powers of such trustees or receivers are as elsewhere given in this chapter, and may be continued as long as the court thinks necessary. (Rev. ss. 1203, 1204; Code, ss. 619, 668, 669; 1901, c. 2, ss. 61, 62; C. S. 1195.)

Cross References.—As to appointment of receiver, see § 55-147. As to powers and duties of receivers, see §§ 55-148 to 55-157.

When Section Applies.—Although by section 55-133 the directors, unless otherwise determined by order of some court having jurisdiction in the matter, may continue as trustees, or wind up the corporate business under this section, the entire matter of winding up the corporate business after dissolution may be taken charge of by the court, and must be at the instance of either the creditors or stockholders or any one of them. White v. Kincade, 149 N. C. 415, 422, 63 S. E. 109.

What is a "Creditor".—Any one who has a debt or demand against an insolvent corporation upon a contract, express or implied, comes within the meaning of the word "creditor" used in the statute, and may apply to the court and other creditors may do so. When a corporation itself applies to the court for a receiver for the corporation. Summit Silk Co. v. Kinston Spinning Co., 154 N. C. 421, 422, 70 S. E. 820.

Property In Custodia Legis.—The property of an insolvent corporation in a receiver's hands is in custodia legis, and the court has jurisdiction by virtue of its general equitable powers, and by express provision of this section. Lasley v. Scales, 179 N. C. 578, 103 S. E. 214.

Jurisdiction Over Foreign Corporation.—An insolvent corporation, with its property or plant located in this state, is subject to the appointment by our courts of a receiver to receive and administer there the assets of the corporation in a receiver's hands is in custodia legis, and the court has jurisdiction by virtue of its general equitable powers, and by express provision of this section. Lasley v. Scales, 179 N. C. 578, 103 S. E. 214.

When Receiver Appointed.—When a corporation is insolvent or in imminent danger of insolvency, and especially when its business operations have practically been suspended owing to its financial condition, the court may, upon proper application of a creditor or stockholder, appoint a receiver to take charge of the business and administer for the benefit of all of its creditors. Summit Silk Co. v. Kinston Spinning Co., 154 N. C. 421, 70 S. E. 820.

Judgment against Corporation.—Judgments against a corporation in a receiver's hands are as subject to the prior lien; and the lien given to laborers and workmen and all persons doing labor or service of whatever character in the regular employment of certain corporations. Phoenix Iron Co. v. Roanoke Bridge Co., 169 N. C. 512, 513, 86 S. E. 184.

Prior Lien Holders Protected.—Property acquired by a private corporation subject to a valid and registered mortgage does not become an asset of the corporation except as subject to the prior lien; and the lien given to laborers and workmen and all persons doing labor or service of whatever character in the regular employment of certain corporations. Phoenix Iron Co. v. Roanoke Bridge Co., 169 N. C. 512, 513, 86 S. E. 184.

Authority to Adjust Claims.—While in the statute relating to the winding up of the affairs of an insolvent corporation, it is given to the court to make such orders as justice and equity shall require and direct how claims shall be approved, the claims may be adjusted. Davis v. Industrial Mfg. Co., 114 N. C. 421, 422, 70 S. E. 820, approving Holshouser v. Copper Co., 138 N. C. 248, 50 S. E. 650.

Clear Expression of Intent.—The language used in this section is admirably fitted to give expression to the legislative intent to accord preference to a favored class of creditors to which it undertakes to accord preferential treatment in the distribution of the assets of an insolvent corporation, and small latitude is afforded for speculation. The favored creditors are "laborers and workmen and all persons doing labor or service of whatever character in the regular employment of certain corporations." Phoenix Iron Co. v. Roanoke Bridge Co., 169 N. C. 512, 513, 86 S. E. 184.

Consecution of Judgment in Director's Favor.—A confes-
section an agent with authority to make collections and to deduct his salary and expenses from the sums collected, has no lien for claims for salary and expenses owing before his appointment to the position. Cummer Lumber Co. v. Walker Lumber Co., 170 N. C. 460, 467 S. E. 331.

Notice Need Not Be Filed.—Under this section the laborer is not required to file a notice of his claim. Walker v. Lumber Co., 170 N. C. 460, 87 S. E. 331.

Section 55-135—Record of Incapacitation.—This section is not intended to destroy the lien for such wages and services performed after the company goes into the hands of a receiver. The word "within" means "subsequent," that is, that after 60 days prior to the insolvency, the laborer shall have a first lien for their wages. Walker v. Lumber Co., 170 N. C. 460, 467 S. E. 331.

§ 55-137. Distribution of funds.—After payment of all allowances, expenses and costs, and the satisfaction of all general and special liens upon the funds of the corporation to the extent of their lawful priority, the creditors shall be paid proportionately to the amount of their respective debts, and shall be entitled to distribution on debts not due, making in such case a rebate of interest when interest is not accruing on the same. Any surplus funds, after payment of the creditors and costs, expenses and allowances, shall be paid to the preferred stockholders according to their respective shares, and if there still be a surplus, it shall be divided and paid to the general stockholders in accordance with their respective shares. Upon the distribution of the assets of an insolvent corporation, judgment of dissolution shall be entered and a certified copy of the judgment filed in the office of the secretary of state, and also in the office of the clerk of the superior court of the county in which the principal office of the corporation is located, and the same shall be recorded in the Corporation Book and in the Record of Incapacitations in those offices respectively. Thereupon the corporation is dissolved without being required to comply with § 55-121. (Rev., s. 1207; Code, s. 670; 1901, c. 2, ss. 65, 59; 1900, c. 15, s. 1; C. S. 1198.)

In General.—When the receiver shall have collected the assets of the corporation, all the claims against the corporation shall be sufficient, and if not sufficient, to distribute the same ratably, among all the creditors who shall prove their claims. When once the court of equity, through its receiver, has determined the priority of its lien creditors, who have established the priority of their lien over the rights of general creditors, in statutory proceedings to wind up the affairs of an insolvent corporation and to distribute its assets. Hickston Lumber Co. v. Gay Lumber Co., 150 N. C. 281, 63 S. E. 194.


§ 55-138. Debts not extinguished nor actions abated.—In case of the dissolution of a corporation, the debts due to and from it are not thereby extinguished, nor do actions against a corporation which is dissolved before final judgment abate by reason thereof, but no judgment shall be entered therein without notice to the trustees or receivers of the corporation. (Rev., ss. 1201, 1208; Code, s. 687; 1901, c. 2, ss. 59, 64; C. S. 1198.)

Cross Reference.—As to directors becoming trustees upon dissolution, see § 134. Where a corporation has been served with summons and has filed answer, the action against it does not abate upon its subsequent dissolution, and its directors are made trustees of its property by §§ 55-132 and 55-133. Lertz v. Hughes Bros., 208 N. C. 490, 181 S. E. 342.

§ 55-139. Copy of judgment to be filed with secretary of state; costs.—A copy of every judgment dissolving a corporation or forfeiting its charter shall be forthwith filed by the clerk of the court in the office of the secretary of state, and a note thereof shall be made by the secretary of state on the charter or certificate of incorporation and in the index thereof, and be published by him in the annual report hereinafter provided for, the cost of which shall be taxed by the clerk of the superior court in the action wherein the corporation is dissolved. (Rev., s. 1211; 1901, c. 2, s. 65; C. S. 1200.)


§ 55-140. How issued; property subject to execution.—If a judgment is rendered against a corporation, the plaintiff may sue out such executions against its property as is provided by law to be issued against the property of natural persons, which executions may be levied as well on the current money as on the goods, chattels, lands and tenements of such corporation. (Rev., s. 1212; 1901, c. 2, s. 66; C. S. 1201.)

Cross References.—As to execution in general, see § 1-302. As to execution by purchaser at execution sale of railroad, see §§ 60-62 and 55-161. As to incorporation by purchaser generally, see § 55-161.

Editor's Note—Levy on Franchise.—Prior to the enactment of the Revised Code, the law of the state was to the effect that a corporation such as that of a railroad or navigation company, could not be levied upon and sold under a writ of fieri facias, or any other writ of execution known either to our common or statute law. Taylor v. Jenkins, 51 N. C. 315, 318; State v. Rives, 27 N. C. 297, 306.

To this section the Revised Code added the following: "And if the judgment or decree be against a railroad or other corporation authorized to receive fares or tolls, the franchise of such corporation, with all the rights and privileges thereof, so far as relates to the receiving of fares or tolls, and other corporation authorized to receive fares or tolls, and other corporation authorized to receive fares or tolls, and any agreement among the shareholders, or tolls, and also all other corporate property, real or personal, may be taken on execution and sold, under rules regulating the sale of real estate." Rev. Code, ch. 26, sec. 9. See Taylor v. Jenkins, 51 N. C. 315, 317, 319; Gooch v. McGee, 83 N. C. 60, 66.

As will be seen this provision no longer constitutes a part of the section, and it is now held that the franchise and other property must go together. They cannot be separated. There cannot be a corporation without a franchise. James v. Western N. C. R. Co., 121 N. C. 523, 527, 28 S. E. 530.

The real estate acquired by a public corporation in exercise of a delegated right of eminent domain, and necessary for uses in which the public is concerned, cannot be sold under execution apart from the franchise and its income, so that when a corporation or the property is divested of all the duties and obligations assumed by the company, Gooh v. McGee, 83 N. C. 60.

The franchise of a water company is inseparable from its
§ 55-141. Agent must furnish information as to property to officer.—Every agent or person having charge or control of any property of the corporation, on request of a public officer having for service a writ of execution against it, shall furnish to him the names of the directors and officers thereof, and a schedule of all its property, including debts due or to become due, so far as he has knowledge of the same. (Rev., s. 1213; 1901, c. 2, s. 67; C. S. 1902.)

Cross Reference.—As to penalty for failure to furnish information, see § 55-144.

§ 55-142. Shares of stock subject to; agent must furnish information.—Any share or interest in any bank, insurance company, or other joint stock company, that is or may be incorporated under the laws of any state, territory, or foreign country, or established under the authority of the United States, belonging to the defendant in execution, may be taken and sold by virtue of such execution in the same manner as goods and chattels. The clerk, cashier, or other officer of such company who has at the time the custody of the books of the company shall, upon being shown the writ of execution, give to the officer having it a certificate of the number of shares or amount of the interest held by the defendant in the company; and if he neglects or refuses to do so, or if he willfully gives a false certificate, he shall be liable to the plaintiff for the amount due on the execution, with costs. (Rev., ss. 1214, 1215; 1901, c. 2, ss. 69, 70; C. S. 1903.)

Cross Reference.—As to shares of stock being liable for attachment, see § 1-458.

Editor’s Note.—Before this section was passed it was held that shares of stock, not being goods or chattels, lands or tenements within the sense of the writ, could not be held that shares of stock, not being goods or chattels, lands or tenements within the sense of the writ, could not be held that shares of stock, not being goods or chattels, lands or tenements within the sense of the writ, could not be held that shares of stock, not being goods or chattels, lands or tenements within the sense of the writ, could not be

§ 55-143. Debts due corporation subject to; duty and liability of agent.—If an officer holding an execution is unable to find other property belonging to the corporation liable to execution, he or the judgment creditor may elect to satisfy such execution in whole or in part out of any debts due the corporation; and it is the duty of any agent or person having custody of any evidence of such debt to deliver it to the officer, for the use of the creditor, and such delivery, with a transfer to the officer in writing, for the use of the creditor, and notice to the debtor, shall be a valid assignment in all respects and the creditor may sue for and collect the same in the name of the corporation, subject to such equitable setoffs on the part of the debtor as in other assignments. Every agent or person who neglects or refuses to comply with the provisions of this section and § 55-144 is liable to pay to the execution creditor the amount due on the execution, with costs. (Rev., s. 1216; 1901, c. 2, s. 68; C. S. 1204.)

§ 55-144. Violations of three preceding sections misdemeanor.—If any agent or person having charge or control of any property of a corporation, or any clerk, cashier, or other officer of a corporation, who has at the time the custody of the books of the company, or if any agent or person having custody of any evidence of debt due to a corporation, shall, on request of a public officer having in his hands for service an execution against the said corporation, willfully refuse to give to such officer the names of the directors and officers thereof, and a schedule of all its property, including debts due or to become due, or willfully refuse to give to such officer a certificate of the number of shares, or amount of interest held by such corporation in any other corporation, or shall willfully refuse to deliver to such officer any evidence of indebtedness due or to become due to such corporation, he shall be guilty of a misdemeanor. (Rev., s. 3990; 1901, c. 2, ss. 67, 68, 70; C. S. 1203.)

§ 55-145. Proceedings when custodian of corporate books is a nonresident. — When the clerk, cashier, or other officer of any corporation incorporated under the laws of this state, who has the custody of the stock-registry books, is a nonresident of the state, it is the duty of the sheriff receiving a writ of execution issued out of any court of this state against the goods and chattels of a defendant in execution holding stock in such company to send by mail a notice in writing, directed to the nonresident clerk, cashier, or other officer at the postoffice nearest his reputed place of residence, stating in the notice that he, the sheriff, holds the writ of execution, and out of what court, at whose suit, for what amount, and against whose goods and chattels the writ has been issued, and that by virtue of such writ he seizes and levies upon all the shares of stock of the company held by the defendant in execution on the day of the date of such written notice. It is also the duty of the sheriff on the day of mailing the notice to affix and set upon any office or place of business of such company, within his county, a like notice in writing, and on the same day to serve like notice in writing upon the president and directors of the company, or upon such of them as reside in his county, either personally or by leaving the same at their respective places of abode. The sending, setting up, and serving of such notices in the manner aforesaid constitutes a valid levy of the writ upon all shares of stock in such company held by the defendant in execution, which have not at the time of the receipt of the notice by the clerk, cashier, or other officer, who has custody of the stock-registry books, been actually transferred by the defendant; and thereafter any transfer or sale of such shares by the defendant in execution is void as against the plaintiff in the execution, or any purchaser of such stock at any sale thereunder. (Rev., s. 1277; 1901, c. 2, ss. 71; C. S. 1206.)

§ 55-146. Duty and liability of nonresident custodian.—The nonresident clerk, cashier, or other officer in such corporation, to whom notice in writing is served under this section, shall send forthwith to the officer having in his hands for service a writ a statement of the time when he received the notice and a certificate of the number of shares held by the defendant in the corporation at the time of the receipt, not actually transferred on the books of the corporation; and the sheriff, or other

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§ 55-147. Powers and bond.—The receiver has power and authority to—

1. Demand, sue for, collect, receive and take into his possession all the goods and chattels, rights and credits, moneys and effects, lands and tenements, books, papers, choses in action, bills, notes, and property of every description of the corporation, and to enforce and protect the same and to settle up the same as long as the court may think it necessary to the performance of the duties pertaining thereto.

2. Foreclose mortgages, deeds of trust, and other liens executed to the corporation.

3. Institute suits for the recovery of any estate, claims, or demand due from the corporation.

§ 55-148. Continuance of Receivership.—A receivership continues as long as the court may think it necessary to the performance of the duties pertaining thereto.

§ 55-149. Directors Duty When Receiver Appointed.—An order appointing a receiver of a defunct corporation with power to receive into possession all the effects of the company, and whose duty it is to investigate and take charge of the property of the corporation, involves the correlative duty of delivering the same to him by the late officers of the company in whose hands the funds are, although not expressly required in the order appointing the receiver. Roberts v. Bowen Mfg. Co., 169 N. C. 27, 76 S. E. 45.


§ 55-151. Where Assignee Appointed Receiver.—One to whom an insolvent bank made an assignment of its assets, who performed his contract to send, or miscarriage of the certificate, does not impair the validity of the levy upon the stock. Davis v. Industrial Mfg. Co., 114 N. C. 321, 19 S. E. 371.

Art. 13. Receivers.

§ 55-155. Appointment and removal.—When a corporation becomes insolvent or suspends its ordinary business for want of funds, or is in imminent danger of insolvency, or has forfeited its corporate rights, or its corporate existence has expired by limitation, a receiver may be appointed by the court upon the same regulations that are provided by law for the appointment of receivers in other cases; and the court may remove a receiver or trustee and appoint another in his place, or fill any vacancy. Everything required to be done by receivers or trustees is valid if performed by a majority of them. (Rev., ss. 1219, 1233; Code, s. 665; 1901, c. 2, ss. 73, 79; C. S. 1208.)

Cross References.—As to receivers in general, see §§ 1-501 to 1-507, inclusive, for powers and duties of corporate receiver, see § 55-146. As to statute making this section applicable to banks, see § 53-22. As to service of summons in appointment of receiver, see § 55-131. As to jurisdiction and mandamus in appointment of receivers, see §§ 55-134 and 55-135. As to payment of creditors, see § 4-74.

Banks, trustees referred to.—This article is so broad and comprehensive in its provisions regarding the appointment of receivers that it was not necessary to refer to the general power of a court of equity in such cases. Summit Silk Co. v. Kinison Spinning Co., 154 N. C. 421, 425, 70 S. E. 820.

Nature of Receivership.—Upon the insolvency of a corporation and the appointment of a receiver under this article, a receiver is vested with the general and exclusive powers and duties of a receiver, including the power of taking any separate or effective steps on their account in furtherance of their claims; and the proceeding for the receivership is in the nature of a judicial process by which the court exercises its jurisdiction of the rights of the general creditors, and ascertains upon whom the corporation becomes insolvent or suspends its ordinary business for want of funds, or is in imminent danger of insolvency, or has forfeited its corporate rights, or its corporate existence has expired by limitation, a receiver may be appointed by the court upon the same regulations that are provided by law for the appointment of receivers in other cases; and the court may remove a receiver or trustee and appoint another in his place, or fill any vacancy. Everything required to be done by receivers or trustees is valid if performed by a majority of them. (Rev., ss. 1219, 1233; Code, s. 665; 1901, c. 2, ss. 73, 79; C. S. 1208.)

§ 55-157. Discretion of Court.—The selection of a receiver for an insolvent corporation is a matter largely in the discretion of the trial judge and will not generally be reviewed unless such discretion has been greatly abused, and the proceedings found to be unreasonable, or for the purpose of obtaining fees in violation of statute. Young v. Rollings, 90 N. C. 125.
place of the corporation in any suit or proceeding pending at the time of his appointment.

4. Sell, convey, and assign all of the said estate, rights, and interest.

5. Appoint agents under him to take possession and control all the books, documents, and papers, and pass on claims as elsewhere provided in this article.

7. Do all other acts which might be done by the corporation, if in being, that are necessary for the final settlement of its unfinished business.

The powers of the receiver may be continued as long as the court thinks necessary, and the receiver shall hold and dispose of the proceeds of all sales of property under the direction of the court, and, before acting, must enter into such bond and comply with such terms as the court prescribes. (Rev. ss. 1223, 1231; Code, s. 668; 1901, c. 3, ss. 74, 81; C. S. 1200.)

Cross Reference.—As to foreclosure by receiver, see § 55-150.

Directors Superseded.—Appointment of receivers of a corporation on a creditors' bill supersedes the power of the directors to carry on the business of the corporation and the receivers take possession of the corporation until further order of the court. (Rev. ss. 1224, 1225; 1901, c. 2, ss. 75, 80; C. S. 1210.)

Power to Bring All Actions.—The receiver represents and, in a certain sense, succeeds to the rights of the corporation. There is no valid reason why he may not, representing the corporation, bring an action in his own name or in the name of the corporation. In either event he may be entitled to. Smathers v. Bank, 135 N. C. 410, 413, 47 S. E. 893; Davis v. Industrial Mfg. Co., 114 N. C. 321, 19 S. E. 371, 23 L. R. A. 322; Gray v. Lewis, 94 N. C. 415, 57 S. E. 923.

Mays Sue In Own Name.—The receiver may sue either in his own name or that of the corporation. In whichever name he may elect to bring the action, it is essentially a suit by the corporation, if not instituted by it. See & Depew v. Fisher Co., 182 N. C. 235, 105 S. E. 758.

Valid Existing Liens Protected.—The title of a receiver of a private corporation to the corporate property relates back to the right of the corporation and divests the property of valid liens existing at that time. Roberts v. Bowen Mfg. Co., 169 N. C. 27, 85 S. E. 45.

All Rights May Be Adjusted.—In the suit by the receivers may be adjudicated all the rights of the bank, its creditors and the defendant debtor, both legal and equitable, pertaining to the matters set out in the pleadings, and such judgment shall be a complete and final settlement of the rights of the corporation and its creditors, and also protect any equities that the defendant may be entitled to. Smathers v. Bank, 135 N. C. 410, 413, 47 S. E. 893; Davis v. Industrial Mfg. Co., 114 N. C. 321, 19 S. E. 371, 23 L. R. A. 322; Gray v. Lewis, 94 N. C. 415, 57 S. E. 923.

Receiver May Plead Usury.—The plea of usury may be made by a receiver of an insolvent corporation against which a usurious contract is sought to be enforced. Riley v. Sears, 154 N. C. 599, 510, 70 S. E. 997.

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No Extraterritorial Power.—A receiver, appointed in a stockholder's action to sequestrate assets of the corporation against mismanagement of its officers and directors, has no extraterritorial power. See & Depew v. Fisheries Products Co., 9 Fed. (2d) 235, 236.

Receiver's Power Over Other Receivers.—One receiver has no priority over another receiver previously appointed in another district in the collection of the assets. See & Depew v. Fisheries Products Co., 9 Fed. (2d) 235, 236.

Power after Charter Has Expired.—A receiver, appointed by the court in a certain sense, succeeds to the rights of the corporation on a creditors' bill supersedes the power of the directors to carry on the business of the corporation under this section, who had in the meanwhile been appointed. Odell Hardware Co. v. Holt-Morgan Mills, 173 N. C. 398, 92 S. E. 8.

Same—Does Not Relate Back. — A judgment rendered against a corporation does not relate back, by implication of law, to the beginning of the term, so as to create a lien on the corporate property as against the vesting of the title in a receiver, under this section, who had in the meanwhile been appointed. Odell Hardware Co. v. Holt-Morgan Mills, 173 N. C. 398, 92 S. E. 8.

Effect of Unrecorded Conditional Sale Contract.—A receiver has the power of creditors armed with process to disregard or avoid the unrecorded contract in a contract of conditional sale. Observer Co. v. Little, 175 N. C. 42, 45, 94 N. C. 506.

Receiver Made Defendant.—"In an action brought by creditors, depositors or stockholders to recover assets belonging to the corporation, the title to which has vested in the receiver, upon his refusal to bring the action the receiver may properly be made a defendant, to the end that the recovery may be subject to orders and decrees by the court, in the judgment, to the application to the claims of creditors and depositors, or to its distribution among stockholders." Douglas v. Dawson, 190 N. C. 458, 463, 130 S. E. 194.


§ 55-150. Foreclosure by receivers and trustees of corporate mortgages or grantees.—Where real estate has been conveyed by mortgage deed, or deed of trust to any corporation in this State au-
authorized to accept such conveyance for the purpose of securing the notes or bonds of the grantor, and such corporation thereafter shall be placed in the hands of a receiver or trustee in properly instituted court proceedings, then such receiver or trustee under and pursuant to the orders and the decrees of the said court or other court of competent jurisdiction may sell such real property pursuant to the orders and the decrees of the said court or may foreclose and sell such real property as provided in such mortgage deed, or deed of trust, pursuant to the orders and decrees of such court.

All such sales shall be made as directed by the court in the cause in which said receiver is appointed or the said trustee elected, and for the satisfaction and settlement of such notes and bonds secured by such mortgage deed or deed of trust or in such other actions for the sales of the said real property as the said receiver or trustee may institute and all pursuant to the orders and decrees of the court having jurisdiction therein.

All sales of real property made prior to April 10, 1931 by such receiver or trustee of and pursuant to the orders of the courts of competent jurisdiction in such cases, are hereby validated. (1931, c. 365.)

Editor’s Note.—This statute, which became effective April 10, 1931, excepted pending litigation. The need for the statute is not apparent, in view of §§ 55-148 and 55-149, as construed in Wachovia Bank and Trust Co. v. Hudson, 200 N. C. 688, 158 S. E. 244, decided shortly after the act was ratified, unless it was because those statutes are limited to receiverships and are inapplicable, as the new statute is, to trusteeships as well.

§ 55-151. May send for persons and papers; penalty for refusing to answer.—The receiver has power to send for persons and papers, to examine under oath or affirmation the receiver may administer, or to make answers to such questions as may be put to him, or refuses to declare the whole truth touching the subject-matter of the examination, the court may, on report of the receiver, commit such person as for contempt. (Rev., s. 1227; 1901, c. 2, s. 78; C. S. 1211.)

§ 55-152. Proof of claims; time limit.—All claims against an insolvent corporation must be presented to the receiver in writing and the claimant, if required, shall submit himself to such examination in relation to the claim as the receiver directs, and shall produce such books and papers relating to the claim as shall be required. The receiver has power to examine under oath or affirmation all witnesses produced before him touching the claim, and shall pass upon and allow or disallow the claims or any part thereof, and notify the claimants of his determination. The court may limit the time within which creditors may present and prove to the receiver their respective claims against the corporation, and may bar all creditors and claimants failing to do so within the time limited from participating in the distribution of the assets of the corporation. The court may also prescribe what notice, by publication or otherwise, must be given to creditors of such limitation of time. (Rev., ss. 1228, 1229; 1901, c. 2, ss. 81, 82; C. S. 1212.)

Court May Extend Time for Filing.—The court has the discretion to permit the filing of claims subsequent to the time fixed after the appointment of the receiver. Odell Hdw. Co. v. Holt-Morgan Mills, 173 N. C. 308, 92 S. E. 8.

Creditor May Assign Claim.—After the appointment of a receiver a creditor may assign his claim, but such assignment is subject to the receiver’s right to set off claims the bank may have against the creditor, and if the assignee of a claim is himself a debtor of the bank he cannot use the assigned claim as a set-off. Davis v. Industrial Mfg. Co., 114 N. C. 321, 322, 19 S. E. 371.


§ 55-153. Report on claims to court; exceptions and jury trial.—It is the duty of the receiver to report to the term of the superior court subsequent to a finding by him as to any claim liquidated or compromised, and exceptions thereto may be filed by any person interested, within ten days after notice of the finding by the receiver, and not later than within the first three days of the said term; and, if, on an exception so filed, a jury trial is demanded, it is the duty of the court to prepare a proper issue and submit it to a jury; and if the demand is not made in the exceptions to the report the right to a jury trial is waived. The judge may, in his discretion, extend the time for filing such exceptions. (Rev., s. 1230; 1901, c. 2, s. 83; C. S. 1213.)

§ 55-154. Property sold pending litigation.—When the property of an insolvent corporation is at the time of the appointment of a receiver encumbered with mortgages or other liens, the legality of which is brought in question, and the property is of a character materially to deteriorate in value pending the litigation, the court may order the receiver to sell the same, clear of incumbrances, at public or private sale, for the price that can be obtained, and pay the money into the court, there to remain subject to the same liens and equities of all parties in interest as was the property before sale, to be disposed of as the court directs. And the receiver or receivers making such sale is hereby authorized and directed to report to the resident judge of the district or to the judge holding the courts of the district in which the property is sold, the said sale for confirmation, the said report to be made to the said judge in any county in which he may be at the time; but before acting upon said report, the said receiver or receivers shall publish in some newspaper published in the county or in some newspaper of general circulation in the county, where there is no newspaper published in the county, a notice directed to all creditors and persons interested in said property, that the said receiver will make application to the judge (naming him) at a certain place and time for the confirmation of his said report, which said notice shall be published at least ten days before the time fixed therein for the said hearing. And the said judge is authorized to act upon said report, either confirming it or rejecting the sale; and if he rejects the sale it shall be competent for him to order a new sale and the said order shall have the same force and effect as if made at a regular
§ 55-155. Compensation and expenses.—Before distribution of the assets of an insolvent corporation among the creditors or stockholders, the court shall allow a reasonable compensation to the receiver for his services, not to exceed five per cent upon receipts and disbursements, and the costs and expenses of administration of his trust, and the fees of the receiver and referee, and (except as to priority) in the proceedings in said court, to be first paid out of such assets. (Rev. s. 1226; 1901, c. 2, s. 88; C. S. 1215.)

In General.—The effect of this section is to take from the funds of the insolvent corporation a sufficient sum to pay all the costs, allowances and legitimate expenses, and then to distribute what is left according to priority. Hickson Lumber Co. v. Gay Lumber Co., 150 N. C. 281, 282, 63 S. E. 1048.

Commissions Limited.—A rate not exceeding 5 per cent on receipts and 5 per cent. on disbursements is the statutory limitation. Battery Park Bank v. Western Carolina Bank, 126 N. C. 531, 36 S. E. 39.

Commissions Part of Costs.—Commissions payable to a receiver are a part of the costs and expenses of the suit in which he is appointed, and should be paid as such instead of being classed as a debt payable pro rata with other debts. Wilson Cotton Mills v. Randleman Cotton Mills, 115 N. C. 473, 20 S. E. 770.

Same—Discretion of Court.—An allowance to a receiver is a part of the costs of the action and usually taxable as such. But like a court below, may, in its discretion, divide it between the receiver and the claimants instead of charging part of the claimants' fees. Simmons v. Allison, 119 N. C. 556, 26 S. E. 171.

First Assets Applied to Costs.—Under this section the first assets of the corporation must be applied to the costs of the proceedings in court, including the fees of the receiver and referee, and (except as to priority) in the proceedings unless they fail to appear. Commer. Nat. Bank v. Mooresville Cotton Mills, 222 N. C. 305, 22 S. E. (2d) 913.

Cross Reference.—As to reorganization in general, see 55-161 et seq.

Duty of Fiduciaries.—In the reorganization of a corporation under this section, executors, trustees, and other fiduciaries, holding stock in the corporation, not only have the right, but it is their duty to assert whatever legal rights they may have to protect themselves, in the interest of the estates involved. Commercial Nat. Bank v. Mooresville Cotton Mills, 222 N. C. 305, 22 S. E. (2d) 913.

Readjustment of Capital Structure.—This section gives the superior court power to readjust the capital structure of the corporation for the reorganization of a corporation, which provides for the readjustment of the company's capital structure, when approved by the creditor stockholders. When the corporation has failed, it cannot affect either the rights of dissenting stockholders not parties to the receivership, or the vested rights of parties to the proceedings unless they fail to appear. Commer. Nat. Bank v. Mooresville Cotton Mills, 222 N. C. 305, 22 S. E. (2d) 913.

Consent of Creditors Unnecessary.—Where a corporation engaged in business transfers its entire property rights and franchises to a new company incorporated and organized by the same stockholders and directors as the old, and the new company continues the business and adopts the creditors of the old predecessor, the effect of such a merger is to create a novation so far as the creditors of the old company are concerned and to substitute the new one as debtor, and in such case it is not necessary to obtain the consent of the creditors of the old company to the change. Friedenwald Co. v. Asheville Tobacco, etc., Co., 117 N. C. 544, 23 S. E. 490.

New Corporation Assumes Contracts of Old.—Where, by merger of an old into a new corporation, the debts of the old is created, the new corporation is, to all intents and purposes, the same body and answerable for its own contracts made under a different name. Friedenwald Co. v. Asheville Tobacco, etc., Co., 117 N. C. 544, 23 S. E. 490.


§ 55-158. Taxes for filing; secretary of state not to file corporate papers until prescribed fees, etc.
paid.—On filing any certificate or paper relative to corporations in the office of the Secretary of State, the following tax shall be paid to the State Treasurer for the use of the State:

1. For certificates of incorporation, forty cents for each thousand dollars of the total amount of capital stock authorized but in no case less than forty dollars.

2. Increase of capital stock, forty cents for each thousand dollars of the total increase authorized, but in no case less than forty dollars.

3. Extension or renewal of corporate existence of any corporation, the same as required for the original certificate of incorporation by this section.

4. Change of name, change of nature of business, amended certificate of incorporation (other than those authorizing increase of capital stock), decrease of capital stock, increase or decrease of par value of, or number of shares, forty dollars.

5. For filing of officers and directors, two dollars.

6. Dissolution of corporation, change of principal place of business, five dollars.

7. For certificates of incorporation for any benevolent, religious, educational or charitable societies or associations having no capital stock, fifteen dollars.

Provided, no tax shall be required by corporations created by virtue of § 55-11 relating to public parks and drives; and these taxes shall not be cumulative, but when two or more taxes have been incurred at the same time the tax for all shall be the largest single tax.

The secretary of state shall not file any articles, certificates, applications, amendments, reports, or other papers relating to any corporation, domestic or foreign, organized under or subject to the provisions of this chapter until all fees, taxes, and charges provided to be paid in connection therewith shall have been paid to him. (Rev., s. 1253; 1901, c. 2, s. 96; 1911, c. 155, s. 5; 1929, c. 36; 1935, c. 10; 1937, c. 171; C. S. 1218.)

Cross References.—As to the requirements of the certificate of incorporation, see § 55-3. As to errors or omissions in the certificate, see § 55-8. As to amending the certificate before payment of stock, see § 55-30. As to tax upon certificate of incorporation or amendments when capital stock is without nominal or par value, see § 55-77. As to franchise or privilege tax on domestic and foreign corporations, see § 105-122.

Editor’s Note.—The Act of 1929 amended this section to make it conform to Public Laws, Extra. Sess. 1920, c. 1, which increased the taxes provided for in the original section.

For an article dealing with taxation of North Carolina corporations see 1 N. C. Law Rev. 203-215. This section is mentioned in the article on p. 205.

Prior to the amendment of 1935 no taxes were required of benevolent, religious, educational or charitable societies or associations having no capital stock, the same being exempted by the proviso at the end of the section. Thus subsection (7) is new.

The last amendment added the last paragraph.


§ 55-159. Fees to secretary of state and clerk of court.—The secretary of state shall collect and retain the following fees: For recording the certificate of incorporation, one dollar for the first three copy sheets and ten cents for each copy sheet in excess thereof, and for official seal one dollar; for copying, the same fees as for recording. There shall be paid the clerk of the superior court for recording the certificate of incorporation a fee of three dollars. (Rev., s. 1234; Code, s. 680; 1893, c. 318, s. 4; 1901, c. 2, s. 96; 1917, c. 251, s. 84; C. S. 1219.)

§ 55-160. Property in receiver’s hands liable for taxes.—When listed or unlisted taxes are duly assessed and charged against and are due and unpaid by a corporation with chartered rights, doing business or with property in this state, or against a person residing in, doing business, or having property in this state, it is competent for an officer or tax collector who has the tax list to levy upon, seize, and take possession of that part of the property belonging to the corporation or person necessary to pay such taxes, even though the property is in the hands of a receiver duly appointed; and the officer or collector need not apply to the court appointing the receiver, or with jurisdiction of the property or the receiver, for an order for the payment of said taxes. This section applies to all taxes, whether state, county, town or municipal, and shall be liberally construed in favor of and in furtherance of the collection of such taxes. (Rev., ss. 1236, 1237; Code, ss. 699, 670; C. S. 1220.)

Cross References.—As to duty of state board of assessment to prepare and keep record of the assessed valuation of the property of corporations, see § 105-149. As to liability of foreign corporations, see § 105-396.

Failure to Pay Taxes.—The State and county having, through the boards of commissioners setting with the justices of the peace, assessed the property of a corporation for taxation and placed the tax list in the hands of the sheriff, who cannot find any property of the corporation upon which to levy, are creditors holding a debt against such corporation and are entitled to bring a proceeding in the nature of a creditor’s bill against such corporation, with or without proceedings for its dissolution. State v. Georgia Co., 112 N. C. 34, 17 E. 32.

Attachment and Continuance of Lien.—The lien for taxes attaches to the real property taxed from the date provided in the statute, and the lien continues thereon until the taxes are paid, regardless into whose hands the property has passed, unless barred by some statute of limitations. Reichland Shale Products Co. v. Southern Steel, etc., Co., 200 N. C. 226, 156 S. E. 407.

Where City and County Have No Lien on Proceeds of Sale.—Where the receiver of a corporation sold personal property of the corporation, comprising its sole assets, under orders of the court, and deposited the proceeds of sale to his credit as receiver, and the city and county in whose property the corporation was located levied executions on the funds deposited, claiming that they, respectively, were entitled to preferred claims against the funds for personal property, said taxes were duly assessed prior to the appointment of the receiver, it was held that since under old § 7986 a lien for personal property taxes does not attach until levy thereon and no lien for taxes was created prior to the sale of the property, the lien was not created in favor of and in furtherance of the collection of such taxes. Co. v. Virginia, 302 U. S. 22, 29, 58 S. Ct. 75, 82 L. Ed. 82.

Art. 15. Reorganization.

§ 55-161. Corporations whose property and franchises sold under order of court or execution.—When the property and franchises of a public-service corporation are sold under a judgment or decree of a court of this state, or of the district court of the United States, or under execution, to satisfy a mortgage debt or other encumbrance thereon, such sale vests in the purchaser all the right, title, interest and property of the parties to the action in which such judgment or decree was
made, to said property and franchise, subject to all the conditions, limitations and restrictions of the corporation; and the purchaser and his associates, not less than three in number, thereupon become a new corporation, by such name as they shall determine, subject to the debts and liabilities of such corporation, are entitled to all the rights and franchises subject to all the conditions, limitations and penalties of the corporation whose property and franchises have been so sold. In the event of the sale of a railroad in foreclosure of a mortgage or deed of trust, whether under a decree of court or otherwise, the corporation created by or in consequence of the sale succeeds to all the franchises, rights and privileges of the original corporation only when the sale is of all the railroad owned by the company and described in the mortgage or deed of trust, and when the railroad is sold as an entirety. If a purchaser at any such sale is a corporation, such purchase shall succeed to all the properties, franchises, powers, rights, and privileges of the original corporation: Provided, that this shall not affect vested rights and shall not be construed to alter in any manner the public policy of the state now or hereafter established with reference to trusts and contracts in restraint of trade. (Rev., s. 1238; Code, ss. 697, 698: 1897, c. 305; 1901, c. 2, s. 99; 1913, c. 25, s. 1; 1919, c. 75; C. S. 1281.)

Cross References.—As to reorganization, see also § 55-157. As to purchaser of railroad property, see also §§ 60-62 and 69-88.

Railroad Property and Franchise Must Be Together.—The property of railroads must be kept in association with the machinery to preserve their value; to give credit to such corporations; to secure creditors and keep railroads in operation for the benefit of the public, which was the primary object of the Legislature in bestowing such corporate franchises. Such legislative purpose is clearly manifested in this section. Bradley v. Ohio River, etc., Co., 119 N. C. 918, 927, 26 S. E. 193; citing Gooch v. McGee, 83 N. C. 858.

New Corporation Must Be Provided.—In order that the sale of the franchise and property of a corporation under the mortgage shall have the effect of a dissolution of such corporation as provided in this section, another corporation must be provided, as contemplated in section 60-62, to take its place, and assume and discharge the obligations to the public growing out of the grant of the franchise, and until such corporation continues to exist, and when it is done the new corporation will be a domestic corporation. James v. Western N. C. R. Co., 121 N. C. 523, 28 S. E. 537.

Meaning of ‘Encumbrance.’—In this section the word ‘encumbrance’ is not restricted, as in cases of real estate alone, to claims having specific lien on the property, but is extended to include any and all claims importing a liability to sale as a whole under a judicial decree. Wood v. Staton, 174 N. C. 245, 93 S. E. 794.

Effect of Sale of Railroad.—The sale of a railroad under a security of mortgage or deed of trust subject to the first mortgage upon its franchise and corporate properties did not extinguish the corporate existence of the company, nor release it from liability to the public for the management of the property. Thus, in cases of corporate franchises, of a corporation is sold under judicial sale, conveying on the purchaser the right to reorganize, etc., the stockholders have a right to share in the assets if there is a surplus; but the decree itself shuts off all their rights as such stockholders in the new corporation. Wood v. Staton, 174 N. C. 245, 93 S. E. 794.

Debts.—The principle that a corporation taking over another by reorganization, consolidation, amalgamation, or union is subject to the debts and liabilities of such corporation, rests upon the ground that the corporation so taken over either has not been paid a consideration, that the transaction was in fraud of creditors, or upon the presumption of law that the corporation so taken over has no independent existence. Pritchard v. Daily, Co., 121 N. C. 523, 28 S. E. 537. Consequently, the principle does not apply to the bona fide sale of only a part of the assets of a corporation which continues to exist and exercise its functions under its own corporate name. McAlister v. Express Co., 179 N. C. 556, 103 S. E. 129.

Use of Former Name.—Where a corporation has been practically reorganized under a different name, the fact that persons in negotiating for the sale of stock in the reorganized corporation used the former name in the conveyance is not material, it appearing that the purchaser received the certificates he had contracted to purchase, and held them without objection, and must have known of the fact. Pritchard v. Daily, 168 N. C. 330, 84 S. E. 392.


§ 55-162. New owners to meet and organize.—The persons for whom the property and franchises have been purchased shall meet within thirty days after the delivery of the conveyance made by virtue of said process or decree, and organize the new corporation, ten days written notice of the time and place of the meeting having been given to each of the said persons. At this meeting they shall adopt a corporate name and seal, determine the amount of the capital stock of the corporation, and shall have power and authority to make and issue certificates of stock in shares of such amount as they see fit. The corporation may then, or at any time thereafter, create and issue preferred stock to such an amount, and at such time, as they may deem necessary. (Rev., ss. 1239, 1240; 1901, c. 2, ss. 100, 101, 105; C. S. 1229.)

Change of Name and Seal Not Required.—Where the purchasers of the entire property of a defunct corporation under the decree of a court have in other respects complied with the requirements of the statute as to reorganization, the fact that they have assumed to continue operations without changing the corporate name, or determining upon a different amount of capitalization, does not necessarily affect the fact of proper reorganization, there being no statutory requirement that they change them. Wood v. Staton, 174 N. C. 245, 93 S. E. 794.

§ 55-163. Certificate to be filed with secretary of state.—It is the duty of the new corporation, within one month after its organization to make certificate thereof, under its common seal, attested by the signature of its president, specifying the date of the organization, the name adopted, the amount of capital stock, and the names of its president and directors, and transmit the certificate to the secretary of state, to be filed and recorded in his office, and there remain of record. A certified copy of this certificate so filed shall be recorded in the office of the clerk of the superior court of the county in which is located the principal office of the corporation, and is the charter and evidence of the corporate existence of the new corporation. (Rev., s. 1241; 1901, c. 2, s. 103; C. S. 1229.)

Failure to File with Secretary of State.—Where the purchasers reorganize within the requirements of this article except they failed to file the certificate with the Secretary of State within one month from its reorganization (as required by this section), and after the corporation obtained the one de jure, the purchasers having acted in good faith, quasi? But, it became at least a corporation de facto, and the individuals cannot be held to personal liability for debts contracted in the name of the corporation, except
§ 55-164. Effect on liens and other rights.—Nothing contained in this article in any manner impairs the lien of a prior mortgage, or other encumbrance, upon the property or franchises conveyed under the sale, when by the terms of the process or decree under which the sale was made, or by operation of law, the sale was made subject to the lien of any such prior mortgage or other encumbrance. No such sale and conveyance or organization of such new corporation in any way affects the rights of any person, body politic, or corporate, to a party to the action, in which the decree was made, nor of the said party except as determined by the decree. When a trustee has been made a party to such action and his custe que trust, for reason satisfactory to the court, has not been made a party thereto, the rights and interest of the custe qui trust are concluded by the decree. (Rev., s. 1241; 1901, c. 2, s. 103; C. S. 1224.)

Art. 16. Consolidation or Merger.

§ 55-165. Consolidation or merger; proceedings for.—Any two or more corporations organized under the provisions of this chapter or existing under the laws of this state, for the purpose of carrying on any kind of business, may, as shall be specified in the agreement hereinafter required, be merged into one of such constituent corporations, herein designated as the surviving corporation, or may be consolidated into a new corporation to be formed by means of such consolidation of the constituent corporations, which new corporation is herein designated as the resulting or consolidated corporation; and the directors, or a majority of them, of such corporations as desire to consolidate or merge, may enter into an agreement signed by them and under the corporate seals of the respective corporations, prescribing the terms and conditions of consolidation or merger, the mode of carrying the same into effect, and stating such other facts required or permitted to be stated in the agreement hereinafter required. All the constituent corporations so merging or consolidating shall have and file in the office of the secretary of state under the seal of his office, a copy of said agreement and act of consolidation or merger, duly certified by the secretary of state under the seal of his office, shall also be recorded in the office of the clerk of the superior court of the county wherein the principal office of the surviving or consolidated corporation is, or is to be established, and in the offices of the clerks of the superior court of the counties of this state in which the respective corporations so merging or consolidating shall have their respective certificates of incorporation recorded, or if any of the corporations shall have been specially created by a public act of the legislature, then said agreement shall be recorded in the county where such corporation shall have had its principal office, and also in the office of the register of deeds in each county in which either or any of the corporations entering into the merger or consolidation owns any real estate, and such record, or a certified copy thereof, shall be evidence of the agreement and act of consolidation or merger of said corporations, and of the observance and performance of all acts and conditions necessary to have been observed and performed precedent to such consolidation or merger.

Any one or more corporations organized under the provisions of this chapter, or existing under the laws of this state, may consolidate or merge with one or more other corporations organized under the laws of any other state or states of the United States of America, if the laws under which said other corporation or corporations are formed shall permit such consolidation or merger. The constituent corporations may merge into a single corporation, which may be any one of said constituent corporations, or they may consolidate to form a new corporation, which may be a corporation of the state of incorporation of any one of said constituent corporations as shall be specified in the agreement hereinafter required. All the
§ 55-166

Editor's Note.—The North Carolina Law Review (Volume 3, page 133) has the following to say concerning this statute: "Significantly, the wording of the function of an arm's length standard, for merger and consolidation, which heretofore has been lacking in our statutes. While the language in the first section, permitting any corporations, engaging in any kind of business, to merge, will have to be interpreted more literally, the court will, perhaps, have an easier task of interpretation under the present language of the Act than would have been the case if the Legislature had attempted to define and restrict specifically.

In considering this statute in respect to the Sherman Anti-Trust Act, reference should be had to the full and comprehensive treatment of the question and operation of that act in 8 U. S. Encyc. Dig. (U. S. S.) 429 et seq.; 12 U. S. Encyc. Dig. (U. S. E.) 429 et seq.; 13 U. S. Encyc. Dig. (U. S. E.) 431 et seq.

The 1943 amendment changed the first paragraph of this section. For comment on the 1939 amendatory act, see 17 N. C. L. Rev. 346.

The 1943 amendment rewrote this section.

The statutes in this article prior to the 1943 amendment did not observe the distinction between "consolidation" and "merger," the terms being loosely applied. For a discussion of the distinction, see Carolina Coach Co. v. Hartness, 165 N. C. 487, 169 S. E. 887, 171 N. C. 499, 181 S. E. 78 (1934); 152 S. E. 489, decided prior to the 1943 amendment.

Statute Controls as to Merger or Consolidation.—Where two corporations enter into an agreement for their union and the continuation of business under the name of one of the corporations, the consent of both corporations to whether there is a merger or a consolidation; and since the statute expresses the primary purpose of creating a corporation it authorizes a consolidation and not a merger. Carolina Coach Co. v. Hartness, 198 N. C. 524, 152 S. E. 489, decided prior to the 1943 amendment.

Rights and Properties of Constituent Bodies.—Where an agreement of merger consolidating two corporations was executed and filed in the office of the secretary of state in proceedings conforming to the pertinent provisions of this and the following section, the result was that the merged corporations came into being possessed of all the rights and vested with all the property of the constituent bodies. Morgan Mfg. Co. v. Commissioner of Internal Revenue, 124 F. (2d) 602, decided prior to the 1943 amendment.

§ 55-166. Consolidation or merger; status of old and new corporations.—When an agreement shall have been signed, acknowledged, filed and recorded, as in the preceding section is required, for all purposes of the laws of this state, the separate existence of all the constituent corporations, parties to said agreement, or of all such constituent corporations except the one into which the other or others of such constituent corporations have been merged, as the case may be, shall cease and the constituent corporations shall become a new corporation, or be merged into one of such corporations, as the case may be, in accordance with the provisions of said agreement, possessing all the rights, privileges, powers and franchises as well of a public as of a private nature, of each of said constituent corporations, and all and singular, the rights, privileges, powers and franchises of each of said corporations, and all property, real, personal and mixed, and all debts due to any of said constituent corporations on whatever account, as well for stock subscriptions as all other things in action or belonging to each of such corporations, shall be vested in the corporation resulting from or surviving such consolidation or merger; and all property, rights, privileges, powers and franchises, and all and singular any other interest shall be thereafter as effectually the property or interest of the said resulting or surviving corporation as they were of the several and respective constituent corporations, and the title
§ 55-167. Consolidation or merger; payment for stock of dissatisfied stockholder.—If any stockholder, entitled to vote, in any corporation of this state consolidating or merging as aforesaid shall vote against the same, or if any stockholder in any such corporation, not entitled to vote, shall, at or prior to the taking of the vote, object in writing to such merger or consolidation, and if any such stockholder shall, within twenty days after the agreement of consolidation or merger has been filed and recorded in the office of the secretary of state, as hereinafter provided, demand in writing from the surviving or resulting corporation payment of his stock, such surviving or resulting corporation shall, within thirty days thereafter, pay to him the fair value of his stock without regard to any depreciation or appreciation thereof in consequence of the merger or consolidation. In case the fair value of said stock is not paid within said thirty-day period, or such stockholder and the surviving or resulting corporation do not within said period enter into a written agreement for the payment of said stock, then such stockholder, within thirty days after the expiration of the aforesaid thirty-day period, shall apply by petition to the superior court of the county wherein the principal office of the constituent corporation, in which he is or was a stockholder, is or was located for the appointment of three appraisers to appraise the fair value of such stock. A summons as in other cases of special proceedings, together with a copy of the petition, must be served on the surviving or resulting corporation at least ten days prior to the hearing of the petition by the court. The award of the appraisers (or a majority of them), if no exceptions be filed thereto within ten days after the award shall have been filed in court, shall be confirmed by the court, and when confirmed shall be final and conclusive. If either party file exceptions to said award within said ten days, the case shall be transferred to the civil issue dockets of the superior court for trial during term and shall be there tried in the same manner, as near as may be practicable, as is provided in chapter forty for the trial of cases under the eminent domain law of this state, and with the same right of appeal to the supreme court as is permitted in said chapter. The court shall assess the cost of said proceedings as it shall deem equitable.

On the making of said demand in writing, as aforesaid, any such stockholder shall cease to be a stockholder in said constituent corporation and shall have no rights with respect to such stock, except the right to receive payment therefor, as aforesaid, and upon payment of the agreed value of said stock, or the value thereof as fixed by final judgment of the court, such stockholder shall
surrender the certificate or certificates representing his shares of stock to the surviving or resulting corporation. In the event the surviving or resulting corporation shall fail to pay the amount of said judgment within ten days after the same becomes final, said judgment may be collected and enforced in the manner prescribed by law for the enforcement of judgments.

Any stockholder in either or any of the constituent corporations, entitled to vote, who does not vote against the merger or consolidation, and any stockholder, not entitled to vote, who does not object thereto in writing as aforesaid, shall cease to be a stockholder in such constituent corporation and shall be deemed to have assented to the merger or consolidation, as the case may be, together with stockholders voting in favor of the merger or consolidation, in the manner and on the terms specified in the agreement of merger or consolidation; and any stockholder in either or any of said constituent corporations voting against said merger or consolidation, or objecting thereto in writing as hereinbefore provided, but who does not demand payment for his stock within the twenty-day period, as hereinbefore provided, or who does not apply to the court to have the value thereof determined as hereinbefore provided, shall likewise cease to be a stockholder in such constituent corporation and shall likewise be deemed to have assented to said merger or consolidation. (1925, c. 77, s. 1; 1943, c. 270.)

Editor's Note.—The 1943 amendment rewrote this section.

§ 55-168. Consolidation or merger; pending actions saved.—Any action or proceeding pending by or against any of the corporations consolidated or merged may be prosecuted to judgment, as if such consolidation or merger had not taken place or the corporation resulting from or surviving such consolidation or merger may be substituted in its place. (1925, c. 77, s. 1; 1943, c. 270.)

Editor's Note.—The 1943 amendment rewrote this section.

§ 55-169. Liability of corporations and rights of others unimpaired by consolidation or merger.—The liability of corporations created under this chapter, or existing under the laws of this state, or the stockholders or officers thereof, or the rights or remedies of the creditors thereof, or of persons doing or transacting business with such corporations, shall not, in any way, be lessened or impaired by the consolidation or merger of two or more of such corporations under the provisions of this article. (1925, c. 77, s. 3; 1943, c. 270.)

Editor's Note.—The 1943 amendment inserted the words "or merger."

§ 55-170. Powers of corporation resulting from or surviving consolidation or merger.—When two or more corporations are consolidated or merged, the corporation resulting from or surviving such consolidation or merger shall have power and authority to issue bonds or other obligations, negotiable or otherwise, and with or without coupons or interest certificates thereto attached, to an amount sufficient with its capital stock to provide for all the payments it will be required to make, or obligations it will be required to assume, in order to effect such consolidation or merger; to secure the payment of which bonds and obligations it shall be lawful to mortgage its corporate franchise, rights, privileges and property, real, personal, and mixed; and may issue its capital stock, with or without par value, or in classes, any class of which may be with or without par value, to the stockholders of such constituent corporations in exchange or payment for the original shares, in such amount as shall be necessary in accordance with the terms of the agreement of consolidation or merger in order to effect such consolidation or merger in the manner and on the terms specified in such agreement; provided, that the only fees that shall be collected from said surviving or resulting corporation shall be office or filing fees and charter fees upon any increase in the authorized capital stock of the surviving or resulting corporation in excess of that provided for in the charters of the constituent corporations when the authorized capital stock of said constituent corporations shall be added together. (1925, c. 77, s. 1; 1931, c. 209; 1943, c. 270.)

Cross Reference.—As to fiduciary powers and liabilities of merged banks or trust companies, see § 53-17.

Editor's Note.—Prior to the 1943 amendment this section related only to powers of consolidated corporations.


§ 55-171. Merger of charitable and other corporations not under control of state.—Any two or more charitable, educational, social, ancestral, historical, penal or reformatory corporations not under the patronage and control of the state, and any two or more corporations without capital stock organized for the purpose of aiding in the work of any church, religious society or organization, or fraternal order, whether organized under special act or general laws, may consolidate into a single corporation, which shall be deemed the successor of each and all corporations joining in such consolidation, in the following manner:

(a) When authorized to do so by the conference, synod, convention or other body owning and/or controlling such corporation, the trustees or directors of such corporation by resolution adopted by majority vote at a meeting duly called and convened in accordance with the present charter, by-laws or other regulations for the conduct of such meetings of such corporation, and in the absence of such charter provision, by-laws or other regulations upon ten days' notice to each trustee or director of the time, place and object of the meeting, may authorize such corporation to make, enter into and execute a consolidation agreement with one or more other such corporations; that such consolidation agreement shall prescribe the terms and conditions of consolidation, the mode of carrying same into effect, and shall set forth in full the certificate of incorporation of the consolidated corporation; and the consolidation agreement so authorized shall be executed in the name and behalf of each such corporation entering into the consolidation by its president or vice-president, attested by its secretary or assistant secretary and its corporate seal thereto affixed, and the due execution thereof shall be acknowledged in the manner and before a notary public or other officer required by the general laws of North Carolina for the acknowledgment of corporate deeds; and there shall be attached to such
agreement of consolidation the written consent of a majority of the trustees or directors of each corporation entering into the consolidation.

(b) The agreement of consolidation, when authorized and executed as provided above and having attached thereto the aforesaid written consent, shall be filed in the office of the secretary of state. When so filed, the separate legal existence of each of the corporations joining in the consolidation thereupon shall be merged into the consolidated corporation, and thereafter there shall be only one corporation having as its charter the certificate of incorporation fully set forth in the agreement of consolidation.

(c) A copy of said agreement of consolidation, duly certified by the secretary of state under the seal of his office, shall be recorded in the office of the clerk of the superior court of the county in which the principal office of the consolidated corporation as fixed by its certificate of incorporation is located, and a like certified copy of the agreement of consolidation shall be recorded in the office of the clerk of the superior court of each county where any one or more of the corporations joining in the consolidation have had their principal office or place of business; and such certified copy shall be evidence of the existence of the consolidated corporation created by such agreement of consolidation and of the observance and performance of all antecedent acts and conditions necessary to the creation thereof. (1933, c. 408, s. 1.)

§ 55-172. Rights and powers of consolidated charitable, etc., corporations.—The consolidated corporation shall succeed to and be vested with all rights, privileges and powers, and all property, real, personal and mixed, tangible and intangible, and the title thereto, of each and all of the corporations joining in the consolidation as fully and effectually as the same were theretofore owned and held by each of the separate corporations, and the consolidated corporation shall be liable for the payment of all debts and liabilities of each and all of the separate corporations: Provided, such consolidation shall not affect liens or the priority of liens established against the separate property of any corporation prior to the consolidation. (1933, c. 408, s. 2.)

§ 55-173. Trust properties vested in new charitable, etc., corporation.—The consolidated corporation shall succeed to and be vested with all money, securities, property, real, personal and mixed, tangible and intangible, and the title thereto, theretofore owned, held and/or administered by each separate corporation upon the uses and trusts declared in any will, deed or other instrument, and the consolidated corporation shall handle, use and administer such trust funds upon the same uses and trusts and not otherwise: and the consolidated corporation shall be deemed to embrace each separate corporation and to constitute a continuation thereof, and no trust fund or other asset of a separate corporation shall be construed to revert and/or pass to other ownership on the ground that such separate corporation has ceased to exist for the purpose of administering such trust or otherwise. (1933, c. 408, s. 3.)


§ 55-174. Application of article.—This article shall apply only to a charitable, educational or social corporation, not under the patronage or control of the state nor under the patronage or control of any religious denomination, which has been formed by the de jure merger of two or more corporations of such character, the merger having been brought about either under §§ 55-165 to 55-173, or under other special or general laws, but where for any reason the merger has not been carried out in fact to the extent of the actual surrender of shares of stock or of other evidences of membership in the respective corporations and the issuance of new stock or new evidences of membership in the merged corporation. A charitable, educational or social corporation, organized by the merger of two such corporations, may be severed and restored to the status of the merging or original corporations by complying with the provisions of this article, with the exceptions above set out. (1937, c. 256, s. 1.)

§ 55-175. Resolution providing for severance; accounting.—At any regular or duly called meeting of the board of directors or other governing body of such merged corporation, a resolution may be adopted providing for the severance of the corporations and restoration to each of the original corporations of the properties owned by each at the time of the merger, and the restoration to the stockholders or members of the stock, rights and privileges owned by them in the merging corporations at the time of the merger, and providing for an accounting as between the respective corporations of their receipts, disbursements and obligations incurred since the attempted merger, the accounting to be on the assumption the corporations had never been merged. (1937, c. 256, s. 2.)

§ 55-176. Stockholders’ meeting; notice; ratification of resolution.—Upon the adoption by the board of directors or other governing body of the merged corporations of such resolution of severance, a meeting shall be called by the said governing body of the members or stockholders of the merged corporation. A notice shall be sent to each stockholder or member of the merged corporation by registered mail at least ten days before the date of the stockholders' or members' meeting. Such notice shall be mailed to the last address of the stockholder or member as it appears on the records of the merged corporation. Such notice shall also be published once in a newspaper of general circulation in the county in which the corporation has its principal office at least ten days before the meeting, stating the substance of the resolution of severance and giving the time and place of the meeting. If at such meeting of stockholders or members a resolution shall be adopted ratifying the resolution of the board of directors or governing body, and providing for the severance of the merged corporation into its constituent corporations as they existed immediately prior to the merger, and such resolution shall be adopted by a majority of three-fourths of the total membership or total number of stockholders by shares, as the voting privilege [486]
may be exercised in the merged corporation, then the merged corporation shall be severed, on compliance with the other procedural provisions of this article. (1937, c. 256, s. 3.)

§ 55-177. Election of officers for severed corporations.—On the adoption of such resolution of severance by the stockholders or members, the president of the merged corporation shall, either at said meeting or within ten days thereafter, appoint an acting chairman of the membership or stockholders of each corporation, and shall call a meeting of the members or stockholders of each corporation for the purpose of electing officers of each of the severed corporations, such meetings to be held in accordance with the charter and by-laws of the severed corporations as they existed prior to the merger. (1937, c. 256, s. 4.)

§ 55-178. Agreement between officers and directors for division and accounting.—The officers and directors of the several corporations shall thereupon enter into an agreement setting out in substantial detail the division of the properties of the merged corporation and providing for the accounting of all receipts and disbursements as between the severed corporations on the same basis as if the respective corporations had never been merged. Such agreement shall thereupon be submitted to the stockholders or members of the severed corporations at a meeting to be called in accordance with the charter or by-laws of the severed corporations. At such meeting such agreement shall become effective when approved by a majority of the stockholders or members. Thereupon said agreement shall be executed by the respective officers of the severed corporations, and deeds and other appropriate instruments shall be executed by the officers of the respective corporations to carry out the terms of the agreement. (1937, c. 256, s. 5.)

§ 55-179. Certificates of severance.—Upon the approval of the terms of the severance agreement, as provided in the preceding section, the president and board of directors of the respective corporations shall execute a certificate under the seal of the corporation setting forth in substance the terms of the resolution of severance adopted by the stockholders or members of the merged corporation provided for by § 55-176, and also setting forth the fact and date of the ratification of the severance agreement by the members or stockholders of the severed corporations, and shall file the same with the secretary of the state of North Carolina. Such certificate, duly certified by the secretary of state under the seal of his office, shall also be recorded in the office of the clerk of the superior court of the county in which the principal office of the merged corporation was established, and also in the offices of the clerks of the superior court for each of the counties in which the respective severed corporations shall have or shall establish their principal offices. On the filing of such certificates in the office of the clerk or clerks of the superior courts, as aforesaid provided, said severance shall be complete to all intents and purposes as if the merger had never taken place. Upon the recording of such certificate it shall be presumptive evidence of the statements of fact contained in said certificate, and after sixty days it shall be conclusive evidence of such statements of fact, except as to any stockholder or member who shall have demanded the value of his stock or membership. (1937, c. 256, s. 6.)

§ 55-180. Original rights restored; liabilities unaffected.—On the completion of the procedure set out in the previous section the stockholders or members in the respective corporations, or their representatives or assigns, as the case may be, shall to all intents and purposes be restored to the same rights and privileges which they, or their predecessors in interest, held in the original corporations: Provided, that any member or stockholder who has conveyed or for any reason forfeited his rights in the merged corporation shall not, by reason of the severance of the merged corporations, be restored to the rights he had in the original corporations at the time of the merger. Nothing contained in this article, however, shall be deemed to affect any debts, liabilities or obligations assumed or incurred by the merged corporation during the period of the merger, but each of the severed corporations shall, with respect to such debts or other obligations, remain liable jointly and severally. (1937, c. 256, s. 7.)

§ 55-181. Objection to severance and demand for payment of stock; failure to object deemed assent.—If any stockholder or member entitled to vote in the merged corporation shall vote against the severance at the stockholders' or members' meeting provided in § 55-176, or shall, prior to the taking of the vote at such meeting, object thereto in writing, and if such dissenting or objecting stockholder or member shall, within twenty days after such meeting, demand in writing from the merged corporation payment of his stock or of his interest in the merged corporation by reason of his membership therein, the merged corporation shall, within thirty days thereafter, pay to him the value of his stock or membership at the date of the adoption of the resolution of severance at the stockholders' or members' meeting. In case of disagreement as to the value thereof, it shall be lawful for any such stockholder or member, within thirty days after he has made demand in writing as aforesaid, or has voted against the resolution as aforesaid, and upon written notice to the merged corporation to appeal by petition to the superior court of the county in which the principal office of the merged corporation is located to appoint three appraisers to appraise the value of his stock or membership. The award of the appraisers, or a majority of them, if not opposed within ten days after the same shall have been filed in court, shall be confirmed by the court or clerk, and when confirmed shall be final and conclusive. If such report is opposed and excepted to, the exceptions shall be transferred to the civil issue docket of the superior court, and there tried in the same manner, as nearly as may be practicable, as is provided in § 40-20 for the trial of exceptions to the appraisal of land condemned for public purposes. The court shall assess against the merged corporation the costs of said proceeding. On the making of such demand in writing, as aforesaid, any such stockholder or member shall cease to be a stockholder or mem-

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Chapter 56. Electric, Telegraph, and Power Companies.

Art. 1. Acquisition and Condemnation of Property.

§ 56-1. Use of public highways.—Any person, firm or co-partnership operating electric power lines for lights or power, or authorized by law to establish such lines, or any duly incorporated company possessing the power to construct telegraph or telephone lines, lines for the conveying of electric power or for lights, either or all, has the right to construct, maintain and operate such lines along any railroad or other public highway, but such lines shall be so constructed and maintained as not to obstruct or hinder the usual travel on such railroad or other highway. (Rev., s. 1571; Code, s. 2007; 1874-5, c. 203, s. 2; 1899, c. 64, s. 1; 1903, c. 562; 1939, c. 228, s. 1; C. S. 195.)

Cross Reference.—See also § 55-45.

Editor's Note.—The 1939 amendment added that part of this section preceding the words "any duly incorporated company," as hereinafter defined.

Constitutionality.—The provisions of secs. 56-1 to 56-10, empowering electric power or lighting companies, etc., to condemn lands for the erection of poles, establishment of offices, and other appropriate purposes, are constitutional and valid. Wissler v. Yadkin River Power Co., 138 N. C. 465, 46 S. E. 460.

Application to Foreign Companies.—The right to construct and operate telegraph lines along any railroad or other public highway in the State, and to obtain the right of way therefor by a condemnation proceeding, is expressly conferred upon any telegraph company incorporated by this act or by any other State. North Carolina, etc., R. Co. v. Carolina Cent., etc., R. Co., 133 N. C. 225, 45 S. E. 572 and cases cited.

No Rights over Private Land.—This section applies to electric light wires placed along the street. Brown v. Electric Co., 138 N. C. 533, 51 S. E. 62. But the construction of a street passenger railway does not impose any additional servitude upon the property fronting on the street so occupied. Hester v. Traciton Co., 138 N. C. 288, 50 S. E. 411 and cases cited.

Cited in Hildebrand v. Southern Bell Tel., etc., Co., 216 N. C. 235, 5 S. E. (2d) 439.

¶ 56-2. Electric and hydro-electric power companies may appropriate highways; conditions.—Every electric power or hydro-electric power corporation, person, firm or co-partnership which may exercise the right of eminent domain under the chapter Eminent Domain, where in the development of electric or hydro-electric power it shall become necessary to use or occupy any public highway, or any part of the same, after obtaining the consent of the public road authorities having supervision of such public highway, shall have power to appropriate said public highway for the development of electric or hydro-electric power: Provided, that said electric power or hydro-electric power corporation shall construct an equally good public highway, by a route to be selected by and subject to the approval and satisfaction of the public road authorities having supervision of such public highway: Provided further, that said company shall pay all damages to be assessed as provided by law, by the damming of water, the discontinuance of the road, and for the laying out of said new road. (1911, c. 114; 1939, c. 228, s. 2; C. S. 1696.)

Cross Reference.—As to what corporations, etc., may exercise the right of eminent domain, see § 40-2.

Editor's Note.—The 1939 amendment inserted the words owner is entitled to just compensation. Phillips v. Postal Tel. Cable Co., 130 N. C. 513, 41 S. E. 1022; Query v. Postal Tel. Cable Co., 178 N. C. 639, 101 S. E. 390; Hodges v. Western Union Tel. Co., 133 N. C. 225, 45 S. E. 572 and cases cited.


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Cross Reference.—As to what corporations, etc., may exercise the right of eminent domain, see § 40-2.

Editor's Note.—The 1939 amendment inserted the words owner is entitled to just compensation. Phillips v. Postal Tel. Cable Co., 130 N. C. 513, 41 S. E. 1022; Query v. Postal Tel. Cable Co., 178 N. C. 639, 101 S. E. 390; Hodges v. Western Union Tel. Co., 133 N. C. 225, 45 S. E. 572 and cases cited.


Cited in Hildebrand v. Southern Bell Tel., etc., Co., 216 N. C. 235, 5 S. E. (2d) 439.
§ 56-3. CH. 56. ELECTRIC, ETC., COMPANIES § 56-5

"person, firm or co-partnership" near the beginning of this section.

Where under the provisions of this section, a hydro-electric power company has appropriated a section of a public highway and built an electric line thereon, the provisions of the statute that the company pay all damages assessed as provided by law does not entitle the plaintiff to recover damages for the slight change in the road causing inconvenience to him in hauling wood, etc., to and from his market town. Crowell v. Tallassae Power Co., 200 N. C. 208, 156 S. E. 492.

§ 56-3. Powers granted corporations under chapter exercisable by persons, firms or co-partnerships.—All the rights, powers and obligations given, extended to, or that may be exercised by any corporation or incorporated company under this chapter shall be extended to and likewise be exercised and are hereby granted unto all persons, firms or co-partnerships engaged in or authorized by law to engage in the business herein described. Such persons, firms, co-partnerships and corporations engaging in such business shall be subject to the provisions and requirements of the public laws which are applicable to others engaged in the same kind of business. (1939, c. 228, s. 3.)

§ 56-4. Acquisition of right of way by contract.—Such telegraph, telephone, or electric power or lighting company has power to contract with any person or corporation, the owner of any lands or of any franchise or easement therein, over which its lines are proposed to be erected, for the right of way for planting, repairing and preservation of its poles or other property, and for the erection and occupation of offices at suitable distances for the public accommodation. This section shall not be construed as requiring electric power or lighting companies to erect offices for public accommodation. (Rev. c. 572; Code, c. 2008; 1874-5, c. 203, s. 3; 1899, c. 64; 1903, c. 562, ss. 1, 2; C. S. 1697.)

Cross References.—As to recording deeds of easement, see § 47-27. As to right of directors of the various state institutions to grant easements to telephone, telephone or power companies, see § 47-27.

Owner Must Grant Easement.—A railroad company, not being the owner of the soil, cannot grant an easement to a telegraph company. Hodges v. Western Union Tel. Co., 113 N. C. 225, 47 S. E. 159. See also Deason v. Wilmington R. Co., 122 N. C. 856, 29 S. E. 356.

Easement by Adverse Possession.—Right of easement may be acquired by adverse and continuous user for the period of twenty years. Tector v. Postal Tel. Cable Co., 172 N. C. 783, 90 S. E. 941.

§ 56-5. Grant of eminent domain; exception as to mills and water-power.—Such telegraph, telephone, electric power or lighting company shall be entitled, upon making just compensation therefor, to the right of way over the lands, privileges and easements of other persons and corporations, and to the right to erect poles and towers, to establish offices, and to take such lands as may be necessary for the establishment of their reservoirs, ponds, dams, works, railroads, or sidetracks, or power-houses, with the right to divert the water from such ponds or reservoirs and conduct the same, or any portion thereof, by flume, ditch, conduit, waterway or pipe line, or in any other manner, to the point of use for the generation of power at its said power-houses, returning said water to its proper channel after being so used. Nothing in this section authorizes interference with any mill or power plant actually in process of construction or in operation; or the taking of water-powers, developed or undeveloped, with the land adjacent thereto necessary for their development: Provided, however, that if the court, upon filing of the petition by such electric power or lighting company, shall find that any mill, excepting cotton mills now in operation, whether operated by water-power or otherwise, together with the lands and easements adjacent thereto or used in connection therewith, or that any water-power, developed or undeveloped, with land adjacent thereto necessary for its development, excepting any water-power, right or property of any person, firm or corporation engaged in the actual service of the general public where such water-power, right or property is being used or held to be used or to be developed for use in connection with or in addition to any power actually used by such person, firm or corporation serving the general public, is necessary for the development of any hydro-electric power plant which is to be operated for the purpose of generating electric power for sale to the general public, and that said electric power or lighting company is unable to agree for the purchase of such property with the owners thereof, and that the failure to acquire such property will affect the ability of such electric power or lighting company to supply power to the general public, and that the taking of such mill or water-power will be greatly more to the benefit of the public than the continued existence of such mill or the continuation of the existing ownership of such water-power, then the court, upon such finding, shall make an order authorizing the condemnation of such mill and easements in all respects as in the cases of other property referred to in this section. Any provisions in conflict with this chapter in any special charters granted before January thirty-first, one thousand nine hundred and seven, in respect to the exercise of the right of eminent domain are repealed. (Rev. c. 1673; Code, c. 2008; 1874-5, c. 203, s. 4; 1899, c. 64; 1903, c. 562, ss. 157, 160; 1907, c. 74; 1921, c. 115; 1928, c. 60; 1923, c. 175; C. S. 1698.)

Cross Reference.—As to the right of eminent domain in general, see chapter 40.

Editor's Notes.—1. The editor's note to this section as it stood in 1919 expressly prohibited interference with any mill or power plant actually in process of construction or operation, also the taking of water powers, developed or undeveloped with the necessary appurtenances thereto. By ch. 60, Laws of 1921, the provision for condemning mills, when to the best interests of the public, was added. Cotton mills are excepted. Ch. 175, Laws of 1925, added the power to condemn any waterpower developed or undeveloped which is not being held for use or actually used in the furnishing of power to the public. The proviso which was inserted March 7, 1925, provided that it should not affect pending litigation. Thus by these two amendments the Legislature has practically abolished the restrictions which existed in the section in 1919. See 1 N. C. Law Rev. 290; 3 N. C. Law Rev. 144.

The General Assembly originally inserted the proviso "water powers, developed or undeveloped, with the necessary land adjacent thereto for their development, shall not be taken," for the purpose of operating by water, all of the water powers by one or more of the great aggregations of capital. Blue Ridge Interocean R. Co. v. Hendersonville Electric Light Co. et al., 143 N. C. 867; 67 S. E. 256.

Right Granted for Public Benefit.—This power of eminent domain is conferred upon corporations affected with public use, not so much for the benefit of the corporations themselves, as for the use and benefit of the people at large. Wissler v. Yadkin River Power Co., 183 N. C. 465, 466; 74 S. E. 460.

Limitation of Right of Eminent Domain.—This section limits the exercise of eminent domain and any special power claimed by the charter must clearly appear. Yadkin River
§ 56-6. Residences, etc., may be taken under certain cases.—Residence property or vacant lots adjacent thereto in towns or cities, or other residences, gardens, orchards, graveyard or cemeteries, may be taken under § 56-6 only when the company alleges, and upon the proceedings to determine the extent and character of the use, easement, privilege or other right claimed, and must be sworn to, and if the use or right sought to be taken are protected by the statute, the burden of proof is upon the defendant to bring the lands or water power therein to the court, on allegation of facts tending to show bad faith on the part of the companies, or an oppressive and manifest abuse of their discretion. Love v. R. R., 81 N. C. 452, cited and distinguished. Yadkin River Power Co. v. Smith. 82 N. C. 549, 79 S. E. 265.

§ 56-7. Condemnation on petition; parties' interests only taken; no survey required.—When such telegraph, telephone, electric power or lighting company fails on application therefor to secure by contract or agreement such right of way for the purposes aforesaid over the lands, privilege or easement of another person or corporation, it is lawful for such company, first giving security for costs, to file its petition before the superior court of the county in which the lands are situate, or into or through which such easement, privilege or franchise extends, setting forth and describing the parcels of land, privilege or easement over which the way, privilege or right of use is claimed, the owners of the land, easement or privilege, and their place of residence, if known, and if not known that fact shall be stated, and such petition shall set forth the use, easement, privilege or other right claimed, and must be sworn to, and if the use or right sought be over or upon an easement or right of way, it shall be sufficient to give jurisdiction if the person or corporation owning the easement or right of way be made a party defendant.

The Petition.—Under this section it is not necessary that a petition asking for the condemnation of a right of way over the right of way of a railroad should state by what tenor the railroad company holds. Postal Tel. Cable Co. v. Southern R. Co., 89 Fed. 90.

§ 56-11. Effect of Subsequent Charter.—Where a legislative charter has been granted since this section was passed, the powers given therein are not subject to the restriction of this section. Carolina-Tennessee Power Co. v. Hiawassee River Power Co., 171 N. C. 248, 88 S. E. 349.

Burden of Proof on Defendant.—Where a quasi-public corporation brings action for condemnation, and the defendant fails to prove that the acts or conduct of such corporation were not within the power of such corporation as granted by statute, or the use made by such corporation is not an issue taken by the statute, the burden of proving the right of the defendant under the statute is on the company, and not on the plaintiff. Phillips v. Postal Tel. Cable Co., 130 N. C. 513, 41 S. E. 1022.


Effect of Federal Statute.—The Act of Congress, entitled "An act to aid in the construction of telegraphs and to secure to the government the use of the same for postal, military and other purposes," approved 24 July, 1866, does not give authority to enter private property without consent of the owner, but provides that where consent is obtained, no State legislature shall prevent the use of such property for postal purposes by such corporations as may avail themselves of its privileges. Phillips v. Postal Tel. Cable Co., 130 N. C. 513, 41 S. E. 1022.

§ 56-13. Corporation brings action for condemnation, and the defendant is granted a corporation, conferring quasi-public as well as private powers, the corporation may proceed to condemn lands when so empowered, in pursuance of its business of a quasi-public nature, and this will not be denied because it was authorized to conduct a business of a private character. Carolina-Tennessee Power Co. v. Hiawassee River Power Co., 171 N. C. 248, 88 S. E. 349.

Conflict of Claims.—Where the claims of two companies conflict the right of use belongs to that company which first designs and marks its route. Carolina-Tennessee Power Co. v. Hiawassee River Power Co., 171 N. C. 248, 88 S. E. 349.

§ 56-14. Extent of Rights Usually Determined by Companies.—The extent and limit of the rights to be acquired are primarily and very largely referred to the companies or grantees of the power, and only becomes an issuable question, usually determinable by the court, on allegation of facts tending to show bad faith on the part of the companies, or an oppressive and manifest abuse of their discretion. Love v. R. R., 81 N. C. 452, cited and distinguished. Yadkin River Power Co. v. Smith. 82 N. C. 549, 79 S. E. 265.

§ 56-15. Power Over Right of Way.—The power of eminent domain is not necessarily exhausted by a single exercise of the power, but, within the limits established by the general law or special charter, a subsequent or further exercise of the power may be permissible. Yadkin River Power Co. v. Wissler, 160 N. C. 269, 75 S. E. 267; Thompson v. Railroad, 130 N. C. 371, 372, 67 S. E. 921. And the company then acquires a continuing right to a right of way, delimited by surface boundaries, but may extend into or through more counties than one, the whole right and controversy may be heard and determined in one county into or through which such right of way extends.

It is not necessary for the petitioner to make any survey of the right of way, nor to file any map or survey thereof, nor to annex any certificate of the location of its line by its board of directors. (Rev., 1574; Code, s. 2010; 1874-5, c. 203, s. 5; 1899, c. 64, s. 2; 1903, c. 562; C. S. 1700.)

§ 56-16. Rights in Held by Telegraph Poles.—When a telegraph line is authorized by telegraph pole or wire it is sufficient to give jurisdiction over the telegraph pole and wires without the actual possession of such property. Phillips v. Postal Tel. Cable Co., 130 N. C. 513, 41 S. E. 1022.

§ 56-17. Condemnation Not Confined to Right of Way.—The power of condemnation granted to these companies is not confined to a right of way, delimited by surface boundaries, but may be extended to cutting of trees or removing obstructions outside of these boundaries when required for the reasonable preservation and protection of their lines and other property. Yadkin River Power Co. v. Wissler, 160 N. C. 269, 275, 75 S. E. 267.

§ 56-18. Permanent Damage Awarded.—Permanent damages may be awarded to the owner of land who is injured by telegraph poles and wires placed on his land. Phillips v. Postal Tel.-Cable Co., 130 N. C. 513, 41 S. E. 1022; Lambeth v. Southern Power Co., 152 N. C. 371, 372, 67 S. E. 921. And the company then acquires an easement over the line.

§ 56-19. Limitation of City Authority.—Authority granted by a city to the defendant electric company to remove a shade tree in front of the plaintiff's home in order to put up its poles and wires does not justify the act of the defendant in removing the tree, the city has no power to deprive the
plaintiff of his property for such purpose without compen-
sation, and the railroad company, as provided by Art. 138 N. C. 139, 51 S. E. 60.

When Jury Trial Necessary.—While ordinarily a jury trial is not required in condemnation proceedings, except as to the assessment of damages, the general rule does not apply to condemnation proceedings between parties who are all before the court. Phillips v. Postal Tel.-Cable Co., 130 N. C. 513, 525, 41 S. E. 1022. Hence sec. 40-12, as to filing and service, does not apply. Id.

Commissioners to inspect premises.—In considering the question of damages where the interest sought is over an easement, privilege or right of way, the commissioners may inspect the premises or rest their finding on such testimony as to them may be satisfactory. (Rev., s. 1757; Code, s. 2013; 1874-5, c. 203, s. 9; C. S. 1703.)

Art. 2. Intrastate Telegraph Messages.

§ 56-8. Copy of petition to be served.—A copy of such petition, with a notice of the time and place the same will be presented to the superior court, must be served on the persons whose interests are to be affected by the proceeding at least ten days prior to the presentation of the same to the said court. (Rev., s. 1575; Code, s. 2011: 1874-5, c. 203, s. 6: 1899, c. 64, s. 3; C. S. 1701.)

Failure to Give Prosecution Bond.—Where it appears that the summons was served in time, but that the prosecution bond required by Code, s. 1575, 41 S. E. 1022, put at issue the question as to whether the railroad company owns an easement therein or the title in fee. Postal Tel. Cable Co. v. Southern R. Co., 90 Fed. 30.

§ 56-9. Proceedings as under eminent domain.—The proceedings for the condemnation of lands, or any easement or interest therein, for the use of a telegraph, telephone, electric power or lighting companies, the appraisal of the lands, or interest therein, the duty of the commissioners of appraisal, the right of either party to file exceptions, the commissioner of appraisal, the mode and manner of appeal, the power to review the action of the court or judge, the final judgment, and the manner of its entry and enforcement, and the rights of the company pending the appeal, shall be as prescribed in Article 2, entitled "Condemnation Proceedings," of the chapter Eminent Domain. (Rev., s. 1576; Code, s. 2012; 1899, c. 64; 1903, c. 562; C. S. 1702.)

Subsequent Provisions Not Incorporated.—The reference in this section to article 2 of the chapter on eminent domain incorporates into the telegraph statute the provisions of the railroad statute referred to, only as they existed at the time of the enactment, and not as thereafter amended. Postal Tel. Cable Co. v. Southern R. Co., 89 Fed. 190.

Proceedings Subsequent to Filing.—This section evidently refers to the proceedings subsequent to the filing of the petition and the service of the required notices. In other words, it repeats material that was all before the court. Phillips v. Postal Tel.-Cable Co., 130 N. C. 513, 525, 41 S. E. 1022. Hence sec. 40-12, as to filing and service, does not apply. Id.
§ 57-1. Regulation and definition; application of other laws; profit and foreign corporations prohibited.

§ 57-2. Incorporation.

§ 57-3. Hospital and physician contracts.

§ 57-4. Supervision of commissioner of insurance; form of contract with subscribers; schedule of rates.

§ 57-5. Application for certificate of authority or license.

§ 57-6. Issuance of certificate.

§ 57-7. Subscriber contracts; required and prohibited provisions.

§ 57-8. Investments and reserves.

§ 57-9. Reports filed with commissioner of insurance.

§ 57-10. Visitation and examinations.

§ 57-11. Expenses.

§ 57-12. Licensing of agents.

§ 57-13. Revocation of certificate of authority; dissolution.

§ 57-14. Taxation.

§ 57-15. Amendments to certificate of incorporation.

§ 57-16. Cost plus plans.

§ 57-17. Pre-existing hospital service corporations.

§ 57-18. Construction of chapter as to single employer plans; associations exempt.

Chapter 57. Hospital and Medical Service Corporations.

Sec.

57-1. Regulation and definition; application of other laws; profit and foreign corporations prohibited.—Any corporation heretofore or hereafter organized under the general corporation laws of the state of North Carolina for the purpose of maintaining and operating a non-profit hospital and/or medical service plan whereby hospital care and/or medical service may be provided in whole or in part by said corporation or by hospitals and/or physicians participating in such plan, or plans, shall be governed by this chapter and shall be exempt from all other provisions of the insurance laws of this state, heretofore enacted, unless specifically designated herein, and no laws hereafter enacted shall apply to them unless they be expressly designated therein.

The term “hospital service plan” as used in this chapter includes the contracting for certain fees for, or furnishing of, hospital care, laboratory facilities, X-ray facilities, drugs, appliances, anesthesia, nursing care, operating and obstetrical equipment, accommodations and/or any and all other services authorized or permitted to be furnished by a hospital under the laws of the state of North Carolina and approved by the North Carolina Hospital Association and/or the American Medical Association.

The term “medical service plan” as used in this chapter includes the contracting for the payment of fees toward, or furnishing of, medical, obstetrical, surgical and/or any other professional services authorized or permitted to be furnished by a duly licensed physician.

The term “hospital service corporation” as used in this chapter is intended to mean any non-profit corporation operating a hospital and/or medical service plan, as herein defined. Any corporation heretofore or hereafter organized and coming within the provisions of this chapter, the certificate of incorporation of which authorizes the operation of either a hospital or medical service plan, or both, may, with the approval of the commissioner of insurance, issue subscribers contracts or certificates approved by the commissioner of insurance, for the payment of either hospital or medical fees, or the furnishing of such services, or both, and may enter into contracts with hospitals or physicians, or both, for the furnishing of fees or services respectively under a hospital or medical service plan, or both.

No hospital service corporation within the meaning of this chapter shall be converted into a corporation organized for pecuniary profit. Every such corporation shall be maintained and operated for the benefit of its members and subscribers as a cooperative corporation.

No foreign or alien hospital or medical service corporation as herein defined shall be authorized to do business in this state.

Editor’s Note.—For comment on this enactment, see 19 N. C. Law Rev. 487.

The 1943 amendment, which made this section applicable to medical service corporations, changed the first, fourth and sixth paragraphs and inserted the second and third paragraphs.

Cited in Cato v. Hospital Care Ass’n, 220 N. C. 479, 17 S. E. (2d) 671.

§ 57-2. Incorporation.—Any number of persons not less than seven, desiring to form a non-profit hospital service corporation, shall incorporate under the provisions of the general laws of the state of North Carolina governing corporations, but subject to the following provisions:

1. The certificate of incorporation of each such corporation shall have endorsed thereon or attached thereto, the consent of the commissioner of insurance, if he shall find the same to be in accordance with the provisions of this chapter.

2. A statement of the services to be rendered by the corporation and the rates currently to be charged therefor which said statement shall be accompanied by two copies of each contract for services which the corporation proposes to make with its subscribers, and two copies of the type of contract which said corporation proposes to make with participating hospitals, shall have been furnished the commissioner of insurance; provided, however, that if the articles of incorporation of
§ 57-3. Hospital and physician contracts.—Any corporation organized under the provisions of this chapter may enter into contracts for the rendering of hospital service to any of its subscribers by hospitals approved by the American Medical Association and/or the North Carolina Hospital Association, and may enter into contracts for the furnishing of, or the payment in whole or in part for, medical services rendered to any of its subscribers by duly licensed physicians. All obligations arising under contracts issued by such corporations to its subscribers shall be satisfied by payments made directly to the hospital or physicians and/or physicians rendering such service, unless otherwise authorized by the commissioner of insurance. Nothing herein shall be construed to discriminate against hospitals conducted by other schools of medical practice. (1941, c. 338, s. 3; 1943, c. 537, s. 2.)

Editor's Note.—As to general laws governing incorporation, see chapter 55.

§ 57-4. Supervision of commissioner of insurance; form of certificate; schedule of rates.—(a) Every contract made by a non-profit hospital service corporation shall be evidenced by a separate instrument in writing filed with the secretary of state. (1941, c. 338, s. 2.)

Cross Reference.—As to general laws governing incorporation, see chapter 55.

§ 57-5. Application for certificate of authority or license.—Any corporation subject to the provisions of this chapter shall issue contracts for the rendering of hospital or medical service to subscribers, until the commissioner of insurance has, by formal certificate or license, authorized it to do so. Application for such certificate of authority or license, shall be made on forms to be supplied by the commissioner of insurance, containing such information as he shall deem necessary. Each application for such certificate of authority or license, as a part thereof shall be accompanied by duplicate copies of the following documents duly certified by at least two of the executive officers of such corporation:

(a) Certificate of incorporation with all amendments thereto.
(b) By-laws with all amendments thereto.
(c) Each contract executed or proposed to be executed by and between the corporation and any participating hospital, and/or physicians under the terms of which hospital and/or medical service is to be furnished to subscribers to the plan.
(d) Each form of contract, application, rider, and endorsement, issued or proposed to be issued to subscribers to the plan, or in renewal of any of contracts with subscribers to the plan, together with a table of rates charged or proposed to be charged to subscribers for each form of such contract.
(e) Financial statement of the corporation which shall include the amounts of each contribution paid or agreed to be paid to the corporation for working capital, the name or names of each contributor and the terms of each contribution. (1941, c. 338, s. 5; 1943, c. 537, s. 3.)

Editor's Note.—The 1943 amendment added the provisions relating to contracts with physicians.

§ 57-6. Issuance of certificate.—Before issuing any such license or certificate the commissioner of insurance may make such an examination or investigation as he deems expedient. The commissioner of insurance shall issue a certificate of authority or license upon the payment of an annual fee of one hundred dollars ($100.00) and upon being satisfied on the following points:

(a) The applicant is established as a bona fide non-profit hospital service corporation.
(b) The rates charged and benefits to be provided are fair and reasonable.
(c) The amounts provided as working capital of the corporation are repayable only out of earned income in excess of amounts paid and payable for operating expenses and hospital and medical expenses and such reserve as the department of insurance deems adequate, as provided hereinafter.
(d) That the amount of money actually available for working capital be sufficient to carry all acquisition costs and operating expenses for a reasonable period of time from the date of the issuance of the certificate. (1941, c. 338, s. 6; 1943, c. 537, s. 4.)

Editor's Note.—The 1943 amendment inserted the words "or medical" in line three. And it inserted in subsection (c) the words "and/or physicians," also the words "and/or medical."

§ 57-7. Subscriber contracts; required and prohibited provisions.—1. Every contract made by a corporation subject to the provisions of the chapter shall be for a period not to exceed twelve months, and no contract shall be made providing for the inception of benefits at a date later than [493]
one year from the date of the contract. Any such contract may provide that it shall be automati-
cally renewed for a similar period unless there shall have been one month's prior written notice
of termination by either the subscriber or the cor-
poration.

2. No contract between any such corporation
and a subscriber, shall entitle more than one per-
son to benefits except that a contract issued and
marked as a "family contract" may provide that
benefits will be furnished to a husband and wife,
or husband, wife and their child or children not
over eighteen years of age.

3. Every contract entered into by any such cor-
poration with any subscriber thereto shall be in writ-
ing and a certificate stating the terms and condi-
tions thereof shall be furnished to the subscriber
to be kept by him. No such certificate form shall
be made, issued or delivered in this state unless it
contains the following provisions:
(a) A statement of the amount payable to the
corporation by the subscriber and the times at
which and manner in which such amount is to be
paid; this provision may be inserted in the appli-
cation rather than in the certificate. Application
need not be attached to certificate.
(b) A statement of the nature of the benefits to
be furnished and the period during which they will
be furnished.
(c) A statement of the terms and conditions, if
any, upon which the contract may be cancelled or
otherwise terminated at the option of either party.
(d) A statement that the contract includes the
endorsements thereon and attached papers, if any,
and together with the application contains the en-
tire contract.
(e) A statement that if the subscriber defaults
in making any payment, under the contract, the
subsequent acceptance of a payment by the cor-
poration at its home office shall reinstate the con-
tact, but with respect to sickness and injury, only
to cover such sickness as may be first manifested
more than ten days after the date of such accept-
ance.

4. In every such contract made, issued or de-
livered in this state:
(a) All printed portions shall be plainly printed;
(b) The exceptions from the contract shall ap-
pear with the same prominence as the benefits to
which they apply; and
(c) If the contract contains any provision pur-
porting to make any portion of the articles, con-
stitution or by-laws of the corporation a part of
the contract, such portion shall be set forth in full.

5. A hospital service corporation may issue a
master group contract with the approval of the com-
misssioner of insurance provided such contract
and the individual certificates issued to members
of the group, shall comply in substance to the
other provisions of this chapter. Any such con-
tact may provide for the adjustment of the rate
of the premium or benefits conferred with the
approval of the commissioner of insurance, based
upon the experience thereunder at the end of the
first year or any subsequent year of insurance
thereunder and such readjustment may be made
retroactive only for such policy year. If such
master group contract is issued, altered or modi-
ified, the subscribers' contracts issued in pursu-
ance thereof are altered or modified accordingly,
all laws and clauses in subscribers' contracts to
the contrary notwithstanding. Nothing in the
chapter shall be construed to prohibit or prevent
the same. Forms of such contract shall at all
times be furnished upon request of subscribers
thereto. (1941, c. 338, s. 7.)

§ 57-8. Investments and reserves. — No hos-
pital service corporation shall invest in any securi-
ties other than securities permitted by the laws of
this state for the investment of assets of life insur-
ance companies, banks, trust companies, executors,
administrators and guardians.

Every such corporation after the first full year of
doing business after the passage of this chap-
ter shall accumulate and maintain, in addition to
proper reserves for current administrative liabil-
ities and whatever reserves are deemed adequate
and proper by the commissioner of insurance for
unpaid hospital and/or medical bills, and un-
earned membership dues, a special contingent
surplus or reserve at the following rates annually
of its gross annual collections from membership
dues, exclusive of receipts from cost plus plans,
until said reserve shall equal three times its
average monthly expenditures for hospital and/or
medical claims and administrative and selling ex-

cpenes.

Any such corporation may accumulate and main-
tain a contingent reserve in excess of the reserve
hereinabove provided for, not to exceed an amount
equal to three times the average monthly expendi-
tures for hospital and/or medical claims and ad-
ministrative and selling expenses.

In the event the commissioner of insurance
finds that special conditions exist warranting an
increase or decrease in the reserves or schedule of
reserves, hereinabove provided for, it may be
modified by the commissioner of insurance ac-
cordingly, provided however, when special condi-
tions exist warranting an increase in said
schedule of reserves, said schedule shall not be
increased by the commissioner of insurance until
a reasonable length of time shall have elapsed
after notice of such increase. (1941, c. 338, s. 8;
1943, c. 537, s. 5.)

Cross References.—As to investments by banks, see §§ 53-
44, 53-45 and 53-60. As to investments by executors, admin-
istrators and guardians, see §§ 36-1 to 36-5.

Editor's Note.—The 1943 amendment inserted the words
"and/or medical" in the second and third paragraphs.

§ 57-9. Reports filed with commissioner of in-
surance. — Every such corporation shall annually
on or before the first day of March of each year,
file in the office of the commissioner of insurance
a sworn statement verified by at least two of the
principal officers of the said corporation showing
its condition on the thirty-first day of December,
then next preceding; which shall be in such form
and shall contain such matter as the commissioner
of insurance shall prescribe. In case any such cor-
poration shall fail to file any such annual statement
as herein required, the said commissioner of in-
surance shall be authorized and empowered to
suspend the certificate of authority issued to such.
§ 57-10. Visitations and examinations. — The commissioner of insurance or any deputy or examiner or other person whom he may appoint, shall have the power of visitations and examination into the affairs of any such corporation and free access to all the books, papers and documents that relate to the business of the corporation, and may summon and qualify witnesses under oath to examine its officers, agents, or employees or other persons in relation to the affairs, transactions and conditions of the corporation, the actual expense of which shall be paid by the association so examined. (1941, c. 338, s. 10.)

§ 57-11. Expenses. — All acquisition expenses in connection with the solicitation of subscribers to such hospital and/or medical service plan and administration costs including salaries paid to officers of the corporations, if any, shall at all times be subject to inspection by the commissioner of insurance. (1941, c. 338, s. 11; 1943, c. 537, s. 6.)

Editor's Note.—The 1943 amendment inserted the words "and/or medical" in line three.

§ 57-12. Licensing of agents. — Every agent of any hospital service corporation authorized to do business in this state under the provisions of this chapter shall be required to obtain annually from the commissioner of insurance a license under the seal of his office showing that the company for which he is agent is licensed to do business in this state and that he is an agent of such company and duly authorized to do business for it. And every such agent, on demand, shall exhibit his license to any officer or to any person from whom he shall solicit hospital service. For said license, each agent shall annually pay the sum of one ($1.00) dollar. Before a license is issued to an agent, hereunder, the agent and the company and duly authorized to do business in this state under the provisions of any of the hospital contracts or subscribers' contracts issued by said corporation in pursuance of this chapter, the commissioner of insurance shall have the right without court action, to transfer all its assets, liabilities, and obligations, to any other corporation, whether organized under the provisions of this chapter, or not, under such contract of reinsurance with such transferee corporation, that he deems to the best interests of the corporation, its members and creditors whose assets, obligations and liabilities, are transferred. This action on the part of the commissioner of insurance is without prejudice to the rights of the corporations whose assets, liabilities and obligations are so transferred, to institute other and proper legal remedies, and to question the action so taken by the commissioner of insurance as herein provided, provided, however, that the action taken by the commissioner of insurance herein shall not be affected pending a final determination by the court with reference thereto. (1941, c. 338, s. 13; 1943, c. 537, s. 8.)

Editor's Note.—The word "affected" in the next to the last line of this section erroneously appeared as "effected" in the 1941 act. The proper correction was made in codifying the act and subsequently the 1946 act also made the correction.

§ 57-13. Revocation of certificate of authority; dissolution. — Whenever the commissioner of insurance shall find as a fact that any corporation subject to the provisions of this chapter, is being operated for profit or fraudulently conducted, or is not complying with the provisions of this chapter, he shall be authorized to revoke the certificate of authority or license theretofore granted and may at any time thereafter institute or cause to be instituted the necessary proceedings under the laws of this state looking to the dissolution of such corporation, and any dissolution, liquidation, merger, or reorganization of a corporation or corporations subject to the provisions of this chapter shall be under the supervision of the commissioner of insurance who shall have all powers with respect thereto granted to him under the insurance laws of this state. If, at any time, a corporation organized under the provisions of this chapter is financially unable to comply with the provisions of this chapter or to comply with any of the provisions of any of the hospital contracts or subscribers' contracts issued by said corporation in pursuance of this chapter, the commissioner of insurance shall have the right without court action, to transfer all its assets, liabilities, and obligations, to any other corporation, whether organized under the provisions of this chapter, or not, under such contract of reinsurance with such transferee corporation, that he deems to the best interests of the corporation, its members and creditors whose assets, obligations and liabilities, are transferred. This action on the part of the commissioner of insurance is without prejudice to the rights of the corporations whose assets, liabilities and obligations are so transferred, to institute other and proper legal remedies, and to question the action so taken by the commissioner of insurance as herein provided, provided, however, that the action taken by the commissioner of insurance herein shall not be affected pending a final determination by the court with reference thereto. (1941, c. 338, s. 13; 1943, c. 537, s. 7.)

Editor's Note.—The 1943 amendment inserted in the fourth sentence the words "or otherwise," and also the words "and/or medical." It added the proviso to the fifth sentence, and inserted in the last sentence the words "and/or medical."

§ 57-14. Taxation. — Every corporation subject to the provisions of this chapter is hereby declared to be a charitable and non-profit corporation and all of its funds and property shall be exempt from every state, county, district, municipal and school tax or assessment, and all other taxes [495]
and license fees, from the payment of which charitable and/or benevolent institutions are now or shall be hereafter exempt. For the purpose of raising revenues sufficient to defray the expenses of the administration of this chapter, and in lieu of all other taxes annual franchise or privilege tax is hereby levied upon every corporation subject to the provisions of this chapter at the rate of one-third of one cent of the gross annual collections from membership dues exclusive of receipts from cost plus plans. The general assembly of North Carolina does hereby appropriate the sum of four thousand dollars ($4,000.00) annually from its general funds to be paid over to the department of insurance of this state for its use in the discharge of the duties by this chapter imposed upon the commissioner of insurance of this state.

(1941, c. 338, s. 14.)

Editor's Note.—For comment on this provision, see 19 N. C. L. Rev. 518.

§ 57-15. Amendments to certificate of incorporation.—Every such corporation subject to the provisions of this chapter shall, prior to any amendments of its certificate of incorporation, file with the commissioner of insurance, two copies of the proposed amendment. Every amendment to a certificate of incorporation of any corporation subject to the provisions of this chapter, shall have annexed thereto the approval of the commissioner of insurance before the same shall be filed with the secretary of state. (1941, c. 338, s. 15.)

Cross Reference.—As to amendments generally, see § 55-31.

§ 57-16. Cost plus plans.—Any corporation organized under the provisions of this chapter shall be authorized as agent of any other corporations, firm, group, partnership, or association, doing business in this state, to administer on behalf of such corporation, firm, group, partnership, or association, any employee group hospitalization or medical service plan, promulgated by such corporation, firm, group, partnership, or association, on a cost plus administrative expense basis, provided only that administrative costs of such a cost plus plan administered by a corporation organized under the provisions of this chapter, acting as an agent as herein provided, shall not exceed the remuneration received therefor, and provided further that the corporation organized under this chapter administering such a plan shall have no liability to the subscribers or to the hospitals for the success or failure, liquidation or dissolution of such group hospitalization or medical service plan and provided further, that nothing herein contained shall be construed to require of said corporation, firm, group, partnership, or association, conformity to the provisions of this chapter if such employee group hospitalization is administered by a corporation organized under this chapter, on a cost plus expense basis. The administration of any cost plus plans as herein provided, shall not be subject to regulation or supervision by the commissioner of insurance. (1941, c. 338, s. 16; 1943, c. 537, s. 9.)

Editor's Note.—The 1943 amendment inserted in line twenty-one the words "or medical service plan."

§ 57-17. Pre-existing hospital service corporations.—No corporations organized under the laws of this state prior to the ratification of this chapter, for the purposes herein provided, shall be required to reincorporate as provided for herein, and the provisions of this chapter shall apply to said corporations only with regard to operations by said corporations with respect to subscribers' contracts, participating hospital contracts, reserves, investments, reports, visitations, expenses, taxation, amendments to charters, supervision of commissioner of insurance, application for certificate, issuance of certificates, licensing of agents after the date of the passage of this chapter, provided, however, as soon as practical hereafter and in accordance with rules and regulations adopted by the commissioner of insurance said corporations shall conform to this chapter as near as practical with respect to subscribers' contracts, endorsements, riders, and applications entered into prior to the ratification of this chapter. (1941, c. 338, s. 17.)

§ 57-18. Construction of chapter as to single employer plans; associations exempt.—Nothing in this chapter shall be construed to affect or apply to hospital or medical service plans which limit their membership to employees and the immediate members of the families of the employees of a single employer and which plans are operated by such employer or such limited group of the employees; nor shall this chapter be construed to affect or apply to any non-stock, non-profit medical service association which was, on January first, one thousand nine hundred and forty-three, organized solely for the purpose of, and actually engaged in, the administration of any medical service plan in this state upon contracts and participating agreements with physicians, surgeons, or medical societies, whereby such physicians or surgeons underwrite such plan by contributing their services to members of such association upon agreement with such association as to the schedule of fees to apply and the rate and method of payment by the association from the common fund paid in periodically by the members for medical, surgical and obstetrical care; and such hospital service plans, and such medical service associations as are herein specifically described, are hereby exempt from the provisions of this chapter. The commissioner of insurance may require from any such hospital service plan or medical service association such information as will enable him to determine whether such hospital service plan or medical service association is exempt from the provisions of this chapter. (1941, c. 338, s. 18; 1943, c. 537, s. 16.)

Editor's Note.—The 1943 amendment extended the exemption to the specified medical service plans and medical service associations.
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§ 58-6. Salary of commissioner.—The salary of the commissioner of insurance shall be six thousand dollars a year, payable monthly. (Rev., s. 2765; 1899, c. 54, ss. 3, 8; 1901, c. 710; 1903, c. 42; 1903, c. 771, s. 3; 1907, c. 830, s. 10; 1907, c. 994; 1909, c. 859; 1913, c. 194; 1915, c. 158, 171; 1917, c. 70; 1919, c. 247, s. 4; 1921, c. 25, s. 1; 1933, c. 282, s. 5; 1935, c. 293; 1937, s. 342; C. S. 3874.)

§ 58-7. Bond of commissioner.—The commissioner of insurance, before he enters upon the execution of his official duties, must give a bond to the state in the sum of twenty-five thousand dollars, with sufficient surety, to be approved by the state treasurer, conditioned upon the faithful performance of the duties of his office during his term of office; this bond extends to the faithful execution of the office of commissioner of insurance by the person elected or appointed thereto until a new election or appointment of commissioner of insurance is made and a new bond given. (Rev., s. 293; 1899, c. 54, s. 55; 1905, c. 430, s. 2; C. S. 6265.)

§ 58-8. Seal of department.—The commissioner of insurance, with the approval of the governor, shall devise a seal, with suitable inscription, for his office, a description of which, with the certificate of approval by the governor, shall be filed in the office of the secretary of state, with an impression thereof, which seal shall thereupon become the seal of office of the commissioner of the insurance department. The seal may be renewed whenever necessary. (Rev., s. 4682; 1899, c. 54, s. 11; C. S. 6266.)

§ 58-9. Duties of commissioner.—The commissioner of insurance shall:
(1) See that all laws relating to the companies, associations, and orders under the insurance department are faithfully executed.
(2) Furnish to each of the companies incorporated by this state and to the attorneys or general agents of companies and associations incorporated by other states and foreign governments, doing business in this state, printed forms for all statements and reports required by law.
(3) Perform all duties now imposed upon him by law in regard to the examination, supervision, and conduct of companies and associations and orders.
(4) Upon a proper application by any citizen of this state, give a statement or synopsis of the provisions of any insurance contract offered or issued to such citizen.
He may administer the oaths in the discharge of his official duty. (Rev., s. 4689; 1899, c. 54, s. 8; 1905, c. 430, s. 3; C. S. 6269.)

Cross References.—As to control of insurance commissioner over building and loan associations, see §§ 54-24 to 54-31. As to duties with regard to Firemen's Relief Fund, see § 118-1 et seq. As to certain duties with regard to fire inspection and prevention, see §§ 69-1 to 69-7. As to appraisal for merger of building and loan or insurance corporation, see § 53-15.

§ 58-10. Commissioner to provide books; make inspection; compensation.—The commissioner of insurance shall provide all books and blanks of every kind required to carry out the provisions of the law for inspection of buildings in towns and cities, and he or his deputy shall make inspections of the cities and towns of the state. Whenever the commissioner has reason to believe that local inspectors are not doing their duty he or his deputy shall make special trips of inspection and take proper steps to have all the provisions of law relative to the investigation of fires and the prevention of fire waste enforced. (Rev., s. 4690; 1905, c. 506, s. 6; 1925, c. 89; C. S. 6270.)

§ 58-11. Reports and records kept for public inspection.—The commissioner of insurance shall keep on file in his office, for the inspection of the public, all the reports received by him in obedience to law. He shall keep and preserve in a permanent form a record of his proceedings, including a concise statement of the result of all official examinations of companies, a report of the condition of receiverships of insolvent companies, an exhibit of the financial condition and business methods as disclosed by the official examinations of the same, or by their several statements; and such other information and comments in relation to insurance and the public interest therein as he deems fit and proper to preserve. He shall keep the records of fires and matters connected therewith as required by § 69-1 of the chapter on Fire Protection, a record of the policies insuring property of the state, as required by § 58-189 of this chapter, and a record of the proceedings attending the service of process on him as agent for a foreign insurance company, as required by § 58-154. (Rev., s. 4683; 1899, c. 54, ss. 9, 77; 1907, c. 1000, s. 1; C. S. 6271.)

§ 58-12. Original documents and certified copies as evidence.—Every certificate, assignment, or conveyance executed by the commissioner, in pursuance of any authority conferred on him by law and sealed with his seal of office, may be used as evidence and may be recorded in the proper recording offices, in the same manner and with like effect as a deed regularly acknowledged or proved before an officer authorized by law to take the probate of deeds; and all copies of papers in the office of the commissioner, certified by him and authenticated by his official seal, shall be evidence as the original. (Rev., s. 4684; 1899, c. 54, s. 11; C. S. 6272.)

§ 58-13. Admissibility as evidence of agent's authority.—In any case or controversy arising in any court of original jurisdiction within this state wherein it is necessary to establish the question as to whether any insurance or other corporation or agent thereof is or has been licensed by the state insurance department to do business in this state, the certificate of the commissioner of insurance under the seal of his office shall be admissible in evidence as proof of such corporation or agent's authority as conferred by the state insurance department. (1929, c. 289, s. 1.)

§ 58-14. Reports of commissioner to the governor and general assembly.—The commissioner
shall biennially submit to the general assembly, through the governor, a report of his official acts. The commissioner shall, from time to time, report to the general assembly any change which in his opinion should be made in the laws relating to insurance and other subjects pertaining to his department. On or before the first day of February of each year in which the general assembly is in session he shall make to the governor the recommendations called for in this section, to be transmitted to the general assembly, with the last annual report of this department, including receipts and disbursements. (Rev., s. 4687, 1899; 1901, c. 54, ss. 6, 7, 10; 1901, c. 391, s. 2; 1911, c. 211, s. 2; 1917, c. 217, s. 5; C. S. 6273.)

Editor's Note.—Before the amendment of 1927 the commissioners by this section were required to submit annually to the governor a report of their official acts, etc.

§ 58-15. Authority over all insurance companies; no exemptions from license.—Every insurance company, association or order, as well as every bond, investment, dividend, guarantee, registry, title guarantee, debenture, or such other like company (not strictly an insurance company, as defined in the general insurance laws), must be licensed and supervised by the commissioner of insurance, and must pay all licenses, taxes, and fees as prescribed in the insurance laws of the state for the class of company, association, or order to which it belongs. No provision in any statute, public or private, may relieve any company, association, or order from the supervision prescribed for the class of companies, associations, or orders of like character, or release it from the payment of the licenses, taxes, and fees prescribed for companies, associations, and orders of the same class; and all such special provisions or exemptions are hereby repealed. It is unlawful for the commissioner of insurance to grant or issue a license to any company, association, or order, or agent for them, claiming such exemption from supervision by his department and release for the payment of license, fees, and taxes. (Rev., s. 4691; 1903, c. 594, ss. 1, 2, 3; C. S. 6274.)

A fraternal insurance order incorporated under the laws of another state, with branch offices in this state, come, within the meaning of this section and must be licensed and supervised by the insurance commissioner. State v. Arlington, 157 N. C. 640, 72 S. E. 122.

Cited in Fuller v. Lockhart, 209 N. C, 61, 182 S. E. 733.

§ 58-16. Examinations to be made.—Before granting certificates of authority to an insurance company to issue policies or make contracts of insurance the commissioner shall be satisfied, by such examination and evidence as he sees fit to make and require, that the company is otherwise duly qualified under the laws of the state to transact business therein. As often as once in three years he shall personally or by his deputy visit each domestic insurance company and thoroughly inspect and examine its affairs, especially as to its financial condition and ability to fulfill its obligations and whether it has complied with the laws. He shall also make an examination of any such company whenever he deems it prudent to do so, or upon the request of five or more of the stockholders, creditors, policyholders, or persons peculiarly interested therein, who shall make affidavit of their belief, with specifications of their reasons therefor, that the company is in an unsound condition. Whenever the commissioner deems it prudent for the protection of policyholders in this state he shall in like manner visit and examine, or cause to be visited and examined by some competent person appointed by him for that purpose, any foreign insurance company applying for admission or already admitted to do business in this state, and such company shall pay the proper charges incurred in this examination, including the expenses of the commissioner or his deputy and the expenses and compensation of his assistants employed therein. For these purposes the commissioner or his deputy or persons making the examination have a right of free access to all the books and papers of the insurance company that relate to its business, and to the books and papers kept by any of its agents, and may summon, administer oaths to, and examine as witnesses, the directors, officers, agents, and trustees of any such company, and any other person, in relation to its affairs, transactions, and condition. (Rev., s. 4692; 1899, c. 54, s. 13; C. S. 6275.)

§ 58-17. Oath required for compliance with law.—Before issuing license to any insurance company to transact the business of insurance in this state, the commissioner of insurance shall require, in every case, in addition to the other requirements provided for by law, that the company file with him the affidavit of its president or other chief officer that it has not violated any of the provisions of this chapter for the space of twelve months last past, and that it accepts the terms and obligations of this chapter as a part of the consideration of the license. (Rev., s. 4693; 1899, c. 54, s. 110; 1901, c. 391, s. 8; C. S. 6276.)

§ 58-18. Investigation of charges.—Upon complaint being filed by a citizen of this state that a company authorized to do business in the state has violated any of the provisions of this chapter, the commissioner of insurance shall diligently investigate the matter, and, if necessary, examine, under oath, by himself or his accredited representatives, at the head office located in the United States, the president and such other officer or agents of such companies as may be deemed proper; also all books, records, and papers of the same. He or his deputies shall have power to summon witnesses, and to compel them to appear before him, or either of them, and to testify under oath in relation to any matter which is, by the provisions of this law, a subject of inquiry and investigation, and may require the production of any book, paper, document, or other matter whatsoever deemed pertinent or necessary to such inquiry with the same force and effect as is possessed by courts of record in this state. (Rev., s. 4694; 1899, c. 54, s. 111; 1903, c. 438, s. 11; 1921, c. 136, s. 4; 1925, c. 275, s. 6; C. S. 6377.)

Cross Reference.—As to penalties for using funds of insurance companies for political purposes, see § 163-206.

Editor's Note.—Prior to the amendment of 1921 this section provided that a bond to secure expense or cost could be required by the commissioner from the complaining party. By the amendment of 1921, $500 was appropriated to carry out this section. By the amendment of 1925 the provisions for a bond and an appropriation were omitted.

§ 58-19. Collection of expenses of examination.—If any company, authorized to do business in
licenses.—The commissioner of insurance shall public, all the reports received by him in obedience to this chapter, and shall certify to the clerk of the superior court of each county an abstract of each annual statement at the expense of the company making the same, and receive therefor from each company the sum of four dollars: Provided, the commissioner of insurance may, in lieu of said abstract, file with the clerks of the courts a copy of the advance sheets of his report or the full report, or both; and he shall also certify, at like expense, to such clerks, on the first day of May of each year, a list of the licenses in force at such dates and those that have expired without renewal or that have been revoked, and each clerk shall file such certified abstracts and lists in stub books, to be kept for that purpose, furnished by the commissioner of insurance, which books shall be open for the inspection of the public. There shall be no tax for any seal on the certificates required by this section. (Rev., s. 4700; 1899, c. 54, s. 77; 1901, c. 391, s. 6; 1903, c. 438, s. 7; 1915, c. 166, s. 9; 1931, c. 74; C. S. 6283.)

§ 58-20. Commissioner to prescribe forms and furnish blanks for returns.—The commissioner of insurance shall furnish blank forms for statements in order to secure full information as to the standing, condition, and other information desired of companies under his department. These forms shall contain such questions and be in such form as the commissioner may prescribe. (Rev., s. 4708; 1899, c. 54, s. 104; C. S. 6279.)

§ 58-21. Annual statements to be filed with commissioner.—Every insurance company, association, or order—domestic, through its officers, and foreign, through its general agent—shall file in the office of the commissioner of insurance, on or before the first day of March in each year, in form and detail as the commissioner of insurance prescribes, a statement showing the business standing and financial condition of such company, association, or order on the preceding thirty-first day of December, signed and sworn to by the chief managing agent or officer thereof, before the commissioner of insurance or some officer authorized by law to administer oaths. The commissioner of insurance shall, in December of each year, furnish to each of the insurance companies authorized to do business in the state two or more blanks adapted for their annual statements. (Rev., s. 4698; 1899, c. 54, ss. 72, 73, 83, 90, 97; 1901, c. 706, s. 2; 1903, c. 438, s. 9; C. S. 6280.)

§ 58-22. Punishment for making false statement.—If any insurance company in its annual or other statement required by law shall wilfully misstate the facts, the insurance company and the person making oath to or subscribing the same shall severally be punished by a fine of not less than five hundred nor more than one thousand dollars. (Rev., s. 3493; 1899, c. 54, s. 97; C. S. 6281.)

§ 58-23. Commissioner to examine statements and publish abstracts.—It is the duty of the commissioner of insurance to receive and thoroughly examine each annual statement required by this chapter, and, if made in compliance with the laws of this state, to publish, at the expense of the company, an abstract of the same in one of the newspapers of the state, which newspaper may be selected by the general agent making the statement, if within thirty days after the filing of the statement he notifies the commissioner of insurance, in writing, of the name of the paper selected by him. (Rev., s. 4699; 1899, c. 54, s. 74; 1901, c. 391, s. 6; C. S. 6282.)

§ 58-24. Commissioner to file reports of companies; copy to superior court clerk; certified list of licenses.—The commissioner of insurance shall keep on file in his office, for the inspection of the public, all the reports received by him in obedience to this chapter, and shall certify to the clerk of the superior court of each county an abstract of each annual statement at the expense of the company making the same, and receive therefor from each company the sum of four dollars: Provided, the commissioner of insurance may, in lieu of said abstract, file with the clerks of the courts a copy of the advance sheets of his report or the full report, or both; and he shall also certify, at like expense, to such clerks, on the first day of May of each year, a list of the licenses in force at such dates and those that have expired without renewal or that have been revoked, and each clerk shall file such certified abstracts and lists in stub books, to be kept for that purpose, furnished by the commissioner of insurance, which books shall be open for the inspection of the public. There shall be no tax for any seal on the certificates required by this section. (Rev., s. 4700; 1899, c. 54, s. 77; 1901, c. 391, s. 6; 1903, c. 438, s. 7; 1915, c. 166, s. 9; 1931, c. 74; C. S. 6283.)

Editor's Note—The Act of 1931 struck out the words "each alternate month" formerly appearing in lines fourteen and fifteen of this section and inserted in lieu thereof "May each year."

§ 58-25. Record of business kept by companies and agents; commissioner may inspect.—All companies, agents, or brokers doing any kind of insurance business in this state must make and keep a full and correct record of the business done by them, showing the number, date, term, amount insured, premiums, and the persons to whom issued, of every policy or certificate or renewal. Information from these records must be furnished to the commissioner of insurance on demand, and the original books of records shall be open to the inspection of the commissioner, his deputy or clerk, when demanded. (Rev., s. 4696; 1899, c. 54, s. 108; 1903, c. 438, s. 11; C. S. 6284.)

§ 58-26. Commissioner may employ actuary or accountant.—It is the duty of the commissioner of insurance, when in his judgment it is necessary in order that he may be fully advised as to the exact financial condition of any insurance company and the manner in which its business has been or is being conducted, to employ an independent actuary to make a technical calculation of the business and policies of the company, or a skilled accountant to examine and check up the books of the company, and the services shall be paid for as other bills against the state, out of the treasury, where payment is not otherwise provided for. (1907, c. 1000, s. 2; C. S. 6285.)

§ 58-27. Books and papers required to be exhibited.—It is the duty of any person having in his possession or control any books, accounts, or papers of any company, order, or person licensed under this chapter, to exhibit the same to the commissioner of insurance or to any deputy, actuary, accountant, or persons acting with or for the commissioner of insurance. Any person who shall refuse, on demand, to exhibit the books, accounts, or papers, as above provided, or who shall knowingly or wilfully make any false statement in regard to the same, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined or imprisoned, or both, at the discretion of the court. (Rev., ss. 3494, 4697; 1899, c. 54, s. 76; 1907, c. 1000, s. 3; C. S. 6286.)

—All contracts of insurance on property, lives, or interests in this state shall be deemed to be made therein; and all contracts of insurance the applications for which are taken within the state shall be deemed to have been made within this state and are subject to the laws thereof. (Rev., s. 4806; 1899, c. 54, s. 2; C. S. 6029.)

Editor's Note.—See 13 N. C. L. Rev. 213, for note on "Validity of Statutes Localizing Insurance Contracts." See also page 41 for the law of contracts in general.

General Consideration. — The section is constitutional. William v. Jefferson Standard Life Ins. Co., 129 N. C. 126, 29 S. E. 802. It did not have a retroactive effect. 1d.

Application Taken out of State.—When neither party was a resident of the state at the time of the contract of insurance and the application was taken out of the state the rule of lex loci contracti applies. Keesler v. Mutual Ben. Life Ins. Co., 177 N. C. 394, 99 S. E. 97.

Place Determined by Application. — Policies of insurance issued by foreign companies, the applications for which are taken in this state, are to be construed in accordance with the laws of this State. Horton v. Life Ins. Co., 122 N. C. 466, 30 S. E. 795; 177 N. C. 394, 99 S. E. 97.

Section 28-29. State law governs insurance contracts.

—The issuance of one or more policies of fire insurance, by any company, whether domestic or foreign, is a contract entered into for the protection of the policy holder, and a recovery may ordinarily be had, though the contract is in breach of the regulation. $33: 'Se (424: L Land, etc., Co. v. National Fire, ete., Co., 192 N. C. 115, 119, 120; Wells v. Jefferson Standard Life Ins. Co., 211 N. C. 632, 182 S. E. 141.

A provision in a contract of insurance that, "This contract is deemed to have been made within this state and all contracts of insurance the application for which is taken out of the state the rule of lex loci contracti applies. Keesler v. Mutual Ben. Life Ins. Co., 177 N. C. 394, 99 S. E. 97.

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§ 58-31. Stipulations as to jurisdiction and limitation of actions.—No company or order, domestic or foreign, authorized to do business in this state under this chapter, may make any condition or stipulation in its insurance contracts concerning the court or jurisdiction wherein any suit or action thereon may be brought, nor may it limit the time within which such suit or action may be commenced or maintained, to less than six months from the time of accrual of action accues or to less than six months from the time at which a plaintiff takes a nonsuit to an action begun within the legal time. All conditions and stipulations forbidden by this section are void. (Rev. s. 4809; 1899, c. 54, ss. 23, 106; 1901, c. 391, s. 8; C. S. 6290).

Editor's Note.—The provision that limits the time to not less than one year after the cause of action accrues is construed by the court to mean not twelve months after loss but less than twelve months after the date when all restrictions preventing suit are removed. If sixty days are allowed for proof of loss the insured would have twelve months after the expiration of the sixty days in which to bring suit. Any restriction in the policy preventing the insured from bringing his action within the twelve month limit in which action must be brought from running against him.

Limitations Not In Conflict.—A stipulation in a policy as to time of bringing an action is a contractual limitation, and has been held by the Supreme Court to be valid when it does not conflict with any provision of the statute. Parker v. Insur. Co., 113 N. C. 285, 19 S. E. 501.

Construed with Standard Fire Insurance Policy.—The provisions of a standard fire insurance policy, as set out in section 58-177, must be construed with the provision of this section and shall be so construed as to prevent bars prescribed it will not be barred. Modlin v. Atlantic Fire Ins. Co., 151 N. C. 35, 45, 63 S. E. 605. Under this policy the insured has twelve months from the date of loss and, according to the provisions of this section and section 58-177, he has twelve months within which to commence his suit. Muse v. London Assur. Corp., 108 N. C. 240, 13 S. E. 94; Dibrell v. Georgia Home Ins. Co., 110 N. C. 393, 14 S. E. 713; Lowe v. United States Mut. Acci. Ass'n, 115 N. C. 18, 20 S. E. 169; Gerringer v. North Carolina Home Ins. Co., 133 N. C. 407, 414, 45 S. E. 723.

Not Construed as a Statute of Limitations.—As the stipulation of the standard policy is a contract, and not a statute of limitations, it may be waived, or the party for whose benefit it was provided may be estopped by his conduct from insisting upon its enforcement. Dibrell v. Georgia Home Ins. Co., 110 N. C. 393, 14 S. E. 713; Lowe v. United States Mut. Acci. Ass'n, 115 N. C. 18, 20 S. E. 169; Gerringer v. North Carolina Home Ins. Co., 133 N. C. 407, 414, 45 S. E. 723.

Construed with Accident Policies.—The stipulations in accident insurance policies that proceedings shall not be begun until ninety days after proof of loss do not contravene the sections of this chapter. The policy Authorities state that the insured may bring his action within 12 months after the accident, this being construed to mean that he will have twelve months after the cause of action accrues. Heilig v. Aetna Life Ins. Co., 163 N. C. 367, 79 S. E. 806.

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Fraternals. —Provisions of the constitution and by-laws of a fraternal order of insurance, that suits shall not be brought or maintained for any cause or claim arising out of [506]
§ 58-32. Insurance as security for a loan by the company.— Where an insurance company, as a condition for a loan by such company, of money upon mortgage or other security, requires that the borrower insure either his life or that of another, or his property, or the title to his property, with the company, and assign or cause to be assigned to it a policy of insurance as security for the loan, and agree to pay premiums thereon during the continuance of the loan, whether the premium is paid annually, semiannually, quarterly, or monthly, such premiums shall not be considered as interest on such loans, nor will any loan be rendered usurious by reason of any such requirements, where the rate of interest charged for the loan does not exceed the legal rate and where the premiums charged for the insurance do not exceed the premiums charged to other persons for similar policies who do not obtain loans. (1915, c. 8; 1917, c. 61; C. S. 6291.)

Does Not Exempt from Usury Laws.—This section was held not to exempt insurance companies from the provisions of § 24-1 and § 24-2, relating to usury, the purport and effect of the section being merely to allow insurance companies to require as a condition precedent to the loan of money to the borrower, that a policy of insurance and assign same as security for the loan. Cowan v. Security Life, etc., Co., 211 N. C. 18, 188 S. E. 812.

If this section did provide that insurance companies should be exempted from §§ 24-1 and 24-2, it would be void as in violation of Art. I, sec. 7, of the Constitution. Id.

A ten-year endowment policy comes within the provisions of this section, when such endowment policy provides that the insured dies during the ten-year period while the policy is in force. Id.

§ 58-33. Companies must do business in own name.—Every insurance company, foreign or domestic, must conduct its business in the state in, and the policies and contracts of insurance issued by it shall be headed or entitled only by, its proper or corporate name. (Rev., s. 4811; 1899, c. 54, s. 18; C. S. 6292.)

§ 58-34. Publication of assets and liabilities; penalty for failure.—When any company publishes its assets it must in the same connection and with equal conspicuousness publish its liabilities computed on the basis allowed for its annual statements; and any publications purporting to show its capital must exhibit only the amount of such capital as has been actually paid in cash. Any company or agent thereof violating the provision of this section shall be punished by a fine of not less than fifty nor more than two hundred dollars. (Rev., ss. 3492, 4812; 1899, c. 54, ss. 18, 96; C. S. 6293.)

§ 58-35. Liabilities and reserve fund determined.—To determine the liability of an insurance company, other than life and real estate title insurance, upon its contracts, and thence the amount such company must hold as a reserve for reinsurance, the commissioner of insurance shall take the actual unearned portion of the premiums written in its policies. In case of the insolvency of any company, the reserve on outstanding policies may with the consent of the commissioner, be used for the reinsurance of its policies to the extent of their pro rata part thereof. (Rev., s. 4704; 1899, c. 54, s. 67; 1901, c. 391, s. 5; 1907, c. 1000, s. 4; C. S. 6294.)

Section Constitutional.—This section in no way impinges on the Constitution. Hardware Mut. Fire Ins. Co. v. Stinson, 210 N. C. 69, 78, 185 S. E. 449.


§ 58-36. Corporation or association maintaining office in state required to qualify and secure license.—Any corporation or voluntary association, other than an association of companies, the members of which are licensed in this state, issuing contracts of insurance and maintaining a principal, branch, or other office within this state, whether soliciting business in this state or in foreign states, shall qualify under the insurance laws of this state applicable to the type of insurance written by such corporation or association and secure license from the commissioner of insurance as provided under this chapter on insurance, as amended, and the officers and agents of any such corporation or association maintaining offices within this state and failing to qualify and secure license as herein provided shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined or imprisoned, or both, at the discretion of the court. (1937, c. 39.)

§ 58-37. Revocation of license of foreign company; publication of notice.—If the commissioner of insurance is of the opinion, upon examination or other evidence, that a foreign insurance company is in an unsound condition, or, if a life insurance company, that its actual funds, exclusive of its capital, are less than its liabilities; or that it has failed to comply with the law, or if it, its officers or agents, refuse to submit to examination or to perform any legal obligation in relation thereto, the commissioner shall revoke or suspend all certificates of authority granted to it or its agents, and shall cause notification thereof to be published in one or more newspapers published in this state; and no new business may thereafter be done by it or its agents in this state while such default or disability continues, or until its authority to do business is restored by the commissioner. (Rev., s. 4701; 1899, c. 54, s. 14; 1901, c. 176, s. 1; C. S. 6295.)

§ 58-38. Revocation of license of domestic company; injunction and receiver.—If, upon examination, the commissioner of insurance is of the opinion that any domestic insurance company is insolvent, or has exceeded its powers, or failed to comply with any provision of law, or that its condition is such as to render its further proceeding
hazardous to the public or to its policyholders, he shall revoke its license, and, if he deems it necessary, shall apply to a judge of the superior court to issue an injunction restraining it in whole or in part from further proceeding with its business.

The judge may issue the injunction forthwith, or upon notice and hearing thereon, and after a full hearing of the matter may dissolve or modify the injunction or make it permanent, and may make all orders and judgments needful in the matter, and may appoint agents or a receiver to take possession of the property and effects of the company and to settle its affairs, subject to such rules and orders as the court from time to time prescribes. (Rev., s. 4702; 1899, c. 54, s. 14; C. S. 6296.)

§ 58-39. Revocation of license for violation of law or impaired assets.—1. The authority of a domestic or foreign insurance company may be revoked if it violates or neglects to comply with any provision of law obligatory upon it, and whenever in the opinion of the commissioner of insurance its condition is unsound, or its assets above its liabilities, exclusive of capital and inclusive of reserve or unearned premiums estimated as provided by this chapter, are less than the amount of its original capital or required unimpaired funds.

2. If the commissioner of insurance is satisfied at any time that any statements made by any company licensed under this chapter are untrue, or if a general agent fails or refuses to obey the provisions of this chapter, the commissioner of insurance may revoke and cancel the license of such company or agent.

An insurance company violating any provision of this chapter, or refusing to submit to the examination provided for in § 58-18, when requested, forfeits its right to do business in this state for twelve months thereafter, and the commissioner of insurance shall immediately revoke the license issued to such insurance company to do business in this state. (Rev., ss. 4703, 4705; 1899, c. 54, ss. 66, 75, 112; 1901, c. 391, s. 8; C. S. 6297.)

§ 58-40. Agents and adjusters must procure license.—Every agent or adjuster of any insurance company authorized to do business in this state shall be required to obtain annually from the commissioner of insurance a license under the seal of his office, showing that the company for which he represents in this state for such length of time and it shall be his duty to revoke, the license of such agent or adjuster for all the companies which he represents, and the commissioner shall have the right to have such revocation reviewed by any judge of the superior court of Wake county upon application because of nonresidence as set out in section 58-43, and the agent or adjuster shall have the right to have such revocation reviewed by any judge of the superior court of Wake county upon appeal.

The commissioner of insurance shall satisfy himself that the person applying for license as an agent or adjuster is a person of good moral character, that he has not wilfully violated any of the insurance laws of this state, and that he is a proper person for such position, and that such license, if issued, shall serve the public's interests. (1913, c. 79, s. 1; 1915, c. 109, ss. 6, 7, c. 166, s. 7; 1931, c. 185; C. S. 6299.)

Editor's Note.—The Act of 1931 added at the end of this section the following: "and that such license, if issued, shall serve the public's interests."

§ 58-41. Application for license.—Before a license is issued to an insurance agent or adjuster in this state, the agent or adjuster and the company for which he desires to act shall apply for the license on forms to be prescribed by the commissioner of insurance; and before he issues a license to such agent or adjuster, the commissioner of insurance shall satisfy himself that the person applying for license as an agent or adjuster is a person of good moral character, that he intends to hold himself out in good faith as an insurance agent or adjuster, and that he has not wilfully violated any of the insurance laws of this state, and that he is a proper person for such position, and that such license, if issued, shall serve the public's interests. (1913, c. 79, s. 1; 1915, c. 109, ss. 6, 7, c. 166, s. 7; 1931, c. 185; C. S. 6299.)

Editor's Note.—As to punishment for violating this section, see § 58-47.

Validity of Contract When Agent Not Licensed.—Where a foreign insurance company, authorized to do business here under our laws, issues its policy on property situated within the State, but through an agency in another State which is unauthorized to write it here, because of not having obtained the license required by law the policy is valid as to the right of action of the insured thereon. Hay v. Union Fire Ins. Co., 167 N. C. 82, 83 S. E. 241.

Agent of Fraternal Insurance Order.—This section is applicable to all agents including an officer of a fraternal insurance order operating in North Carolina. State v. Arlington, 157 N. C. 643, 643, 73 S. E. 122.


§ 58-42. Revocation of agent's or adjuster's license.—When the commissioner of insurance is satisfied that any insurance agent or adjuster licensed by this state has wilfully violated any of the insurance laws of this state, or has wilfully overinsured property of any of the citizens of the state, or has wilfully misrepresented any policy of insurance, or has dealt unjustly with or wilfully deceived any citizen of this state in regard to any insurance policies, or has exercised coercion in obtaining an application for or in selling insurance, or has failed or refused to pay over to the company which he represents, any money or property in the hands of such agent or adjuster belonging to the company, or not demanded, or has become in any way disqualified according to any of the provisions necessary for obtaining or holding such license as set out in § 58-41, or has in any other way become unfit for such position, the commissioner may revoke, and it shall be his duty to revoke, the license of such agent or adjuster for all the companies which he represents in this state for such length of time as he may decide, not exceeding one year. The commissioner of insurance shall give to the agent or adjuster ten days' notice of the revocation of such license, and shall give the reasons therefor: and the agent or adjuster shall have the right to have such revocation reviewed by any judge of the superior court of Wake county upon appeal.

For the purpose of investigation under this section, the commissioner of insurance shall have all the power conferred upon him by § 58-171. (1913, c. 79, ss. 2, 3; 1915, c. 166, s. 7; 1929, c. 301, s. 1; 1943, c. 434; C. S. 6300.)

Cross Reference.—As to insurance agents and brokers wrongfully converting money being guilty of larceny, see § 14-96.

Editor's Note.—The amendment of 1929 added disqualification because of nonresidence as set out in section 58-43, to the grounds for revocation.

The 1943 amendment inserted after the word "policies" in
§ 58-43. Nonresident agents forbidden; exception.—No nonresident of the state shall be licensed to do business in the state, except as a special agent or organizer, and then only when he reports his business for record as North Carolina business to some or all of the direct agent of his company in the state, or having territory within the state. (Rev., s. 4707; 1899, c. 54, s. 108; 1903, c. 438, s. 11; C. S. 6301.)

§ 58-44. Resident agents required; discrimination.—All business done in this state by steam-boiler, liability, accident, health, live-stock, marine, leakage, credit, plate-glass, and fidelity insurance companies shall be by their regularly authorized agents residing in the state, or transacted through applications of such agents; and all policies so issued must be countersigned by such agents, who may pay not exceeding fifty per cent of the regular commissions allowed on the premiums collected on such business to a licensed nonresident broker. It shall be unlawful for any salaried officer, manager, or other representative of any company, unless a bona fide resident agent, to do or perform for or on behalf of his company any act which by the insurance laws of this State is required to be performed by a licensed resident agent. It shall be unlawful for the commissioner of insurance to license as a resident agent any person unless he is fully satisfied that such a person is a bona fide resident of this State, and is not being licensed for the purpose of evading the resident agent laws. The companies or their agents may make any discrimination in favor of individuals or insurers, and the provisions hereinafter set forth in this chapter with respect to discrimination by life insurance companies shall apply to the companies above named and their agents. (Rev., s. 4810; 1899, c. 54, ss. 107, 108; 1903, c. 438, s. 11; 1911, c. 196, s. 5; 1913, c. 140, s. 3; 1921, c. 136, s. 3; 1925, c. 70, s. 1; C. S. 6302.)

Editor's Note.—Prior to amendment of 1921, Public Laws, c. 136, section 3, no provision was made as to what broker-age fee should be paid by a resident agent. By amendment of 1921 five per cent was allowed for such fee.

The Public Laws of 1925 in amending this statute states that the section as amended by section 3 shall be changed without further designation of the amending act. Obviously this refers to section 3 of the Act of 1921, supra. This later amendment allowed fifty per cent commission as brokerage fee, and required that the local agent be a resident of the state, making it unlawful for the insurance commissioner to license as a resident agent anyone unless he is fully satisfied that such person is a bona fide resident of the state.


§ 58-45. Agents personally liable, when.—An insurance agent is personally liable on all contracts of insurance unlawfully made by or through him, directly or indirectly, for any contract made without authority to do business in the state. A person or citizen of the state who fills up or signs any open policy, certificate, blank or coupon of, or furnished by, an unlicensed company, agent, or broker, the effect of which is to bind any insurance in an unlicensed company on property in this state, is the agent of such company, and personally liable for all licenses and taxes due on account of such transaction. (Rev., s. 4813; 1899, c. 54, s. 70; 1903, c. 458, s. 7; C. S. 6303.)

§ 58-46. Payment of premium to agent valid; obtaining by fraud a crime.—An insurance agent or broker who acts for a person other than himself negotiating a contract of insurance is, for the purpose of receiving the premium therefor, the company's agent, whatever conditions or stipulations may be contained in the policy or contract. Such agent or broker knowingly procuring by fraudulent representations, payment or the obligation for the payment, of a premium for insurance, shall be punished by a fine of not less than one hundred nor more than five hundred dollars, or be imprisoned for not more than one year. (Rev., ss. 3464, 4814; 1899, c. 54, s. 69; C. S. 6304.)

Where Broker Fails to Deliver Funds.—Where the insurer has credited the amount of the unearned premium to its broker's account, who in turn has credited the amount to account of the broker who has procured the employer's application for the insurance, the insurer is liable to the employer for the amount of the unearned premium not actually paid to the employer by the broker. Hughes v. Lewis, 203 N. C. 775, 166 S. E. 229.

Where Policy Requires Receipt.—Where a policy provided that premiums were payable to a duly authorized agent only in exchange for insurer's official receipt and where evidence showed payment of a note given for a premium to insurer's agent without obtaining the note or insurer's official receipt, and there was no evidence that insurer received any part of the payment, in insurer's action to recover the premium paid after insurer had declared the policy forfeited, it was held that insurer's motion to nonsuit was properly allowed, payment to the agent under the circumstances not constituting payment to insurer. Aills v. New York Life Ins. Co., 209 N. C. 206, 181 S. E. 289.

§ 58-47. Punishment for violating this chapter or for agent acting without license.—If any person shall assume to act as insurance agent or broker without license therefor as required by law, or shall act in any manner in the negotiation or transaction of unlawful insurance with a foreign insurance company not admitted to do business in this state, or as principal or agent shall violate any provisions of law contained in this chapter, the punishment for which is not provided for elsewhere, he shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than one hundred nor more than five hundred dollars for each offense. (Rev., s. 3484; 1899, c. 54, s. 94; 1903, c. 119, s. 2.)

Purpose of Section.—The entire, certainly the chief, purpose of this legislation is to protect people from harmful imposition in contracts and dealings of this character, and the evil which the statute is designed to prevent is as threatening in the case of a bogus as a real company, perhaps more so. State v. Arlington, 157 N. C. 640, 646, 73 S. E. 122.

Inapplicability to Fraternal Insurance Agents.—The agent of a fraternal insurance order is punishable under this section. State v. Arlington, 157 N. C. 640, 643, 73 S. E. 122.

Same—Acts Constituting Violation.—The conduct of a person in publishing advertisements circulating his cards, taking money, issuing receipts, assuming to represent a fraternal insurance order, comes within the permissible and proper meaning of the words used in the statute and clearly within the mischief of the section. State v. Harrison, 145 N. C. 408, 417, 59 S. E. 807; State v. Arlington, 157 N. C. 640, 646, 73 S. E. 122.

Same.—Indictment.—A bill of indictment for the offences provided for by this section will not be held fatally defective because it contains no direct averment that a fraternal insurance order was subject to the insurance regulations, when otherwise sufficient. State v. Arlington, 157 N. C. 640, 641, 73 S. E. 122.

§ 58-48. Agent failing to exhibit license.—If any agent of any insurance company shall, on demand
§ 58-49. Agents making false statements. — If any solicitor, agent, examining physician, or other person shall knowingly or willfully make any false or fraudulent statement or representation in or with reference to any publication for insurance, or shall make any such statement for the purpose of obtaining fee, commission, money, or benefit in any corporation transacting business in this state, he shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, or imprisonment in the county jail for not less than thirty days nor more than one year, or both, at the discretion of the court. (Rev., s. 3488; 1899, c. 54, s. 108, 109; 1911, c. 196, s. 6; C. S. 6308.)

§ 58-50. Agents signing certain blank policies.—If any agent, commissioned or otherwise, of any fire, marine, health, live-stock, leakage, credit, steam-boiler, liability, accident, plate-glass, or fidelity insurance company shall sign any blank contract or policy of insurance, upon conviction thereof he shall be fined for each offense not less than one hundred dollars nor more than two hundred dollars. (Rev., s. 3487; 1899, c. 54, s. 60; C. S. 6307.)

§ 58-51. Adjuster acting for unauthorized company.—If any person shall act as adjuster on a contract made otherwise than as authorized by the laws of this state, or by any insurance company or other person not regularly licensed to do business in the state, or shall adjust or aid in the adjustment, either directly or indirectly, of a loss by fire on property located in this state, incurred on a contract not authorized by the laws of the state, he shall be deemed guilty of a misdemeanor and shall, upon conviction, be fined not less than two hundred dollars nor more than five hundred dollars, or imprisoned not less than six months nor more than two years, or both, in the discretion of the court. (Rev., s. 3489; 1899, c. 54, s. 114; C. S. 6309.)

§ 58-52. Agent violating insurance law.—If any person, either as principal or agent, or pretending to be such, shall solicit, examine, or inspect any risk, or shall examine into, adjust, or aid in adjusting any loss, or shall receive, collect, or transmit any premium of insurance, or shall do any other act in the soliciting, making, or executing any contract of insurance of any kind otherwise than the law permits, he shall be deemed guilty of a misdemeanor, and on conviction shall pay a fine of not less than two hundred dollars nor more than five hundred dollars, or be imprisoned not less than one nor more than two years, or both, at the discretion of the court. (Rev., s. 3490; 1899, c. 54, s. 115; C. S. 6310.)

§ 58-53. Informer to receive half of penalty. — The person, if other than the commissioner of insurance or his deputy, upon whose complaint a conviction is had for violation of the law prohibiting insurance in or by foreign companies not authorized to do business in the state, or for soliciting, examining, inspecting any risk, or receiving, collecting, or transmitting any premium, or adjusting or aiding in the adjustment of a loss, under a contract made otherwise than as authorized by the laws of this state, is entitled to one-half of the penalty recovered therefor. (Rev., s. 4831; 1899, c. 54, s. 93; C. S. 6311.)

§ 58-54. Forms to be approved by commissioner of insurance.—It is unlawful for any insurance company, association, order or society doing business in this state to issue, sell, or dispose of any policy, contract, or certificate, or use applications in connection therewith, until the forms of the same have been submitted to and approved by the commissioner of insurance of North Carolina, and copies filed in the insurance department. (1907, c. 879; 1913, c. 139; C. S. 6312.)

Validity of Unapproved Policy.—The statute does not purport to deal with the validity of the contract of insurance, but with the insurance company. It does not say a policy shall be void unless approved by the Insurance Commissioner, but that it shall be unlawful for the company to issue such policy, and the reason for the language used is obvious. Blount v. Royal Fraternal Ass'n, 163 N. C. 167, 170, 79 S. E. 299.

Art. 4. Deposit of Securities.

§ 58-55. Deposits held in trust by commissioner or treasurer. — 1. Deposits by domestic company.—The commissioner of insurance or the treasurer, in their official capacity, shall take and hold in trust deposits made by any domestic insurance company for the purpose of complying with the laws of any other state to enable the company to do business in that state. The company making the deposits is entitled to the income thereof, and may, from time to time, with the consent of the commissioner of insurance or treasurer, and when not forbidden by the law under which the deposit was made, change in whole or in part the securities which compose the deposit for other solvent securities of equal par value. Upon request of any domestic insurance company such officer may return to the company the whole or any portion of the securities of the company held by him on deposit, when he is satisfied that they are subject to no liability and are not required to be longer held by any provision of law or purpose of the original deposit.

2. Deposits by foreign company.—The commissioner or treasurer may return to the trustees or other representatives authorized for that purpose any deposit made by a foreign insurance company, when it appears that the company has ceased to do business in the state and is under no obligation to policyholders or other persons in the state for whose benefit the deposit was made.

3. Action to enforce or terminate the trust.—An insurance company which has made a deposit in this state pursuant to this chapter, or its trustees or resident managers in the United States, or the commissioner of insurance, or any creditor of the company, may at any time bring an action in the superior court of Wake county against the state and other parties properly joined therein, to enforce, administer, or terminate the trust created by the deposit. The proc-
ess in this action shall be served on the officer of the state having the deposit, who shall appear and answer in behalf of the state and perform such orders and judgments as the court may make in such action. (Rev., s. 4709; 1899, c. 54, s. 17; 1901, c. 391, s. 2; 1903, c. 438, s. 1; 1903, c. 536, s. 4; C. S. 6313.)

Cross Reference.—As to Workmen's Compensation Security Fund, see §§ 97-106 to 97-122.

§ 58-56. Deposits subject to approval and control of commissioner.—The deposits of securities required to be made by any insurance company of this state shall be approved by the commissioner of insurance of the state, and he may examine them at all times, and may order all or any part thereof changed for better security, and no change or transfer of the same may be made without his assent. (Rev., s. 4710; 1903, c. 536, s. 5; C. S. 6314.)

§ 58-57. Deposits by foreign companies required and regulated.—A foreign company, if incorporated or associated under the laws of any government or state other than the United States or one of the United States, shall not be admitted to do business in this state until, in addition to complying with the conditions by law prescribed for the licensing and admission of such companies to do business in this state, it has made a deposit with the treasurer or commissioner of insurance of this state, or with the financial officer of some other state of the United States, of a sum not less than the capital required of like companies under this chapter. This deposit must be in exclusive trust for the benefit and security of all the company's policyholders and creditors in the United States, funds of an amount equal to the net value of all its policies in the United States and not less than two hundred thousand dollars. (Rev., s. 4712; 1899, c. 54, s. 82; 1901, c. 391, s. 7; 1905, c. 430, s. 4; C. S. 6317.)

§ 58-58. Deposits by life companies not chartered in United States.—Every life insurance company organized under the laws of any other country than the United States must have and keep on deposit with some state insurance department or in the hands of trustees, in exclusive trust for the security of its contracts with policyholders in the United States, funds of an amount equal to the net value of all its policies in the United States and not less than two hundred thousand dollars. (Rev., s. 4711; 1899, c. 54, s. 64; 1903, c. 438, s. 6; C. S. 6315.)

§ 58-59. Registration of bonds deposited in name of treasurer.—The commissioner of insurance is hereby empowered, upon the written consent of any insurance company depositing with the commissioner or the state treasurer under any law of this State, any state, county, city, or town bonds or notes which are payable to bearer, to cause such bonds or notes to be registered as to the principal thereof in lawful books of registry kept by the issuing state, county, city or town, such registration to be in the name of the treasurer of North Carolina in trust for the company depositing the notes or bonds and the State of North Carolina, as their respective interest may appear, and is further empowered to require of any and all such companies the filing of written consent to such registration as a condition precedent to the right of making any such deposit or right to continue any such deposit heretofore made. (1925, c. 145, s. 2.)

§ 58-60. Notation of registration; release.—Bonds or notes so registered shall bear notation of such registration on the reverse thereof, signed by the registering officer or agent, and may be released from such registration and may be transferred on such books of registry by the signature of the State Treasurer. (1925, c. 145, s. 3.)

§ 58-61. Expenses of registration.—The necessary expenses of procuring such registration and any transfer thereof shall be paid by the company making the deposits. (1925, c. 145, s. 4.)

Art. 5. License Fees and Taxes.

§ 58-62. Commissioner to report and pay monthly.—On or before the tenth day of each month the commissioner of insurance shall furnish to the auditor a statement in detail of the taxes and license fees received by him during the previous month, and shall pay to the treasurer the amount in full of such taxes and fees. The auditor may examine the accounts of the commissioner of insurance and check them up with said statement. (Rev., s. 4714; 1899, c. 54, s. 82; 1901, c. 391, s. 7; 1905, c. 430, s. 4; C. S. 6317.)

§ 58-63. Schedule of fees and charges.—The commissioner of insurance shall collect and pay into the state treasury fees and charges as follows:

1. For filing and examining statement preliminary to admission, twenty dollars; for filing and auditing annual statement, ten dollars; for filing any other papers required by law, one dollar; for each certificate of incorporation or of examination, ten dollars; for examination of company or association, two dollars; for each seal when required, one dollar; for filing charter and other papers of a fraternal order, preliminary to admission, twenty-five dollars.

2. To be paid to the publisher, for the publication of each financial statement, nine dollars.

3. The commissioner shall receive for copy of any record or paper in his office ten cents per copy sheet and one dollar for certifying same, or any fact or data from the records of his office; for making and mailing abstracts to the clerks of the superior courts in the counties of the state, four dollars; for examination of any foreign company, twenty-five dollars per diem and all expenses, and for examining any domestic company, actual expenses incurred; for the examination and approval of charters of companies, five dollars; also, to defray the expense of computing the value of the policies of domestic life insurance companies, one cent for every thousand dollars of the whole amount insured by its policies so valued. The traveling and other expenses of accountants, and other examiners when engaged in the work of examination shall be paid by the companies, associations, or orders under investigation. For the investigation of tax returns and the collection of any
delinquent taxes disclosed by such investigation, the commissioner may, in lieu of the above per diem charge, assess against any such delinquent company the expense of the investigation and collection of such delinquent tax, a reasonable percentage of such delinquent tax, not to exceed ten per centum (10%) of such delinquency, and in addition thereto.

§ 58-64. License fees for more than one class of insurance.—No insurance company admitted to do business in the state shall be authorized to transact more than one class or kind of insurance therein, unless it pays the license fees for each class. But upon the payment of the largest license fees provided for any one business done a fire insurance company may do a life business, and a fire insurance company may insure against the perils of the sea and other perils usually insured against by marine insurance, including risks of inland navigation and transportation; and may also insure against loss or damage by water to any goods or premises arising from leakage of sprinklers and water pipes. No insurance company may be required to pay license fees amounting in the aggregate to more than three hundred and fifty dollars per annum. (Rev., s. 4715; 1899, c. 54, ss. 50, 58, 80, 81, 82, 87, 90, 92; 1901, c. 391, s. 7; c. 706, s. 2; 1903, c. 438, ss. 7, 8; 1903, c. 536, s. 4; 1903, c. 680, s. 7; 1905, c. 558, s. 68; 1913, c. 140, s. 1; 1919, c. 186, s. 6; 1921, c. 218; 1935, c. 334; 1939, c. 158, s. 208; C. S. 6318.)

Cross Reference.—As to franchise and license taxes on insurance companies, see § 105-121.

§ 58-66. Licenses run from April first; pro rata payment.—The license required of insurance companies shall continue for the next ensuing twelve months after April first of each year, unless revoked as provided in this chapter; but the commissioner of insurance may, when the annual license tax exceeds twenty-five dollars, receive from applicants after April first so much of the license fee required by law as may be due for the remainder of the year, beginning with the first day of the current month. (Rev., s. 4718; 1899, c. 54, s. 78; C. S. 6321.)

Cross Reference.—For franchise and license taxes on insurance companies, see § 105-121.

§ 58-67. Statements of gross receipts filed and tax paid.—Every general agent shall, within the first thirty days of January and July of each year, make a full and correct statement, under oath of himself and of the president, secretary, or some officer at the home or head office of the company in this country, of the amount of the gross receipts derived from the insurance business under this chapter obtained from residents of this state, or on property located therein during the preceding six months, and shall, within the first fifteen days of February and August of each year, pay to the commissioner of insurance the tax imposed upon such gross receipts. (Rev., s. 4719; 1899, c. 54, s. 79; 1901, c. 391, s. 7; 1903, c. 438, s. 8; C. S. 6322.)

Cross Reference.—The gross receipts tax referred to is imposed by § 105-121.

§ 58-68. Policyholders to furnish information.—To enable the commissioner of insurance the better to enforce the payment of the taxes imposed by this chapter and by § 105-121 every corporation, firm, or individual doing business in the state shall, upon demand of the commissioner, furnish to him, upon blanks to be provided by him, a statement of the amount of all insurance held by them, giving the name of the company, number, and amount of policies and the premiums paid on each, and such other information as the commissioner calls for, or shall file an affidavit with the commissioner that all their insurance is placed in companies licensed to do business in this state. (Rev., s. 4720; 1899, c. 54, s. 79; 1901, c. 391, s. 7; 1903, c. 438, s. 8; C. S. 6323.)

SUBCHAPTER II. INSURANCE COMPANIES.

Art. 6. General Domestic Companies.

§ 58-69. Application of this chapter and general laws.—The general provisions of law relative to the powers, duties, and liabilities of corporations apply to all incorporated domestic insurance companies where pertinent and not in conflict with other provisions of law relative to such companies or with their charters. All insurance companies of this state shall be governed by this chapter, notwithstanding anything in their special charters to the contrary, provided notice of the acceptance of this chapter is filed with the commissioner of insurance. (Rev., s. 4721; 1899, c. 54, s. 19; C. S. 6324.)

§ 58-70. Extension of existing charters.—Domestic insurance companies incorporated by special acts, whose charters are subject to limitation of time, shall, after the limitation expires, and upon filing statement and paying the taxes and fees required for an amendment of the charter, continue to be bodies corporate, subject to all general laws applicable to such companies. (Rev., s. 4722; 1899, c. 54, s. 20; C. S. 6325.)

§ 58-71. Certificate required before issuing policies.—No domestic insurance company may issue policies until upon examination of the commissioner of insurance, his deputy or examiner, it is found to have complied with the laws of the state, and until it has obtained from the commissioner of insurance a certificate setting forth that fact and authorizing it to issue policies. The issuing
of policies in violation of this section renders the company liable to the forfeiture prescribed by law, but such policies are binding upon the company. (Rev., s. 4723; 1899, c. 54, ss. 21, 99; 1903, c. 438, s. 10; C. S. 6328.)

§ 58-72. Purposes of organization. — Insurance companies, associations, or orders may be formed as provided in §§ 58-73 and 58-74 for any one of the following purposes:

1. Fire and Storm.—To insure against loss or damage to property by fire, lightning, wind, hail, or water, occasioned thereby or arising therefrom, and for nonoccupancy, upon the stock or mutual plan.

2. Marine.—To insure, upon the stock or mutual plan, vessels, freights, goods, money, effects, and money lent on bottomry or respondentia against the perils of the sea and other perils usually insured against by marine insurance, including risks of inland navigation and transportation.

3. Life.—To carry on the business commonly known as life insurance on the stock or mutual plan, contract for the payment of endowments or annuities, or make and enter into such other contracts conditioned upon the continuance or cessation of human life.

4. Sickness.—Against disablement resulting from sickness and every insurance appertaining thereto.

5. Accident.—Against injury, disablement, or death resulting from traveling or general accident and every insurance appertaining thereto.

6. Fidelity and Surety.—Guaranteeing the fidelity of persons holding places of public or private trust, and guaranteeing the performance of contracts other than insurance policies, and guaranteeing and executing all bonds, undertakings, and contracts of suretyship. And a company is authorized to execute such bonds, undertakings, and contracts of suretyship by itself, though a statute requires two or more sureties.

7. Plate-glass.—Upon glass against breakage.

8. Liability.—Insuring any one against loss or damage resulting from accident to or injury, fatal or nonfatal, suffered by an employee or other person, for which the person insured is liable.

9. Boiler and Machinery.—Upon steam boilers and upon pipes, engines, and machinery connected therewith or operated thereby, against explosion and accident and against loss or damage to life, person, or property resulting therefrom. And a company is authorized to make inspection of and to issue certificates of inspection upon such boilers, pipes, engines, and machinery.

10. Burglary.—Against loss by burglary or theft, or both.

11. Credit.—To carry on the business commonly known as credit insurance or guaranty, either by agreeing to purchase uncollectible debts or otherwise to insure against loss or damage from the failure of persons indebted to the insured to meet their liabilities.

12. Sprinkler.—To insure against loss or damage by water to any goods or premises arising from the breakage or leakage of sprinklers and water-pipes. And a company is authorized to make inspection of and to issue certificates of inspection upon such sprinklers and pipes.

13. Accidents to Vehicles.—To insure against loss or damage to property arising from accidents to elevators, automobiles, bicycles, and vehicles, except rolling stock of railways.

14. Live-stock.—To insure horses and other live-stock against death and damage.

15. Real estate title.—For the purpose of examining titles to real estate and furnishing information in relation thereto, and of insuring owners and others interested therein against loss by reason of encumbrances and defective title.

16. Miscellaneous.—Against any other casualty authorized by the charter of the company, not included under the heads of life, fire, marine, or title insurance, which is a proper subject of insurance. No corporation so formed may transact any other business than that specified in its charter and articles of association. (Rev., s. 4726; 1899, c. 54, ss. 21, 26; 1903, c. 438, s. 1; 1911, c. 111, s. 1; C. S. 6327.)

§ 58-73. Manner of creating such corporations. — The procedure for organizing such corporations is as follows: The proposed incorporators, not less than ten in number, a majority of whom must be residents of the state, shall subscribe articles of association setting forth their intention to form a corporation; its proposed name, which must not so closely resemble the name of an existing corporation doing business under the laws of this state as to be likely to mislead the public, and must be approved by the commissioner of insurance; the class of insurance it proposes to transact and on what business plan or principle; the place of its location within the state, and if on the stock plan, the amount of its capital stock. The words “insurance company,” “insurance association,” or “insurance society” must be a part of the title of any such corporation, and also the word “mutual,” if it is organized upon the mutual principle. The certificate of incorporation must be subscribed and sworn to by the incorporators before an officer authorized to take acknowledgment of deeds, who shall forthwith certify the certificate of incorporation, as so made out and signed, to the commissioner of insurance of the state at his office in the city of Raleigh. The commissioner of insurance shall examine the certificate, and if he approves of it and finds that the requirements of the law have been complied with, shall certify such facts, by certificate on such articles, to the secretary of state. Upon the filing in the office of the secretary of state of the certificate of incorporation and attached certificates, and the payment of a charter fee in the amount required for private corporations, and the same fees to the secretary of state, the secretary of state shall cause the certificate and accompanying certificates to be recorded in his office, and shall issue a certificate in the following form:

Be it known that, whereas (here the names of the subscribers to the articles of association shall be inserted) have associated themselves with the intention of forming a corporation under the name of (here the name of the corporation shall be inserted), for the purpose (here the purpose declared in the articles of association shall be inserted), with a capital (or with a permanent fund) of (here the amount of capital or permanent fund fixed in the articles of association shall be inserted), and have complied with the provisions of the
§ 58-74. First meeting; organization; license.—The first meeting for the purpose of organization under such charter shall be called by a notice signed by one or more of the subscribers to the certificate of incorporation, stating the time, place, and purpose of the meeting; and at least seven days before the appointed time a copy of this notice shall be given to each subscriber, left at his usual place of business or residence, or duly mailed to his postoffice address, unless the signers waive notice in writing. Whoever gives the notice must make affidavit thereof, which affidavit shall include a copy of the notice and be entered upon the records of the corporation. At the first meeting, or any adjournment thereof, an organization shall be effected by the choice of a temporary clerk, who shall be sworn; by the adoption of by-laws; and by the election of directors and such other officers as the by-laws require; but at this meeting no person may be elected director who has not signed the certificate of incorporation. The temporary clerk shall record the proceedings until the election and qualification of the secretary. The directors so chosen shall elect a president, secretary, and other officers which under the by-laws they are so authorized to choose. The president, secretary, and a majority of the directors shall forthwith make, sign, and swear to a certificate setting forth a copy of the certificate of incorporation, with the names of the subscribers thereto, the date of the first meeting and of any adjournments thereof, and shall submit such certificate and the records of the corporation to the commissioner of insurance, who shall examine the same, and who may require such other evidence as he deems necessary. If upon his examination the commissioner of insurance approves of the by-laws and finds that the requirements of the law have been complied with, he shall issue a license to the company to do business in the state, as is provided for in this chapter. (Rev., s. 4728; 1899, c. 54, s. 26; 1903, c. 495, ss. 2, 3; C. S. 6329.)

§ 58-75. By-laws; classification and election of directors.—A domestic company may adopt by-laws for the conduct of its business not repugnant to law or its charter, and therein provide for the division of its board of directors into two, three, or four classes, and the election thereof at its annual meetings so that the members of each class only shall retire and their successors be chosen each year. Vacancies in any such class may be filled by election by the board for the unexpired term. (Rev., s. 4724; 1899, c. 54, s. 22; C. S. 6330.)

§ 58-76. Power to purchase, hold, and convey real estate.—Any company organized by special charter or under the provisions of the general insurance laws of this state may purchase, hold, and convey real estate for the sole purposes and in the manner herein set forth:
1. Such as is necessary for its immediate use in the transaction of its business.
2. Property mortgaged to it in good faith as security for loans previously contracted or for money due.
3. Property conveyed to it in satisfaction of debts previously contracted in the course of its dealings, or purchased at sales upon judgments, decrees, or mortgages obtained or made for such debts.
(A) Real estate acquired for the purpose of leasing the same to any person, firm, or corporation for a period not exceeding thirty years, or real estate already leased for an unexpired period not exceeding thirty years, under an agreement (1) that the lessee shall at its own cost erect, or where under the lessee or its predecessor in title has at its own cost already erected thereon, free of liens, a building or other improvements satisfactory to the owner; (2) that the said improvements shall remain on the said property during the period of the lease, with provision that at the termination of the lease the ownership of such improvements, free of liens, shall vest in the owner of the real estate; and (3) that during the term of the lease the tenant shall keep and maintain the said improvements in good repair. Real estate acquired pursuant to the provisions of this subsection (A) shall not be treated as an admitted asset unless and until the improvements herein required shall have been constructed and the lease agreement entered into in accordance with the terms of this subsection, nor shall real estate acquired pursuant to this subsection (A) be treated as an admitted asset in an amount exceeding the amount actually invested reduced each year by equal decrements sufficient to write off at least seventy-five per cent of the investment at the normal termination of the lease. The total investments of any company under this subsection (A) shall not exceed three per cent of its assets.
(B) Subject to approval of the commissioner of insurance, real estate for recreation, hospitalization, convalescent and retirement purposes of its
employees only. Such investment under this sub-section (B) shall not exceed five per cent of the company’s surplus.

No investment shall be made by any company pursuant to this subdivision 3½ which will cause such company’s investment in all real property owned by it to exceed ten per cent of its assets.

4. It is unlawful for any such incorporated company to purchase or hold real estate in any other case or for any other purpose; and such real estate acquired, and not necessary for the accommodation of the company in the convenient transaction of its business, shall be sold and disposed of within five years after the company has acquired title, and it is not lawful for it to hold the real estate for a longer period than that mentioned, unless it acquired such real estate prior to March sixth, one thousand eight hundred and ninety-nine, or procures a certificate from the commissioner of insurance that the interest of the company will suffer materially by a forced sale of such real estate, in which event the time for the sale may be extended to such a time as the commissioner of insurance directs in the certificate.

Nothing contained herein shall apply to any insurance company from improving and conveying its real estate, notwithstanding the lapse of five years from its acquisition thereof, without having procured such certificate from the commissioner of insurance.

(Rev., s. 4725; 1899, c. 54, s. 22; 1903, c. 536, s. 2; 1943, c. 385; C. S. 6331.)

Editor’s Note.—The 1941 amendment inserted subdivision 3½.

§ 58-77. Amount of capital required. — The amount of capital requisite to the formation and organization of companies under the provisions of this subsection is as follows: Companies to insure plate-glass, not less than twenty-five thousand dollars. Companies issuing health policies, policies against damage by hail, or insuring marine risks or inland risks upon the stock plan, or insuring live-stock, not less than fifty thousand dollars. Companies for the purposes of transacting life or fire insurance on the industrial plan, issuing policies to insure mechanics’ tools and apparatus against loss by fire for an amount not exceeding two hundred and fifty dollars in a single risk, with a capital of not less than ten thousand dollars, divided into shares of the par value of ten dollars each. (Rev., s. 4729; 1899, c. 54, s. 26; 1903, c. 438, s. 4; 1907, c. 1000, s. 5; 1913, c. 140, s. 2; 1929, c. 284, s. 1; C. S. 6332.)

Editor’s Note.—By the amendment of 1939 the capital stock required was materially increased.

§ 58-78. Capital stock fully paid in cash.—The capital stock shall be paid in cash within twelve months from the date of the charter or certificate of organization, and no certificate of full shares and no policies may be issued until the whole capital is paid in. A majority of the directors shall certify on oath that the money has been paid by the stockholders for their respective shares and is held as the capital of the company invested or to be invested as required by § 58-79. (Rev., s. 4730; 1899, c. 54, s. 27; C. S. 6333.)

§ 58-79. Investment of capital.—Such capital shall be invested only as follows:

1. In first mortgages of real estate in this state.

2. In bonds of the United States or of any of the states whose bonds do not sell for less than par.

3. In the bonds or notes of any city, county, or town of this state whose net indebtedness does not exceed five per cent of the last preceding valuation of the property therein for purposes of taxation. The term “net indebtedness” excludes any debt created to provide an electric light plant and equipment, sewerage system, and a supply of water for general domestic use, and allows credit for the sinking fund of a county, city, town, or district available for the payment of its indebtedness.

4. Any insurance company having a capital stock of more than one hundred thousand dollars may, with the consent of the commissioner of insurance, after investing one hundred thousand dollars of the capital as provided in this section, invest the balance in such other securities or in such a manner as may be approved by the commissioner.

5. Any real-estate title insurance company organized for any of the purposes set forth in article fourteen of this chapter, and having a capital stock of more than fifty thousand dollars, may, with the consent of the commissioner of insurance, after investing thirty per cent of its combined capital and surplus without first having the approval of the commissioner of insurance of North Carolina, which approval shall be endorsed upon the policy. If the capital stock of such company does not exceed fifty thousand dollars, it may, with the consent of the commissioner of insurance, after having invested three-fourths of its capital stock as now provided by law, invest the balance thereof in abstracts of titles of property situated in one or more of the cities or counties of this state. (Rev., s. 4731; 1899, c. 54, s. 27; 1907, c. 798; 1907, c. 998; 1911, c. 32; 1913, c. 200; 1923, c. 73; 1955, c. 187; C. S. 6334.)

Cross References.—As to authority to invest in bonds guaranteed by the United States, see § 53-44. As to authority to invest in bonds secured by mortgages insured by the Federal Housing Administration, see § 53-45. See also § 53-50 as to investments in Federal Farm Loan bonds, and see § 142-29 as to investments in refunding bonds of North Carolina.

§ 58-80. Valuation of bonds and other evidences of debt; discretion of commissioner of insurance.—Such bonds or other evidences of debt having a fixed term and rate of interest, and issued by any life insurance company, assessment life association, health association, or fraternal beneficiary association authorized to do business in this state may, if amply secured [515]
and not in default as to principal and interest, be valued as follows: If purchased at par, at the par value; if purchased above or below par, on the basis of the purchase price adjusted so as to bring the value to par at maturity, and so as to yield in the meantime the effective rate of interest at which the purchase was made: Provided, that the purchase price shall in no case be taken at a higher figure than the actual market value at the time of purchase; and provided further, that the commissioner of insurance shall have full discretion in determining the method of calculating values according to the foregoing rule. (1921, c. 220; C. S. 6334(a).)

§ 58-81. Authority to increase or reduce capital stock.—The commissioner of insurance shall, upon application, examine the proceedings of domestic companies to increase or reduce their capital stock, and when found conformable to law shall issue certificates of authority to such companies to transact business upon such increased or reduced capital. He shall not allow stockholders' obligations of any description as part of the assets or capital of any stock insurance company unless the same are secured by competent collateral. (Rev., s. 4732; 1899, c. 54, s. 15; C. S. 6335.)

§ 58-82. Assessment of shares; revocation of license.—When the net assets of a company organized under this article do not amount to more than three-fourths of its original capital, it may make good its capital to the original amount by assessment of its stock. Shares on which such an assessment is not paid within sixty days after demand shall be forfeitable and may be canceled by vote of the directors and new shares issued to make up the deficiency. If such company does not, within three months after notice from the commissioner of insurance to that effect, make good its capital or reduce the same, as allowed by this article, its authority to transact new business of insurance shall be revoked by the commissioner. (Rev., s. 4733; 1899, c. 54, s. 28; 1903, c. 438, s. 4; C. S. 6336.)

§ 58-83. Increase of capital stock.—Any company organized under this article may issue proportionate to its stockholders certificates of any portion of its actual net surplus it deems fit to divide, which shall be considered an increase of its capital to the amount of such certificates. The company may, at a meeting called for the purpose, vote to increase the amount and number of shares of its capital stock, and to issue certificates therefor when paid for in full. In whichever method the increase is made, the company shall, within thirty days after the issue of such certificates, submit to the commissioner of insurance a certificate setting forth the amount of the increase and the facts of the transaction, signed and sworn to by its president and secretary and a majority of its directors. If the commissioner of insurance finds that the facts conform to the law, he shall endorse his approval thereof; and upon filing such certificate so endorsed with the secretary of state, and the payment of a fee of five dollars for filing the same, the company may transact business upon the capital as increased, and the commissioner of insurance shall issue his certificate to that effect. (Rev., s. 4734; 1899, c. 54, s. 29; C. S. 6337.)

§ 58-84. Reduction of capital stock.—When the capital stock of a company organized under this article is impaired, the company may, upon a vote of the majority of the stock represented at a meeting legally called for that purpose, reduce its capital stock and the number of shares thereof to an amount not less than the minimum sum required by law, but no part of its assets and property shall be distributed to its stockholders. Within ten days after such meeting the company must submit to the commissioner of insurance a certificate setting forth the proceedings thereof and the amount of the reduction and the assets and liabilities of the company, signed and sworn to by its president, secretary, and a majority of its directors. The commissioner of insurance shall examine the facts in the case, and if they conform to law, and in his judgment the proposed reduction may be made without prejudice to the public, he shall endorse his approval upon the certificate. Upon filing the certificate so endorsed by the secretary of state and paying a filing fee of five dollars, the company may transact business upon the basis of the reduced capital as though it were original capital, and its charter shall be deemed to be amended to conform thereunto, and the commissioner of insurance shall issue his certificate to that effect. The company may, by a majority vote of its directors, after the reduction, require the return of the original certificates of stock held by each stockholder in exchange for new certificates it may issue in lieu thereof for such number of shares as each stockholder is entitled to in the proportion that the reduced capital bears to the original capital. (Rev., s. 4735; 1899, c. 54, s. 30; C. S. 6338.)

§ 58-85. Dividends declared; liability of stockholders for unlawful dividends.—No stock company organized under this article may pay a cash or stock dividend except from its actual net surplus computed as required by law in its annual statements, nor may any such company which has ceased to do new business of insurance divide any portion of its assets, except surplus, to its stockholders, until it has performed or canceled its policy obligations. No dividend shall be paid by any company incorporated in this state when its capital stock is impaired, or when such payment would have the effect of impairing its capital stock; and any dividend so paid subjects the stockholders receiving it to a joint and several liability to the creditors of said company to the extent of the dividend so paid. (Rev., s. 4736; 1899, c. 54, s. 31; 1903, c. 536, s. 3; C. S. 6339.)

§ 58-86. Loans insufficiently secured. — Whenever it appears by examination, as authorized by law, that an insurance company, organized under the laws of this state, holds, as collateral security, for the payment of any loan, any stock, bond, or security of whatever description which has not a cash market value of at least twenty-five per centum more than the amount of such loan, the commissioner of insurance may require the reduction of the loan or an increase of the collateral security, so that the security shall be at least twenty-five per centum in excess of the amount
Art. 7. Guaranty Fund for Domestic Companies.

§ 58-87. Guaranty fund established.—Any insurance company formed as provided in the preceding article, or now existing by virtue of any of the laws of North Carolina, may establish a guaranty fund of not less than twenty-five thousand dollars nor more than two hundred thousand dollars, in the following manner: The company may receive from any person, firm, or corporation, money, bonds, or other securities, in such amount as may be agreed upon, for the purpose of providing a guaranty fund, to be used as hereinafter provided, for payment of the claims of policyholders. Upon the receipt of such bonds, money, or other securities by an insurance company, it shall issue its certificate, in writing, authenticated as required by law for certificates of stock, stating the amount, terms, and conditions of repayment of such money or the return of such bonds or other securities, the name of the payee or depositor, and the certificate shall also state upon its face that it is issued under the provisions of this section. The money, bonds, or other securities, when so paid to or deposited with such insurance company, become a part of the guaranty fund of the company, and are, in the absence of a majority of its stockholders authorized at any regular or special meeting called for the purpose, (1909, c. 922, s. 1; C. S. 6341.)

§ 58-88. Separate accounts; application of fund.—Every insurance company which establishes a guaranty fund under the provisions of this article must keep a separate account of the same on its books, together with a full and true list of any securities held therefor. The money and securities belonging to the guaranty fund must be invested in the same manner as is now provided by law for the investment of other assets of insurance companies; but any bond or other securities received by any such insurance company as a part of its guaranty fund must be deposited with the commissioner of insurance, as is now allowed by law, subject to the further provisions of this article. An insurance company receiving said money or securities as a part of its guaranty fund, as herein provided, may pay to the person, firm, or corporation from whom the same is received a semi-annual dividend of not more than three and one-half per cent on the amount of said money or securities. The guaranty fund herein provided for shall be applied to the payment of claims of policyholders only when the insurance company has exhausted its cash on hand and the invested assets, exclusive of uncollected premium; and when the guarantee is in any way impaired the directors may make good the whole or any part of such impairment, by assessment upon the contingent funds of the company at the date of such impairment, if any are available. (1909, c. 922, s. 1; C. S. 6342.)

§ 58-89. Reduction or retirement of fund.—The guaranty fund shall be retired when the permanent fund of the company equals two per centum of the amount insured upon all policies in force; and such guaranty fund may be reduced or retired by vote of the directors of the company and the assent of the commissioner of insurance, if the net assets of the company above the reinsurance reserve and all other claims and obligations, exclusive of the guaranty fund, for two years immediately preceding and including the date of its last annual statement, are not less than twenty-five per centum of the fund. Due notice of this proposed action on the part of the directors of the company must be mailed to each director of the company not less than thirty days before the meeting when such action may be taken, and must also be advertised in two newspapers of general circulation, to be approved by the commissioner of insurance, not less than twice a week for a period of not less than four weeks before the meeting. No insurance company with a guaranty fund, as hereinafter provided, which has ceased to do new business, may return or retire any part of the guaranty fund or divide to its stockholders any part of its general assets, except incomes from its investments, until it shall have performed, reinsured, or canceled its policy obligations. (1909, c. 922, s. 1; C. S. 6343.)

§ 58-90. Insolvency; return of fund. — In the event of insolvency or voluntary liquidation of any such insurance company, the amount of the guaranty fund shall be returned to the persons, firms, or corporations, their heirs, executors, administrators, successors, or assigns, from which the same was received, in full or pro rata, as the case may be, before any amount shall be paid from the assets of said company to its stockholders. The intention of this section is that the liability of the company for the repayment or the return of its guaranty fund, as evidenced by its certificates therefor, as hereinafore provided, shall be preferred in the distribution of its assets to the stockholders and general creditors of the company, other than its policy obligations. (1909, c. 922, s. 1; C. S. 6344.)

§ 58-91. Conversion to guaranty fund.—Any insurance company now doing business as a domestic insurance company under the laws of this state which has received any money or securities to be held as a guaranty capital, guaranty sur-
plus, or guaranty fund, may convert the same into a guaranty fund, as hereinbefore provided, by mutual agreement between the board of directors of the insurance company and the parties from whom the money or securities have been received, subject, however, to the approval of the commissioner of insurance, and thereupon certificates shall be issued therefor, as hereinbefore provided, and the same shall thereafter be held subject to the rights and liabilities provided in this article. (1909, c. 922, s. 2; C. S. 6345.)


§ 58-92. Mutual fire insurance companies organized; requisites for doing business.—Mutual fire insurance companies may be formed under this article, but no policy may be issued by a purely mutual fire insurance company, or by a mutual fire insurance company with a guaranty fund, as hereinbefore provided, unless the guaranty fund, or guaranty capital, consists of at least two hundred thousand dollars, divided into shares of one hundred dollars each, which shall be invested in the manner prescribed in this subchapter. (1909, c. 922, s. 2; C. S. 6346.)

Cross Reference.—Mutual life and health insurance companies are largely governed by this article. See § 58-101.

§ 58-93. Assessments kept in treasury; certain officers debarred from commissions.—Every mutual or assessment company or association organized or doing business in the state on the assessment plan shall keep in its treasury at least one assessment sufficient to pay one average loss. No officer or other person whose duty it is to determine the character of the risk, and upon whose decision the application shall be accepted or rejected, if a mutual fire insurance company, shall receive as any part of his compensation a commission upon the premiums, but his compensation shall be a fixed salary and such share in the net profits as the directors may determine. Nor shall such officer or person be an employee of any officer or agent of the company. (Rev., s. 4738; 1899, c. 54, s. 32; 1903, c. 438, s. 4; C. S. 6347.)

§ 58-94. Policyholders are members of mutual fire companies.—Every person insured by a mutual fire insurance company is a member while his policy is in force, entitled to one vote for each policy he holds, and must be notified of the time and place of holding its meetings by a written notice or by an imprint upon the back of each policy, receipt, or certificate of renewal, as follows:

The insured is hereby notified that by virtue of this policy he is a member of the insurance company, and that the annual meetings of the company are held at its home office on the day of ............, in each year, at .......... o'clock.

The blanks shall be duly filled in print and are a sufficient notice. A corporation which becomes a member of such company may authorize any person to represent it, and this representative has all the rights of an individual member. A person holding property in trust may insure it in such company, and as trustee assume the liability and be entitled to the rights of a member, but is not personally liable upon the contract of insurance. Members may vote by proxies, dated and executed within three months, and returned and recorded on the books of the company three days or more before the meeting at which they are to be used; but no person as proxy or otherwise may cast more than twenty votes. (Rev., s. 4739; 1899, c. 54, s. 33; C. S. 6348.)

This section is an enabling statute to protect a trustee from liability. Fuller v. Lockhart, 209 N. C. 61, 70, 182 S. E. 731.

This and § 58-97 do not indicate legislative intent to prohibit county boards of education insuring property in mutual companies by failing to expressly grant such authority. Id.

§ 58-95. Directors in mutual fire companies.—Every mutual fire insurance company shall elect by ballot a board of not less than seven directors, who shall manage and conduct its business and hold office for one year or for such term as the by-laws provide and until their successors are qualified. Two-thirds at least of the directors must be citizens of the state, and after the first election members only are eligible, but no director is disqualified from serving the term he was chosen for by reason of the expiration or cancellation of his policy. In companies with a guaranty capital, one-half of the directors shall be chosen by and from the stockholders. (Rev., s. 4739; 1899, c. 54, s. 33; C. S. 6349.)

§ 58-96. Mutual fire companies with a guaranty capital.—A mutual fire insurance company formed as provided in this article, or a mutual fire insurance company now existing, may establish a guaranty capital or surplus of not less than twenty-five thousand dollars nor more than two hundred thousand dollars, divided into shares of one hundred dollars each, which shall be invested in the same manner as is provided in this subchapter for the investment of the capital stock of certain insurance companies. The stockholders of the guaranty capital of a company or owners of guaranty surplus are entitled to a semiannual dividend of not more than three and one-half per cent on their respective shares, if the net profits or un-
used premiums left after all expenses, losses, and liabilities then incurred, together with the reserve for reinsurance, as provided for, are sufficient to pay the same. The guaranty capital or surplus shall be applied to the payment of losses only when the company has exhausted its cash in hand and the invested assets, exclusive of uncollected premiums, and when thus impaired, the directors may make good the whole or any part of it by assessments upon the contingent funds of the company at the date of such impairment. Shareholders and members of such companies are subject to the same provisions of law in respect to their right to vote as apply respectively to shareholders in stock companies and policyholders in purely mutual companies. This guaranty capital or surplus shall be retired when the permanent fund of the company equals two per centum of the amount insured upon all policies in force, and may be reduced or retired by vote of the policyholders of the company and the assent of the commissioner of insurance, if the net assets of the company above its reinsurance reserve and all other claims and obligations, exclusive of guaranty capital or surplus, for two years immediately preceding and including the date of its last annual statement, is not less than twenty-five per centum of the guaranty capital or surplus. Due notice of such proposed action on the part of the company must be mailed to each policyholder of the company not less than thirty days before the meeting when the action may be taken, and must also be advertised in two papers of general circulation, approved by the commissioner of insurance, not less than three times a week for a period of not less than four weeks before such meeting. No insurance company with a guaranty capital or surplus, which has ceased to do new business, shall divide to its stockholders any part of its assets or guaranty capital or surplus, except income from investments, until it has performed or canceled its policy obligations. (Rev., s. 4741; 1899, c. 54, s. 34; 1911, c. 196, s. 3; C. S. 6350.)

§ 58-97. Dividends and assessments; liability of policyholders.—The directors of a mutual fire insurance company may from time to time, by vote, fix and determine the amount to be paid as a dividend upon policies expiring during each year. Each policyholder is liable to pay his proportional share of any assessments which are made by the company in accordance with law and his contract on account of losses incurred while he was a member, if he is notified of such assessments within one year after the expiration of his policy. Any mutual fire insurance company doing a business with a fixed annual premium may in its by-laws and policies fix the contingent liability of its members for the payment of losses and expenses not provided for by its cash funds, which contingent liability must not be less than a sum equal to the cash premium written in his policy and in addition thereto. The by-laws may also provide for policies to be issued for cash premiums without contingent liability of policyholders; provided, that no mutual fire insurance company shall issue any policy without contingent liability until and unless it possesses a surplus of at least one hundred thousand dollars. The total amount of the liability of the policyholder must be plainly and legibly stated upon the back of each policy. Whenever any reduction is made in the contingent liability of members, it applies proportionally to all policies in force: Provided this section shall not apply to farmers mutual fire insurance companies. (Rev., s. 4741; 1899, c. 54, s. 35; 1935, c. 89; C. S. 6351.)

Editor's Note.—Prior to the amendment the contingent liability was required to be not less than a sum equal to five times the cash written in its policy. The third from the last sentence of this section relating to provisions in by-laws was added by the amendment. The proviso at the end of the section was also added.

This section provides the terms and method of how mutual insurance can operate in this state. Those who purchase mutual insurance have their rights fixed. Fuller v. Lockhart, 200 N. C. 61, 182 S. E. 733.

§ 58-98. Waiver of forfeiture in policies assigned or pledged; notice of assignment; payment of assessment or premium by assignee or mortgagee.—When any policy of insurance is issued by any mutual insurance company or association organized under the laws of this state and such policy is assigned or pledged as collateral security for the payment of a debt, such company or association, by its president and secretary or other managing officers, may insert in such policy so assigned or pledged, or attach thereto as a rider thereon, a provision or provisions to be approved by the commissioner of insurance, whereby any or all conditions of the policy which work a suspension or forfeiture and especially the provisions of the statute which limits such corporation to insure only property of its members, may be waived in such case for the benefit of the assignee or mortgagee. In case any such company or association shall consent to such assignment of any policy or policies, or the proceeds thereof, it may nevertheless at any time thereafter, by its president and secretary or such other officer as may be authorized by the board of directors, cancel such policy by giving the assignee or mortgagee not less than ten days notice in writing: Provided, however, a longer period may be agreed upon by the company or association and such assignee or mortgagee. And the president and secretary of such company or association, with the approval of the commissioner of insurance, may agree with the assignee or mortgagee upon an assessment or premium to be paid to the insurer in case the insured shall not pay the same, which shall not be less than such a rate or sum of money as may be produced by the average assessments or premiums made or charged by like company or association during a period of five years next preceding the year of such agreement and assignment. When an assignment is made as herein provided the policy or policies so assigned or pledged, subject to the conditions herein, shall remain in full force and effect for the benefit of the assignee or mortgagor, notwithstanding the title or ownership of the assured to the property insured, or to any interest therein, shall be in any manner changed, transferred or encumbered. (Ex. Sess. 1930, c. 79; C. S. 6351(a).)

§ 58-99. Guaranty against assessments prohibited.—If any director or other officer of a mu-
tual fire insurance company, either officially or privately, shall give a guarantee to a policyholder thereof against an assessment to which such policyholder would otherwise be liable, he shall be punished by a fine not exceeding one hundred dollars for each offense. (Rev., s. 3406; 1899, c. 54, s. 100; C. S. 6352.)


§ 58-100. Manner of making assessments; rights and liabilities of policyholders.—When a mutual fire insurance company is not possessed of cash funds above its reinsurance reserve sufficient for the payment of insured losses and expenses, it must make an assessment for the amount needed to pay such losses and expenses upon its members liable to assessment therefor in proportion to their several liabilities. The company shall cause to be recorded in a book kept for that purpose the order for the assessment, together with a statement which must set forth the condition of the company at the date of the order, the amount of its cash assets and deposits, notes, or other consideration fund liable to the assessment, the particular losses or liabilities it is made to provide for. This record must be made and signed by the directors who voted for the order before any part of the assessment is collected, and any person liable to the assessment may inspect and take a copy of the same. When, by reason of depreciation or loss of its funds or otherwise, the cash assets of such company, after providing for its other debts, are less than the required premium reserve upon its policies, it must make good the deficiency by assessment in the manner above provided. If the directors are of the opinion that the company is liable to become insolvent they may, instead of making such assessment, make two assessments, the first determining what each policyholder must equitably pay or receive in case of withdrawal from the company and having his policy canceled; the second, what further sum each must pay in order to render its reinsurance reserve sufficient for the payment of insured losses and expenses, it must make an assessment for the amount the assessment calls for, and the particular losses or liabilities it is made to provide for. This record must be made and signed by the directors who voted for the first assessment, and his policy shall be canceled unless he pays the sum further determined by the second assessment, in which case his policy continues in force; but in neither case may a policyholder receive or have credited to him more than he would have received on having his policy canceled by a vote of the directors under the by-laws. (Rev., s. 4742; 1899, c. 54, ss. 36, 37; C. S. 6353.)

Forfeiture and Waiver.—It is clear that failure to pay assessments, in accordance with the terms of a contract works a forfeiture of the policy. It is equally well settled that a company may by acts of unequivocal character waive such forfeiture. Perry v. Farmers Mut. Life Ins. Co., 132 N. C. 263, 267, 41 S. E. 837.

An acceptance of an overdue assessment by a fire insurance company, after the property is burned, the company having notice thereof, is a waiver of the forfeiture of the policy. Perry v. Farmers Mut. Life Ins. Co., 132 N. C. 263, 267, 41 S. E. 837.

Where mutual fire insurance company relies on failure to pay assessment in order to defeat recovery on policy, it must show that the assessment was legally made in conformity with the provisions of this section, and where it fails to so show and plaintiff insurer testifies that she did not get notice of the assessment or of the cancellation of the policy, peremptory instructions against insurer on the affirmative defense are without error. Abernethy v. Mecklenburg Farmers' Mut. Fire Ins. Co., 213 N. C. 23, 195 S. E. 30.

Right of Insured to Withdraw.—Where the members of mutual insurance companies have enjoyed the protection which membership affords, they cannot, after a loss has been sustained, withdraw and refuse to pay their portion of the loss. Perry v. Farmers Mut. Fire Ass'n, 139 N. C. 374, 51 S. E. 1025.

Payments of Claims.—The right of each policyholder in the defendant company is to have an assessment made to pay his loss, and he has no claim upon an amount paid to another policyholder. Perry v. Farmers Mut. Fire Ass'n, 139 N. C. 374, 51 S. E. 1025.

§ 58-101. Mutual life and health companies.—Life and health insurance companies and associations organized in this state to do business on the mutual plan shall be governed as to the commencement of business, election of members, guaranty capital, dividends, and assessments as provided in this article for mutual fire insurance companies, where applicable. (Rev., s. 4743; 1903, c. 530, s. 1; C. S. 6354.)

§ 58-102. Dividends on, and redemption of, guaranty capital of life companies.—The stockholders of the guaranty capital of any domestic life insurance company are entitled to such annual dividends not exceeding eight per centum, payable from the net surplus, as have been agreed upon in the subscription thereof. Such company may redeem its guaranty capital by appropriation of net surplus for that purpose whenever its members so vote. (Rev., s. 4744; 1899, c. 54, s. 58; 1903, c. 438, s. 5; C. S. 6355.)


§ 58-103. Domestic stock life insurance corporations authorized to convert into mutual corporations; procedure.—Any domestic stock life insurance corporation may become a mutual life insurance corporation, and to that end may carry out a plan for the acquisition of shares of its capital stock: Provided, however, that such plan (first) shall have been adopted by a vote of a majority of the directors of such corporation; (second) shall have been approved by a vote of the holders of two-thirds of the stock outstanding at the time of approving the call for a meeting for that purpose; (third) shall have been submitted to the commissioner of insurance and shall have been approved by him in writing, and (fourth) shall have been approved by a majority vote of the policyholders (including, for the purpose of this article, the employer or the president, secretary or other executive officer of any corporation or association to which a master group policy has been issued, but excluding the holders of certificates or policies issued under or in connection with a master group policy) voting at said meeting, called for that purpose, at which meeting only such policyholders whose insurance shall then be in force and shall have been in force for at least one year prior to such a meeting shall be entitled to vote; notice of such a meeting shall be given by mailing such notice, postage prepaid, from the home office of such corporation at least thirty days prior to such meeting to such policyholders at their last known post-office addresses: Provided, that personal delivery of such written notice to any policyholder may be in lieu of mailing the same; and such meeting shall be otherwise provided for and conducted in such
manner as shall be provided in such plan: Provided, however, that policyholders may vote in person, by proxy, or by mail; that all such votes shall be cast by ballot, and a representative of the commissioner of insurance shall supervise and direct the methods and procedure of said meeting and appoint an adequate number of inspectors to conduct the voting at said meeting who shall have power to determine all questions concerning the verification of the ballots, the ascertainment of the validity thereof, the qualifications of the voters, and the canvass of the vote, and who shall certify to the said representative and to the corporation the results thereof, and with respect thereto shall act under such rules and regulations as shall be prescribed by the commissioner of insurance; that all necessary expenses incurred by the commissioner of insurance or his representative shall be paid by the corporation as certified to by said commissioner. Every payment for the acquisition of any shares of the capital stock of such corporation, the purchase price of which is not fixed by such plan, shall be subject to the approval of the commissioner. Provided, that neither such plan, nor any payment thereunder, nor any payment not fixed by such plan, shall be approved by the commissioner, if the making of such payment shall reduce the assets of the corporation to an amount less than the entire liabilities of the corporation, including therein the net values of its outstanding contracts according to the standard adopted by the commissioner of insurance, and also all other funds, contingent reserves and surplus which the corporation is required by order or direction of the commissioner of insurance to maintain, save so much of the surplus as shall have been appropriated or paid under such plan. (1937, c. 231, s. 1.)

Editor’s Note.—For a discussion of act from which this article is codified, see 15 N. C. Law Rev. 359.

§ 58-104. Stock acquired to be turned over to voting trust until all stock acquired; dividends repaid to corporation for beneficiaries.—If a domestic stock life insurance corporation shall determine to become a mutual life insurance corporation it may, in carrying out any plan to that end under the provisions of § 58-103, acquire any shares of its own stock by gift, bequest or purchase. And until all such shares are acquired, any shares so acquired shall be acquired in trust for the policyholders of the corporation as hereinafter provided, and shall be assigned and transferred on the books of the corporation to not less than three nor more than five trustees, and be held by them in trust and be voted by such trustees at all corporate meetings at which stockholders have the right to vote until all of the capital stock of such corporation is acquired, when the entire capital stock shall be retired and canceled; and thereupon, unless sooner incorporated as such, the corporation shall be and become a mutual life insurance corporation without capital stock. Said trustees shall be appointed and vacancies shall be filled as provided in the plan adopted under § 58-103. Said trustees shall file with the corporation and with the commissioner of insurance a verification of their appointments and declaration that they will faithfully discharge their duties as such trustees. After the payment of such dividends to stockholders or former stockholders as may have been provided in the plan adopted under § 58-103, all dividends and other sums received by said trustees on said shares of stock so acquired, after paying the necessary expenses of executing said trust, shall be immediately repaid to said corporation for the benefit of all who are or may become policyholders of said corporation and entitled to participate in the profits thereof, and shall be added to and become a part of the surplus accumulated by said corporation and be apportionable accordingly as a part of said surplus among said policyholders. (1987, c. 231, s. 2.)

Art. 10. Assessment Companies.

§ 58-105. Copies of charter and by-laws filed.—Every corporation, society, or organization of this or any other state or country, transacting business under this department upon the cooperative or assessment plan, must file with the commissioner of insurance, before beginning to do business in this state, a copy of its charter or articles of association, and the by-laws, rules, or regulations referred to in its policies or certificates and made a part of such contract. By-laws or regulations not so filed with the commissioner of insurance will not affect any policy or certificate issued by such company or association. (Rev., s. 4790; 1899, c. 54, s. 86; C. S. 6356.)

Cross Reference.—As to fraternal orders and societies, see § 58-253 et seq.

§ 58-106. Contracts must accord with charter and by-laws.—Every policy or certificate or renunciation received in or issued to a resident of this state by any corporation, association, or order incorporated therein the business of insurance upon the assessment plan must be in accord with the provisions of the charter and by-laws of such corporation, association, or order, as filed with the commissioner of insurance. It is unlawful for any such domestic or foreign insurance company or fraternal order to transact or offer to transact any business not authorized by the provisions of its charter and the terms of its by-laws, or, through an agent or otherwise, to offer or issue any policy, renewal certificate, or other contract whose terms are not in clear accord with the powers, terms, and stipulations of its charter and by-laws. (Rev., s. 4791; 1899, c. 54, s. 84; 1903, c. 438, s. 9; C. S. 6357.)

Duty and Liability under By-laws.—The by-laws of an assessment association when assented to by the members, as provided in this chapter, constitute the measure of duty and liability of the parties, provided they are reasonable and not in violation of any principle of public law. Duffy v. Fidelity Mut. Life Ins. Co., 142 N. C. 103, 55 S. E. 79.

Duty and Liability under Charter.—The contract of insurance must conform to the charter and by-laws, and these are as authorized by the state of its origin. Hollingsworth v. Supreme Council, 175 N. C. 615, 96 S. E. 81; Caldwell Land, etc., Co. v. Board, 174 N. C. 634, 94 S. E. 406, cited and distinguished. Assessment companies are prohibited from issuing policies or transacting business not authorized by their charters. Brenizer v. Royal Arcanum, 141 N. C. 409, 418, 53 S. E. 835.

§ 58-107. “Assessment plan” printed on application and policy; waiver by commissioner.—Every policy or certificate issued to a resident of the state by any corporation transacting in the state the business of life insurance upon the assessment plan, or admitted to do business in this state, on the assessment plan, shall print in bold type and
§ 58-108. Revocation for noncompliance.—If any corporation or association transacting insurance business in this state on the assessment plan or issuing any policy upon the life of a resident of North Carolina upon the assessment plan shall fail or refuse to comply with the foregoing section, the commissioner of insurance shall forthwith suspend or revoke all authority of such corporation or association and of its agents to do business in this state. (1913, c. 159, s. 1; 1929, c. 93, s. 1; 1933, c. 34; C. S. 6539.)

Editor's Note.—The amendment of 1929 added the last sentence of this section.

§ 58-109. Deposits and advance assessments required.—Every domestic insurance company, association, order, or fraternal benefit society doing business in this state, or in some responsible banking or trust company, one regular assessment sufficient to pay the average loss or losses occurring among its members in this state during the time allowed by it for the collection of assessments and payment of losses. It shall notify the commissioner of insurance of the place of deposit and furnish him at all times such information as he requires in regard thereto; and no such company, association, order, or fraternal benefit society shall be licensed by the commissioner unless it makes and maintains with him for the protection of its obligations at least five thousand dollars in United States or North Carolina bonds, in farm loan bonds issued by federal land banks, or in the bonds of some county, city, or town in North Carolina to be approved by the commissioner of insurance, or a good and sufficient bond or note, secured by deed of trust on real estate situated in North Carolina, and approved by the commissioner. The provisions of this section do not apply to associations, orders, or fraternal benefit societies operating in not more than two contiguous counties in the state and paying a benefit of not exceeding two hundred dollars, but the amount to be deposited by said societies is within the discretion of the commissioner of insurance, but must be not less than one hundred dollars. (Rev., s. 4713; 1899, c. 54, s. 84; 1903, c. 438, s. 9; 1913, c. 119, ss. 2, 3; 1917, c. 191, s. 2; C. S. 6561.)

Cross References.—As to other bonds insurance companies are authorized to invest in, see §§ 53-44, 53-45. As to investments in refunding bonds of North Carolina, see § 142-29.

§ 58-110. Deposits by foreign assessment companies or order.—Each foreign insurance company, association, order, or fraternal benefit society doing business in this state on the assessment plan shall keep at all times deposited with the commissioner of insurance or in its head office in this state, or in some responsible banking or trust company, one regular assessment sufficient to pay the average loss or losses occurring among its members in this state during the time allowed by it for the collection of assessments and payment of losses. It shall notify the commissioner of insurance to make such deposit in like installments; and the last named association when hereafter organized may be allowed by the commissioner of insurance to make such deposit in like installments. The commissioner of insurance may increase the amount of deposit to the amount of reserve on the contracts of the association or society. The provisions of this section shall not apply to the farmers mutual fire insurance associations now doing business in the state and restricting their activities to not more than two adjacent counties. (Rev., s. 4799; 1913, c. 119, s. 1; 1917, c. 191, s. 2; 1933, c. 47; C. S. 6560.)

Cross References.—As to other bonds insurance companies are authorized to invest in, see §§ 53-44, 53-45. As to investments in refunding bonds of North Carolina, see § 142-29.

§ 58-111. Must pay death benefits in coin instead of services.—No corporation, society, or organization now doing business in the state shall thereafter be authorized to do business in this state upon a mutual or assessment insurance plan and issuing contracts to its members providing benefits in excess of one hundred dollars ($100) in the event of death of its members or policy holders shall issue any contract to such members provid-
for the payment of benefits in merchandise or service to be rendered to such member or his beneficiary; but all contracts hereafter issued by any such corporation, society, or organization, shall provide by the terms of its contract for the payment of such benefits only in lawful currency or coin. (1891, c. 71.)

Cross Reference.—As to mutual burial associations in which benefits do not exceed $100.00, see § 58-224 et seq.

§ 58-112. Revocation of license.—If any such corporation, society, or organization, or any of its agents or officers, shall fail or refuse to comply with the provisions of §§ 58-109 and 58-110 or shall issue policies or certificates not in accord with its charter and by-laws, as provided in this article, the commissioner of insurance shall forthwith suspend or revoke all authority to it, and of all its agents or officers, to do business in this state, and shall publish such revocation in some newspaper published in this state. (Rev., s. 4793; 1899, c. 54, s. 85; C. S. 6362.)

Art. 11. Fidelity Insurance Companies.

§ 58-113. May act as fiduciaries.—Any corporation licensed by the commissioner of insurance, where such powers or privileges are granted it in its charter, may be guardian, trustee, assignee, receiver, executor or administrator in this state without giving any bond; and the clerks of the superior courts or other officers charged with the duty, or clothed with the power of making such appointments, are authorized to appoint such corporation to any such office, whether the corporation is a resident of this state or not. (Rev., s. 4799; 1899, c. 54, s. 47; 1903, c. 498, s. 8; C. S. 6376.)

Cross Reference.—As to fiduciaries in general, see § 32-1 et seq. See § 58-116 and note.


§ 58-114. License to do business.—Before any such corporation is authorized to execute any bond, obligation, or undertaking, or act in any fiduciary capacity without bond, it must be licensed by the commissioner of insurance of the state, which the commissioner is authorized to do when satisfied that such company or corporation is safe and solvent and has complied with the laws of this state applicable to such companies, and if a foreign company, that it has also complied with the conditions, rules, and regulations governing the admission of foreign insurance companies to do business in this state; but if such corporation be engaged in the business of commercial banking then such license shall be issued by the Commissioner of Banks and all other provisions of this article pertaining to corporations engaged in the business of banking shall apply to such corporations but shall be exercised and enforced by the Commissioner of Banks. For such license the licensee shall pay to the Banking Commission an annual license fee of two hundred ($200.00) dollars, which shall be remitted to the State Treasurer for the use of the Commissioner of Banks in the supervision of banks acting in a fiduciary capacity in so far as it may be necessary and the surplus, if any, shall remain in the State treasury for the use of the general fund of the State. (Rev., s. 4800; 1899, c. 54, s. 46; 1901, c. 706, s. 1; 1901, c. 387; C. S. 6377.)

Cross Reference.—See § 58-116 and note.

Editor’s Note.—The Act of 1931 added all of this section beginning with the words “but” in line thirteen.


§ 58-115. Examination as to solvency.—The commissioner shall examine into the solvency of such corporation, and shall, if he deem it necessary, at the expense of the corporation make or cause to be made an examination at its home office or cause to be made an examination at its home office of its assets and liabilities. (Rev., s. 4801; 1899, c. 54, s. 46; 1901, c. 706; C. S. 6378.)

Cross Reference.—See § 58-116 and note.

§ 58-116. Certificate of solvency equivalent to justification.—After any such corporation has been licensed by the commissioner, the certificate of the commissioner that it has been admitted to do business in the state and is licensed by the commissioner of insurance and is solvent to an amount not less than one hundred thousand dollars, shall be, until revoked by him, equivalent to the justification of sureties, and full evidence of its authority to give such bonds or undertakings. There shall be no charge for the seal of this certificate. (Rev., s. 4802; 1899, c. 54, s. 46; 1901, c. 706; C. S. 6379.)

There is a presumption that the Insurance Commissioner has complied with the law in licensing a bank to act as administrator, and where there is evidence that a bank, on the date it was appointed administrator, was solvent in an amount in excess of $100,000, the contention of an administrator d. b. n. appointed upon the bank's insolvency that the bank had not complied with the provisions of this section and those preceding it cannot be sustained. Security Nat. Bank v. Bridgers, 207 N. C. 91, 176 S. E. 295.

§ 58-117. Clerk of superior court notified of license and revocation.—The commissioner of insurance, upon granting license to any such corporation, shall immediately notify the clerk of the superior court of each county in the state that such corporation has been licensed under this chapter; and whenever the commissioner is satisfied that any corporation licensed by him has become insolvent, or is in imminent danger of insolvency, he shall revoke the license granted to it, and notify the clerk of the superior court of each county of such revocation; and after such notification the right of such corporation to hold any office, or be surety on any bond, as permitted by this chapter, ceases. (Rev., s. 4803; 1899, c. 54, s. 50; C. S. 6380.)

§ 58-118. Resident agents required.—All business done in this state by any fidelity insurance company must be done through regularly authorized agents residing in this state, or through applications of such agents; and all policies so issued must be countersigned by such agents. (Rev., s. 4804; 1899, c. 54, s. 105; 1903, c. 438, s. 11; C. S. 6381.)

§ 58-119. Limitation of liability assumed.—No stock corporation transacting fidelity or surety business in this State shall expose itself to any loss on any one fidelity or surety risk or hazard in an amount exceeding ten per centum of its capital and surplus, unless it shall be protected in excess of that amount by

(a) Reinsurance in a corporation authorized to transact a fidelity and surety business in this State: Provided, that such reinsurance is in such form as to enable the obligee or beneficiary to maintain an action thereon against the company
reinsured jointly with such reinsurer and, upon recovering judgment against such reinsured, to have recovery against such reinsurer for payment to the extent in which it may be liable under such reinsurance and in discharge thereof; or

(b) The co-suretyship of such a corporation similarly authorized; or

(c) By deposit with it in pledge or conveyance to it in trust for its protection of property; or

(d) By conveyance or mortgage for its protection; or

(e) In case a suretyship obligation was made on behalf or on account of a fiduciary holding property in a trust capacity, by deposit or other disposition of a portion of the property so held in trust that no future sale, mortgage, pledge or other disposition can be made thereof without the consent of such corporation; except by decree or order of a court of competent jurisdiction;

Provided: (1) That such corporation may execute what are known as transportation or warehousing bonds for United States Internal Revenue taxes to an amount equal to fifty per centum of its capital and surplus; (2) that, when the penalty of the suretyship obligation exceeds the amount of a judgment described therein as appealed from and thereby secured, or exceeds the amount of the subject matter in controversy or of the estate in the hands of the fiduciary for the performance of whose duties it is conditioned, the bond may be executed if the actual amount of the judgment or the subject matter in controversy or estate not subject to supervision or control of the surety is not in excess of such limitation; and (3) that, when the penalty of the suretyship obligation executed for the performance of a contract exceeds the contract price, the latter shall be taken as the basis for estimating the limit of risk within the meaning of this section.

No such corporation shall, anything to the contrary in this section notwithstanding, execute suretyship obligations guaranteeing the deposits of any single financial institution in an aggregate amount in excess of ten per centum of the capital and surplus of such corporate surety, unless it shall be protected in excess of that amount by credits in accordance with sub-section (a), (b), (c) or (d) of this section: Provided, nothing in this section shall be construed to make invalid any contract entered into by such corporation with any other person, firm, corporation or municipal corporation notwithstanding any provisions of this section. (1911, c. 28; 1931, c. 285; C. S. 6382.)

Editor's Note.—The Act of 1931 struck out the former section and substituted in lieu thereof the above. That Act, which was ratified April 16, 1931, provided that nothing therein should affect, modify or qualify the liability of any such corporation or surety company with respect to any contract of such company in force at the time of its ratification. The old statute placed the limit at ten per centum of the capital and surplus of the surety company, unless "suitable and sufficient collateral agreements of indemnity" were made, mentioning ostensibly as such "suitable agreements" a pledge deposit or conveyances in trust. The 1931 enactment provided the same per centum limit, statutory limitation, although the proscribed penalty of the suretyship obligation exceeds such actual amount. De- pository bonds are specifically mentioned as coming within the limits set down. It seems advisable to have cleared up the ambiguity of the loose phrase in the old statute describing the conditions under which the limits in the old statute could be exceeded and to have furnished a test for determining the amount of the risk in at least three transactions. But as to the test for the risk assumed in other types, quære. 9 N. C. Law Rev. 394.

Joint-Control Agreements.—It would seem that in cases coming within the purview of this section, and perforce to the extent thereof, joint-control agreements between fiduciaries and their sureties are sanctioned in this State by the act of Assembly. Pierce v. Pierce, 197 N. C. 348, 148 S. E. 438; Leonard v. York, 202 N. C. 704, 706, 163 S. E. 873.

Art. 12. Promoting and Holding Companies.

§ 58-120. Terms defined.—As the terms are used in this article, "promoting corporation" means a corporation or joint-stock association, engaged in the business of organizing or promoting or endeavoring to organize or promote the organization of an insurance corporation or corporations, or in any way assisting therein; "holding corporation" means a corporation or joint-stock association, which holds or is engaged in the acquisition of the capital stock or a major portion thereof of one or more insurance corporations for the purpose of controlling the management thereof, as voting trustee or otherwise; and "securities" means the shares of capital stock, subscription certificates, debenture bonds, and any and all other contracts or evidences of ownership of or interest in insurance corporations, or in promoting or holding corporations. (1913, c. 182, s. 1; C. S. 6383.)

§ 58-121. Certificate of authority to sell securities required.—No individual, partnership, association, or corporation, as the agent of another or as a broker, shall sell or offer for sale, or in any way assist in the sale in this state of the securities of any promoting or holding corporation, or of any insurance corporation, which is not at that time lawfully engaged or authorized to engage in the transaction of the business of insurance in this state, without first procuring, as hereinafter provided, a certificate of authority from the insurance department to sell such securities; nor shall any individual, partnership, association, or corporation sell or offer for sale in this state the securities of any promoting or holding corporation, or of any insurance corporation which is not at the time of such sale or offer of sale lawfully engaged or authorized to engage in the transaction of the business of insurance in the state, unless such corporation has first procured from the commissioner of insurance, as hereinafter provided, a certificate that the corporation has fully complied with the provisions of this article, and is authorized to sell the securities. Every certificate issued by the commissioner of insurance pursuant to the provisions of this article shall state in bold type that the commissioner in no way recommends the securities thereby authorized to be sold, and shall be renewable annually, upon written application, filed on or before the first day of April of each year, and may be revoked for cause at any time by the commissioner. The commissioner shall prepare and furnish upon request suitable blank forms of application for the certificates required by this article. (1913, c. 182, s. 2; C. S. 6384.)
§ 58-122. Application for certificate by agent.—Every individual, partnership, association, or corporation desiring or intending to sell or to offer for sale in this state the securities of insurance corporations or of any holding or promoting corporation shall file with the commissioner of insurance an application for a certificate of such authority. This application must contain a statement, verified by oath, setting forth the name and address of the applicants' previous business experience, date and place of birth or organization, and such other information as the commissioner requires. It is the duty of the commissioner to examine the application and to make any further inquiry or examination of the applicant as he deems advisable. If upon examination the commissioner finds the applicant, or if a corporation, the officers and directors thereof, to be trustworthy persons of good business credit, he may issue to the applicant a certificate of authority to sell or offer for sale in this state the securities of any insurance corporation, and of any promoting or holding corporation previously authorized under this article, which shall be mentioned therein. (1913, c. 182, s. 3; C. S. 6385.)

§ 58-123. Application for certificate by corporation.—Every such unauthorized insurance corporation, and every promoting or holding corporation, whose securities are offered for sale in this state, must file with the commissioner of insurance copies of all securities to be offered for sale, and an application for certificate of authority under this article which shall contain a statement in detail of the plans and purposes of such corporation, the amount and par value of the securities to be offered for sale, and the selling price thereof, the manner in which the money paid in therefor is to be spent or employed, the rate of commission to be paid for the sale of such securities, the salaries to be paid to the officers of such corporation, and such other information as the commissioner of insurance requires. No change shall thereafter be made in the form or character of the securities to be offered for sale, or in the plans or purposes of any such corporation, without the approval thereof in writing by the commissioner. It is the duty of the commissioner to examine the application and other documents filed, and to make any further inquiry or examination of the corporation as he deems advisable. If upon examination the commissioner finds that the plans and purposes of the corporation are proper, that its condition is satisfactory, that the amount of its securities is reasonable, that the price at which such securities are to be sold is adequate, and that the manner in which the money is paid in therefor, the rate of commissions to be paid and the salaries of officers are fair, he may issue a certificate that the corporation has complied with all the provisions of this article, and is authorized to sell or offer its securities for sale in this state. (1913, c. 182, s. 4; C. S. 6386.)

§ 58-124. Approval of advertising matter; misrepresentation.—No printed matter may be used in connection with the sale of securities of any such promoting, holding, or insurance corporation, for advertising purposes, or in the dissemination of information with reference thereto, unless it is first submitted to the commissioner of insurance and approved by him in writing. No such corporation, and no officer, director, or agent thereof, or any other person, copartnership, association, or corporation may issue, circulate, or employ or cause or permit to be used, issued, circulated, or employed any circular or statement, whether printed or oral, misrepresenting or exaggerating the earnings of insurance corporations or the value of their corporate stock or other securities, or the profits to be derived either directly or indirectly from the organization and management of insurance corporations, or of organizing or holding corporations. No insurance or other corporation, and no individual, copartnership, or association transacting business in this state shall place or offer to place insurance in any corporation in connection with the sale or purchase of the securities of any insurance corporation or of any promoting or holding corporation. (1913, c. 182, s. 5; C. S. 6387.)

Art. 13. Rate-Making Companies.

§ 58-125. Information to be filed with commissioner of insurance. — Every corporation, association, board, or bureau which now exists or hereafter may be formed, and every person who maintains, or hereafter may maintain, a bureau or association for the purpose of suggesting, approving or making rates to be used by more than one underwriter for insurance, including surety bonds, on property or risks of any kind located in this state, shall file with the commissioner of insurance a copy of the articles of agreement, association or incorporation and the by-laws and all amendments thereto under which such person, association, or bureau operates or proposes to operate, together with his or its business address and a list of the members or insurance corporations represented or to be represented by him or it, as well as such other information concerning such rating organization and its operations as may be required by the commissioner of insurance. (1913, c. 145, s. 1; 1915, c. 166, s. 8; C. S. 6388.)

Cross References.—As to certain insurance contracts exempt from this article, see § 58-131. As to compensation rating and inspection bureau for Workmen's Compensation Insurance, see §§ 97-102 to 97-104.

§ 58-126. Examination by commissioner of insurance; reports.—Every such person, corporation, association, or bureau, whether before or after the filing of the information specified in the preceding section, shall be subject to the visitation, supervision, and examination of the commissioner of insurance, who shall cause to be made an examination thereof as often as he deems expedient, and at least once in three years. For such purpose he may appoint as examiners one or more competent persons, and upon such examination he, his deputy, or any examiner authorized by him shall have all the powers given to the commissioner of insurance, his deputy, or any examiner authorized by him by law, including the power to examine under oath the officers and agents and all persons deemed to have material information regarding the business or manner of operation by every such person, corporation, association, bureau, or board. The commissioner of

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§ 58-127. Schedule of rates filed.—Every such person, corporation, association, or bureau, as well as every insurance company doing business in the state, shall file with the commissioner of insurance, whenever he may call therefor, any and every schedule of rates or such other information concerning such rates as may be suggested, approved, or made by any such rating organization for the purposes specified in § 58-125, or by such company for its own use. (1913, c. 145, s. 3; 1915, c. 166, s. 8; C. S. 6890.)

§ 58-128. Certain conditions forbidden; no discrimination.—No such person, corporation, association, or bureau shall fix or make any rate or schedule of rates which is to or may apply to any risk within this state, on the condition that the whole amount of insurance on such risk or any specified part thereof shall be placed at such rates, or with the members of or subscribers to such rating organization; nor shall any such person, association, or corporation authorized to transact the business of insurance within this state, fix or make any rate or schedule of rates or charge a rate which discriminates unfairly between risks within this state of essentially the same hazard, or if such rate be a fire insurance rate, which discriminates unfairly between the risks in the application of like charges or credits or which discriminates unfairly between risks of essentially the same hazards and having substantially the same degree of public protection against fire. Whenever it is made to appear to the satisfaction of the commissioner of insurance that such discrimination exists, he may, after a full hearing, either before himself or before any salaried employee of the insurance department whose report he may adopt, order such discrimination removed; and all such persons, corporations, associations, or bureaus affected thereby shall immediately comply therewith; nor shall such persons, corporations, associations, or bureaus remove such discrimination by increasing the rates on any risk or class of risks affected by such order unless it is made to appear to the satisfaction of the commissioner of insurance that such increase is justifiable. (1913, c. 145, s. 4; C. S. 6091.)

§ 58-129. Record to be kept; hearing on rates.—Every such rating organization shall keep a careful record of its proceedings and shall furnish upon demand to any person upon whose property or risk a rate has been made, or to his authorized agent, full information as to such rate, and if such property or risk have been sold by the holder of a mortgage or other lien on the property, or the property or risk have been transferred to another, or if the property or risk be rated by schedule, a copy of such schedule; it shall also provide such means as may be approved by the commissioner of insurance whereby any person affected by such rate may be heard, either in person or by agent, before the governing or rating committee or other proper executive of such rating organization on an application for a change in such rate. (1913, c. 145, s. 5; C. S. 6392.)

§ 58-130. Hearing on rates before commissioner of insurance.—Any person, firm, or corporation aggrieved by any rating of a fire insurance company, bureau, or board, may file a complaint in writing with the commissioner of insurance stating in detail the grounds upon which the complainant asks relief. The commissioner shall set a time, not earlier than seven days after the date of the notice, and a place for a hearing upon the complaint. After due hearing the commissioner shall make a finding as to whether the established rate is excessive or unfair, and shall make such recommendations as he deems advisable. The finding and recommendations in each case shall be made a matter of record, and shall be open to public inspection. (1915, c. 166, s. 8; C. S. 6393.)

§ 58-131. Certain insurance contracts excepted.—This article shall not apply to any contract of life insurance, nor to any contract of insurance upon or in connection with marine or transportation risks or hazards other than contracts for automobile insurance, nor to contracts of insurance upon property or risks located within the state, nor to life and credit insurance. (1913, c. 145, s. 6; 1935, c. 152; C. S. 6394.)

Editor's Note.—Prior to the amendment of 1935 this section excepted contracts made on a mutual or cooperative plan. The act further provided that nothing therein shall authorize the Commissioner of Insurance to raise the rates of any mutual insurance company doing business in North Carolina, and that farmers mutual fire insurance companies shall not be required to file such rates.


§ 58-132. Purpose of organization.—Companies may be formed in the manner provided in this subchapter, with a capital of not less than fifty thousand dollars, for the purpose of examining titles to real estate, of furnishing information in relation thereto, and of insuring owners and others interested therein against loss by reason of encumbrances and defective titles. Such companies shall not be subject to the provisions of this chapter except as regards the manner of their formation and as provided in this article. (Rev., s. 4745; 1899, c. 54, s. 38; 1901, c. 391, s. 3; 1923, c. 53; C. S. 6583.)

Notice to Agent.—Where the agent for the insurer was notified prior to the issuance of the renewal policy sued on that the property had been sold by the former owner to another and was requested to issue the renewal policy in the name of the new owner, the policy containing a standard loss payable clause in favor of the holder of the mortgagee that such notice had been given the insurer's agent prior to the inception of the policy, the agent in such case being the insurer's alter ego. Mahler v. Milwaukee Mechanics' Ins. Co., 295 N. C. 692, 172 S. E. 204.

§ 58-133. Certificate of authority to do business.—Before any such company may issue any policy or make any contract or guarantee of insurance, it shall file with the commissioner of insurance a certified copy of the record or the certificate of its organization in the office of the secretary of state, and obtain from the commissioner of insurance a certificate that it has complied with the laws applicable to it and that it is authorized to do business. (Rev., s. 4745; 1899, c. 54, s. 38; 1901, c. 391, s. 3; C. S. 6396.)
§ 58-134. Annual statement and license required.
—Every such corporation shall, on or before the thirtieth day of January of each year, file in the office of the commissioner of insurance a statement, such as he may require, showing its condition and its affairs for the year ending on the preceding thirty-first day of December, signed and sworn to by its president or secretary or treasurer and one of its directors. For neglect to file such annual statement or for making a wilfully false statement it shall be liable to the same penalties imposed upon other insurance companies. The commissioner of insurance shall annually license such companies and their agents, and have the same power and authority to visit and examine such corporations as he has in the case of other domestic insurance companies; and the duties and liabilities of such corporations and their agents in reference to such examinations are the same as those of other domestic insurance companies. (Rev., s. 4745; 1899, c. 54, s. 38; 1901, c. 391, s. 3; C. S. 6397.)

Cross Reference.—As to examinations to be made by the commissioner, see § 58-16.

Art. 16. Title Insurance Companies and Land Mortgage Companies Issuing Collateral Loan Certificates.

§ 58-135. Issuance of collateral loan certificates; security.—Any domestic land mortgage company or title insurance company having a paid in capital and surplus of at least two hundred thousand ($200,000.00) dollars, may, under the supervision and control of the commissioner of insurance, issue collateral loan certificates, or other certificates of indebtedness secured by the deposit of first mortgages on real estate with the commissioner, or under his direction, or secured by the deposit with the commissioner, or under his direction, of collateral trust bonds secured by first mortgages, the principal and interest of which said mortgages is guaranteed by a surety company having assets of at least ten million ($10,000,000.00) dollars, upon a basis not to exceed one hundred ($100.00) dollars for each one hundred dollars and all other fees assessed against such company and such renewal shall continue in force and effect until a new license be issued or specifically refused unless revoked for good cause. The commissioner of insurance, or any person appointed by him, shall have the power and authority to make such rules and regulations and examinations not inconsistent with the provisions of this article, as may be in his discretion necessary or proper to enforce the provisions hereof and secure compliance with the terms of this article. For any examination made hereunder the commissioner of insurance shall charge the land mortgage companies or title insurance companies examined with the actual expense of such examination. (1927, c. 204, s. 2.)

§ 58-137. Annual statements furnished. — Every such domestic land mortgage company or title insurance company doing business in this State under this article shall annually file with the commissioner of insurance on or before the first day of March in each year a full and complete sworn statement of its financial condition on the thirty-first day of December next preceding. Such statement shall plainly exhibit all real and contingent assets and liabilities and a complete account of its income and disbursements during the year and shall also exhibit the amount of real estate mortgages deposited by such land mortgage company or title insurance company for the protection of the certificates issued under this article. The commissioner of insurance is hereby empowered to require such further information as may be reasonably necessary to satisfy him that the statements contained in the sworn statements are true and correct. (1927, c. 204, s. 3.)

Art. 16. Reciprocal or Inter-Insurance Exchanges.

§ 58-138. Exchange of insurance contracts authorized; power of attorney.—Individuals, partnerships, and corporations of this state hereby designated as subscribers, are authorized to exchange reciprocal or inter-insurance contracts with each other, or one with individuals, partnerships, and corporations of other states and countries, providing indemnity among themselves from any loss which may be insured against under other provisions of the laws, excepting life insurance. Such contracts may be executed by an attorney, agent, or other representative, herein designated attorney, duly authorized and acting for such subscribers.

The attorney in fact for each of such exchanges shall be required to obtain a written power of attorney executed by each of the subscribers and have the same in his or its possession before any contracts of insurance of any kind or description shall be issued or renewed to subscribers, and a full copy of the provisions of the power of attorney used at the exchange and on file with the commissioner of insurance under the requirements of § 58-139, subsection four, shall be incorporated into and made a part of all contracts or policies issued to subscribers in this state. (1913, c. 183, ss. 1, 2; 1937, c. 130; C. S. 6398.)

Editor's Note.—The 1937 amendment added the second paragraph.

§ 58-139. Statement to be filed with commiss-
sioner of insurance.—The subscribers, so contracting among themselves, shall, through their attorney, file with the commissioner of insurance of this state a declaration verified by oath of such attorney, setting forth:

1. The name or title of the office at which such subscribers propose to exchange such indemnity contracts. This name or title shall not be so similar to any other name or title previously adopted by a similar organization, or by any insurance corporation or association, as in the opinion of the commissioner of insurance is calculated to result in confusion or deception. The office or offices through which such indemnity contracts shall be exchanged shall be classified as reciprocal or inter-insurance exchanges.

2. The kind or kinds of insurance to be effected or exchanged.

3. A copy of the form of policy, contract, or agreement under or by which the insurance is to be effected or exchanged.

4. A copy of the form of power of attorney or other authority of such attorney under which the insurance is to be effected or exchanged.

5. The location of the office or offices from which such contracts or agreements are to be issued.

6. That applications have been made for indemnity upon at least one hundred separate risks, aggregating not less than one and one-half million dollars as represented by executed contracts or bona fide applications, to become concurrently effective, or, in case of liability or compensation insurance, covering a total pay roll of not less than one and one-half million dollars: Provided, that when the attorney maintains the central office in this state the commissioner of insurance may authorize an exchange with a less number of risks and a smaller amount of indemnity to be exchanged and an amount of cash deposits less than twenty-five thousand dollars.

7. That there is on deposit with such attorney and available for payment of losses a sum of not less than twenty-five thousand dollars. (1913, c. 183, s. 3; C. S. 6399.)

§ 58-140. Agreement for service of process.—At the time of filing the declaration provided for by the preceding section, the attorney shall file with the commissioner of insurance an instrument in writing, executed by him for the subscribers, conditioned that upon the issuance of certificate of authority provided for in this article, service of process may be had upon the commissioner of insurance and the attorney shall make an annual report to the commissioner of insurance for each calendar year, showing the financial condition of affairs and assets of the reciprocal or inter-insurance exchanges shall be subject to examination by the commissioner of insurance. (1913, c. 183, s. 4; C. S. 6400.)

§ 58-141. Statement as to amount of risks.—There shall be filed with the commissioner of insurance of this state by such attorney a statement under his oath showing the maximum amount of indemnity upon any single risk, and the attorney shall, whenever and as often as the same shall be required, file with the commissioner of insurance a statement verified by his oath to the effect that he has examined the commercial rating of such subscribers as shown by the reference book of a commercial agency having at least one hundred thousand subscribers, and that from such examination or from other information in his possession it appears that no subscriber has assumed on any single risk an amount greater than ten per cent of the net worth of such subscriber. (1913, c. 183, s. 5; C. S. 6401.)

§ 58-142. Certificate issued by commissioner.—Upon the filing of the foregoing papers, and upon the payment of fees as provided for in this article, the commissioner of insurance shall examine and pass upon the same, and if found correct, and in accordance with this article, issue a certificate of authority, which shall expire on the first day of April next succeeding. (1913, c. 183, s. 6; C. S. 6402.)

§ 58-143. Reserve fund.—There shall at all times be maintained as a reserve a sum in cash or convertible securities equal to fifty per centum of the aggregate net annual deposits collected and credited to the accounts of the subscribers on policies having one year or less to run and pro rata on those for longer periods. For the purpose of said reserve, net annual deposits shall be construed to mean the advance payments of subscribers after deducting therefrom the amounts specifically provided in the subscribers' agreements, for expenses. Said sum shall at no time be less than twenty-five thousand dollars, and if at any time fifty per cent of the aggregate deposits so collected and credited shall not equal that amount, then the subscribers, or their attorney for them, shall make up any deficiency. (1913, c. 183, s. 7; C. S. 6403.)

§ 58-144. Annual reports; examination by commissioner.—The attorney shall make an annual report to the commissioner of insurance for each calendar year, showing the financial condition of affairs at that office where such contracts are issued, and shall furnish such additional information and reports as may be required; but the attorney shall not be required to furnish the names and addresses of any subscribers. The business affairs and assets of the reciprocal or inter-insurance exchanges shall be subject to examination by the commissioner of insurance. (1913, c. 183, s. 8; C. S. 6404.)

§ 58-145. Corporations empowered to exchange insurance.—Any corporation now or hereafter organized under the laws of this state shall, in addition to the rights, powers, and franchises specified in its articles of incorporation, have full power and authority to exchange insurance contracts of the kind and character herein mentioned through exchanges complying with this article. (1913, c. 183, s. 9; C. S. 6405.)

§ 58-146. Punishment for failing to comply with law.—Any attorney or representative who shall, except for the purpose of applying for certificate of authority as herein provided, exchange any contracts of indemnity of the kind and character specified in this article, or directly or indirectly solicit or negotiate any applications for same without first complying with the foregoing pro-
visions, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be subject to a fine of not less than one hundred dollars nor more than five hundred dollars. (1913, c. 183, s. 10; C. S. 6406.)

§ 58-147. Certificate to attorney; revocation.—Each attorney by or through whom are issued any policies or contracts for indemnity of the character referred to in this article shall procure from the commissioner of insurance annually a certificate of authority, stating that all the requirements of this article have been complied with, and upon such compliance and the payment of the fees and taxes required by this article, the commissioner of insurance shall issue such certificate of authority. The commissioner of insurance may revoke or suspend any certificate of authority issued hereunder in case of breach of any of the conditions imposed by this article after reasonable notice has been given the attorney in writing so that he may appear and show cause why such action should not be taken. (1913, c. 183, s. 11; C. S. 6407.)

§ 58-148. Application of general insurance law.——Nothing in the general insurance laws, except as herein provided and as may specifically apply to such contracts and exchanges, shall be construed to extend to inter-insurance or reciprocal exchanges licensed under this article. (1913, c. 183, s. 13; C. S. 6409.)

Art. 17. Foreign Insurance Companies.

§ 58-149. Admitted to do business.—Foreign insurance companies, upon complying with the conditions herein set forth applicable to them, may be admitted to transact in this state, by constituted agents resident herein, any class of insurance authorized by the laws in force relative to the duties, obligations, prohibitions, and penalties of insurance companies, and subject to all laws applicable to the transaction of such business by foreign insurance companies and their agents. (Rev., s. 4746; 1899, c. 54, s. 62; 1901, c. 391, s. 5; 1903, c. 438, s. 6; C. S. 6411.)

Rights of Insurer after Admission.—When a foreign insurance company has complied with all the laws of the state, the courts of this state are open to it for the purpose of enforcing liabilities of policy holders. Commonwealth Mut. Fire Ins. Co. v. Edwards, 134 N. C. 116, 32 S. E. 404.

§ 58-150. Conditions of admission.——A foreign insurance company may be admitted and authorized to do business when it:

1. Deposits with the commissioner of insurance a certified copy of its charter or certificate of organization and a statement of its financial condition and business, in such form and detail as he requires, signed and sworn to by its president and secretary or other proper officer, and pays for the filing of this statement the sum required by law.

2. Satisfies the commissioner of insurance that it is fully and legally organized under the laws of another state. The service on the commissioner is not effective until the insurance company has fully complied with all the laws applicable to the transaction of such business by foreign insurance companies and their agents. Commonwealth Mut. Fire Ins. Co. v. Edwards, 134 N. C. 116, 32 S. E. 404.

3. In case of an amount not less than $100,000 or not less than $50,000, with, also, invested assets of not less than $100,000, and that such capital or net assets are well invested and immediately available for the payment of losses in this state; and that it insures on any single hazard a sum no larger than one-tenth of its net assets.

4. By a duly executed instrument filed in his office constitutes and appoints the commissioner of insurance and his successor its true and lawful attorneys to do all lawful processes in any action or legal proceeding against it may be served, and therein agrees that any lawful process against it which may be served upon such attorney shall be of the same force and validity as if served on the company; and the authority thereof shall continue in force irrevocable so long as any liability of the company remains outstanding in this state. Copies of this instrument, certified by the commissioner of insurance, are sufficient evidence thereof, and service upon such attorney is sufficient service upon the principal.

5. Obtains from the commissioner of insurance a certificate that it has complied with the laws of the state and is authorized to make contracts of insurance. It must also comply with the provisions of this chapter as to deposits and reinsurance by such companies. (Rev., s. 4747; 1899, c. 54, s. 62; 1901, c. 391, s. 5; 1903, c. 438, s. 6; C. S. 6411.)

Cross Reference.—As to deposits required of foreign companies, see §§ 58-57, 58-110, 58-182.

Subsection 3.—Power of Attorney Is Irrevocable.—The statute requires the power of attorney executed to the State Insurance Commissioner. The appointment of an attorney upon whom process may be served to be irrevocable not "as long as the company continues to do business" in this State, but as long as "any liability of the company remains outstanding" in this State. By ceasing to transact insurance business, the foreign company ceases to have the power of attorney afforded by the company so specified. No amount of authorities having a more or less fancied analogy or analogy of any kind whatever to the statute and of the power of attorney drawn and filed in compliance thereto. Biggs v. Life Ass'n, 128 N. C. 7, 37 S. E. 955; Insurance Co. v. Scott, 134 N. C. 157, 48 S. E. 581.

Subsection 4.—Brokerage Makes Agency.—Where a citizen of this State applies for a policy in a foreign company through a broker here, and the application is accepted and the policy is delivered, the broker will be deemed to be the agent of the insurance company, and the insurance company is subject to the laws of this State and has domesticated here, it acquires the right to sue and be sued by the state courts of this state, as a foreign insurance company. Occidental Life Ins. Co. v. Lawrence, 204 N. C. 707, 169 S. E. 636.

Same.—Non-Resident Insured.—This section was intended to protect residents of this state and does not apply to policies issued before the statute and transferred to a resident of another state. The service on the commissioner is not effective until the insurance company has ceased doing business in the state and has no further liabilities therein. Williams v. Mutual Reserve Fund Life Ins. Ass'n, 145 N. C. 158 S. E. 404.

Subsection 5.—Power of Corporation to Sue and Be Sued.—Where a foreign insurance corporation has fully complied with the provisions of this section, and has moved its head office to this State and has domesticated here, it acquires the right to sue and be sued by the state courts of this state, as a foreign corporation. Occidental Life Ins. Co. v. Lawrence, 204 N. C. 707, 169 S. E. 636.

Cited in Fuller v. Lockhart, 209 N. C. 61, 152 S. E. 733.
§ 58-151. Limitation as to classes of business.—No insurance company admitted to do business in the state may be authorized to transact more than one class or kind of insurance therein, unless it has the requisite capital for such business engaged in, and such a company may undertake two or more of the classes of insurance set out in article six, § 58-72, of this chapter, upon providing for each additional kind at least fifty thousand dollars additional capital. But if life, fire, and credit insurance is added to any other line or lines, the additional capital shall be one hundred thousand dollars each, and the company shall pay the license taxes and fees for each class or kind of insurance provided by this chapter.

§ 58-152. Retaliatory laws.—When, by the laws of any other state or nation, any taxes, fines, penalties, licenses, fees, deposits of money or of securities, or other obligations or prohibitions are imposed upon insurance companies of this state doing business in such other state or nation or upon their agents therein greater than those imposed by this state upon insurance companies of such other state, then, so long as such laws continue in force, the same taxes, fines, penalties, licenses, fees, deposits, obligations and prohibitions, of whatever kind, shall be imposed upon all such insurance companies of such other state or nation doing business within this state and upon their agents here. Nothing herein repeals or reduces the license, fees, taxes, and other obligations now imposed by the laws of this state or to go into effect with the companies of any other state or nation unless some company of this state is actually doing or seeking to do business in such state or nation. When an insurance company organized under the laws of any state or country is prohibited by the laws of such state or country or by its charter from investing its assets other than capital stock in the bonds of this state, then and in such case the commissioner of insurance is authorized and directed to refuse to grant a license to transact business in this state to such insurance company.

The Act of 1931 inserted the words "bonding and/or surety" in line three of this section.

§ 58-153. Service of legal process upon commissioner of insurance.—The service of legal process upon any insurance, bonding and/or surety company, admitted and authorized to do business in this state under the provisions of this chapter, shall be made by leaving the same in the hands or office of the commissioner of insurance, and no service upon a company that is licensed to do business in this state is valid unless made upon the commissioner of insurance, the general agent for service, or some officer of the company. As a condition precedent to a valid service of process and of the duty of the commissioner in the premises, the plaintiff shall pay to the commissioner of insurance at the time of service the sum of one dollar, which the plaintiff shall recover as taxable costs if he prevails in his action. In any action of which a justice of the peace has jurisdiction, summons may be served on any licensed agent of such company, not to exceed ten days from date of service; if there is no such agent in the county, then the summons may be served as provided for in other actions against foreign corporations in a court of a justice of the peace. (Rev., s. 4750; 1899, c. 54, ss. 16, 62; 1903, c. 438, s. 6; 1927, c. 167, s. 1; 1931, c. 287; C. S. 6414.)

Cross Reference.—As to other ways in which a foreign insurance company may be served with a copy of process, see §§ 1-97, 55-38.

Editor's Note.—Prior to the amendment of 1927 this section applied only to foreign insurance companies. By this amendment the word "foreign" was struck out.

There are three ways in which a foreign insurance corporation may be served with process: first, when the company is actually doing business in this state and is not restricted to the method prescribed by this section but may be served in the manner prescribed in section 55-38; second, when the service of process is directed to its secretary and shall state whether or not it was served; if there is no such agent in the county, then the summons may be served as provided for in other actions against foreign corporations in a court of a justice of the peace. (Rev., s. 4750; 1899, c. 54, ss. 16, 62; 1903, c. 438, s. 6; 1927, c. 167, s. 1; 1931, c. 287; C. S. 6414.)

Editor's Note.—The Public Laws of 1927 inserted in the first sentence of this section the clause reading: "greater than those imposed by this state upon insurance companies of such other state."

Not Repealed by Implication.—This section was not implicitly repealed by the Revenue Acts of 1923 or 1925 (Pub. Laws 1923, c. 4, § 903; 1925 c. 101, § 903). The amendment applied only to foreign insurance companies. By this act and sections 1-97, 58-38 of this chapter, upon providing for each additional kind at least fifty thousand dollars additional capital. But if life, fire, and credit insurance is added to any other line or lines, the additional capital shall be one hundred thousand dollars each, and the company shall pay the license taxes and fees for each class or kind of insurance provided by this chapter.

The Act of 1931 inserted the words "bonding and/or surety" in line three of this section.

Conditions Precedent to Doing Business in the State.—One of the conditions precedent upon which a foreign insurance company is authorized to do business in this State is that such company will file a duly executed instrument with the insurance commissioner, appointing him its attorney, upon whom all lawful process against said company can be served. Biggs v. Life Ass'n, 128 N. C. 5, 6, 37 S. E. 955.

Annulment of Power of Attorney.—The service of a life insurance company, appointed by the insurance commissioner, appointing him its attorney, upon whom all lawful process against said company can be served. Biggs v. Life Ass'n, 128 N. C. 5, 6, 37 S. E. 955.

Service of legal process upon commissioner.—When legal process is served on the commissioner of insurance brings service of summons on the commissioner of insurance doing business in this State is not restricted to the method prescribed by this section but may be served in the manner prescribed in section 55-38 or section 1-97. Pardue v. Absher, 174 N. C. 676, 94 S. E. 414.

Unlicensed Companies.—Service can be made under this section only upon an insurance company that does not affirmatively appear that the insurance company is licensed, service under section 1-97 may be made. Parker v. Insurance Co. v. National Fire, etc., 143 N. C. 339, 55 S. E. 717. And service under section 55-38 or section 1-97 is not the invalid because of this section. Fisher v. Traders Mut. Life Ins. Co., 136 N. C. 217, 48 S. E. 667.

Service on Fraternal Society.—In an action against a foreign fraternal insurance society doing business in this state, service of summons on the commissioner of insurance brings the corporation into court. Brenizer v. Royal Aracanum, 141 N. C. 409, 53 S. E. 835.

Service of process.—In an action against a foreign fraternal insurance society doing business in this state, service of summons on the commissioner of insurance brings the corporation into court. Brenizer v. Royal Aracanum, 141 N. C. 409, 53 S. E. 835.

§ 58-154. Commissioner to notify company of service of process.—When legal process is served upon the commissioner of insurance as attorney for an insurance company under the provisions of this chapter, he shall immediately notify the company of such service by registered letter directed to its secretary and shall state whether or not complaint was served with the process; or, in the case of a foreign country, to its resident manager, if any in the United States; and must with-
§ 58-155. Action to enforce compliance with this chapter.—Compliance with the provisions of this chapter as to deposits, obligations, and prohibitions, and the payment of taxes, fines, fees, and penalties by foreign insurance companies, may be enforced in the ordinary course of legal procedure by action brought in the superior court of Wake county by the attorney-general in the name of the state upon the relation of the commissioner of insurance. (Rev., s. 4753; 1899, c. 54, s. 102; 1903, c. 438, s. 10; C. S. 6416.)

§ 58-156. Riders insuring against damage to sprinkler systems, water damage, etc., permitted.—All insurance companies authorized to do business in this state may, in addition to the business which they are now authorized by law to do, insure sprinklers, pumps, and other apparatus erected or put in position for the purpose of extinguishing fires, against damage, loss, or injury resulting from accidental causes other than fire; and may also insure any property which such companies are authorized to insure against loss or damage by fire, against damage, loss, or injury by water or otherwise, resulting from the accidental breaking of or injury to such sprinklers, pumps, or other apparatus, arising from causes other than fire. Contracts of insurance of this kind, provided for in this section, shall not be incorporated in any contract of insurance against loss or damage by fire, but may be contained in riders attached thereto, the conditions of which shall be prescribed by the commissioner of insurance. (Rev., s. 4754; 1899, c. 54, s. 24; 1907, c. 1000, s. 6; C. S. 6417.)

§ 58-157. Performance of contracts as to devices not prohibited.—Nothing contained in this chapter shall be construed as prohibiting the performance of any contract hereafter made for the introduction or installation of automatic sprinklers or other betterments or improvements for reducing the risk by fire or water on any property located in this State, and containing provisions for obtaining insurance against loss or damage by fire or water, for a specified time at a fixed rate; provided, every policy issued under such contract shall be as provided by law. (1929, ch. 145, s. 1.)

§ 58-158. Policies limited as to amount and term.—No insurance company or agent shall know-ingly issue any fire insurance policy upon property within this state for an amount which, together with any existing insurance thereon, exceeds the fair value of the property, nor for a longer term than seven years. Policies issued in violation of this section are binding upon the company issuing them, but the company is liable for the forfeitures by law prescribed for such violation. (Rev., s. 4755; 1899, c. 54, ss. 39, 99; 1903, c. 438, s. 10; C. S. 6418.)

Cross Reference.—As to forfeiture prescribed, see § 58-172.

Determining Amount of Loss.—A statement of an agent acting for his company in writing fire insurance, containing that amount of the policy was greatly in excess of the value of the one store, but was about the value of the entire building, and that insured paid the premium based upon the amount named in the policy and not upon the actual cash value of the property, etc., to be insured before issuing the policy thereon. Queen v. Dixie Fire Ins. Co., 177 N. C. 7655, 185055 B. 7655.

Construction of Policy.—Where plaintiffs' property consisted of one building containing three stores, and the insurer contended that the policy issued covered only one of the stores and not the entire building, the court held that amount of the policy was greatly in excess of the value of the one store, but was about the value of the entire building, and that insured paid the premium based upon the amount named in the policy and not upon the actual cash value of the property, etc., to be insured before issuing the policy thereon. Queen v. Dixie Fire Ins. Co., 177 N. C. 7655, 185055 B. 7655.

Editor's Note.—See 13 N. C. Law Rev. 98.

Two or More Mortgages.—Where the owner of lands borrows money thereon under two separate mortgages from different persons, one registered prior to the other, and the mortgagee contracts with each to take out certain policies of fire insurance for their benefit, the rights of the mortgagor to the proceeds under the policies will be determined by the contracts as executed in the loss payable clauses in the policies, and where they are of the New York standard form, appearing to be payable to the mortgagors "as interest may appear," the mortgagee under the prior registered mortgage has a superior lien on the proceeds. Johnson v. Ladies' Home Bank, 197 N. C. 68, 147 S. E. 691.

§ 58-159. Limit of liability on total loss.—When buildings insured against loss by fire and situated within the state are totally destroyed by fire, the company is not liable beyond the actual cash value of the insured property at the time of the loss or damage; and if it appears that the insured has paid a premium on a sum in excess of the actual value, he shall be reimbursed the proportionate excess of premium paid on the difference between the amount named in the policy and the ascertainable values, with interest at six per centum per annum from the date of issue. (Rev., s. 4756; 1899, c. 54, s. 40; C. S. 6419.)

§ 58-160. Policies for the benefit of mortgagees.—Where by an agreement with the insured, or by the terms of a fire insurance policy taken out by a mortgagor, the whole or any part of the loss thereon is payable to, or mortgagee of, the property for his benefit, the company shall, upon satisfactory proof of the rights and title of the parties, in accordance with such terms or agreement, pay all mortgagees protected by such policy in the order of their priority of claim, as their claims appear, not beyond the amount for which the company is liable, and such payments are, to the extent thereof, payment and satisfaction of the liabilities of the company under the policy. (Rev., s. 4757; 1899, c. 54, s. 41; C. S. 6420.)

Editor's Note.—See 13 N. C. Law Rev. 98.
§ 58-161. Fire loss reported to commissioner before payment.—Every insurance company transacting business in this state shall, upon receiving notice of loss by fire of property in North Carolina, on which it is liable under a policy of insurance, notify the commissioner of insurance thereof, either directly or through some bureau or association approved by the commissioner, and no insurance upon any such property shall be paid by any company until one week after this notification. A company violating this section may be fined by the commissioner of insurance the sum of ten dollars for each offense, and for refusal to comply with its provisions its license may be canceled by the commissioner. (Rev., s. 4822; 1899, c. 54, s. 40; 1903, c. 488, s. 4; 1913, c. 166, s. 4; C. S. 641.)

§ 58-162. Reinsurance restricted and regulated.—When an application for license, renewal of license, or for admission to do business in this state, is made by a company, whether of this state, or of another state of the United States, or of a foreign country, for the transaction of business of fire insurance herein, the company shall, as one of the prerequisites of license and admission, file a sworn declaration signed by its president and secretary, or officers corresponding thereto, that it will not reinsure any risk or part thereof taken by it on any property located in this state with any company not authorized to transact the business of fire insurance in the state. Every fire insurance company admitted shall annually and at such other times as the commissioner of insurance requires, in addition to all returns now required by law of it or its agents or managers, make a return to the commissioner of insurance, in such form and detail as is prescribed by him, of all reinsurance contracted for or effected by it directly or indirectly upon property located in this state, this return to be certified by the oath of its president and secretary, if a company of one of the United States, and if a company of a foreign country, by its president and secretary or by officers corresponding thereto, as to such reinsurance contracted for or effected through the foreign office, and by the United States manager as to such reinsurance effected by the United States branch. If any company, domestic or foreign, directly or indirectly, reinsure any risk taken by it on any property located in this state in any company not duly authorized to transact business herein, or if it refuses or neglects to make the returns required by this section, the commissioner of insurance shall revoke its authority to transact business in this state. The provisions of this section also apply to companies licensed to do reinsurance business only. It is unlawful for any company reinsuring risks on property located in this state to reinsure such risks or parts thereof except in companies authorized by the laws of this state to do business. (Rev., s. 4770; 1899, c. 54, s. 63; 1901, c. 391, s. 5; C. S. 6422.)

§ 58-163. Penalty for reinsuring in unauthorized company.—If any fire insurance company shall, directly or indirectly, reinsure any risk taken by it on any property located in North Carolina in any company not duly authorized to transact business herein, the insurance agent and the company effecting or acting in the negotiation of such reinsurance shall severely be punished by a fine of five hundred dollars. (Rev., s. 3495; 1899, c. 54, ss. 63, 98; C. S. 6423.)

§ 58-164. No action lies on policy of unlicensed company.—No action may be maintained in any court in the state upon a policy or contract of fire insurance issued upon property situated in the state by any company, association, partnership, individual, or individuals that have not been authorized by the commissioner of insurance to transact such insurance business. (Rev., s. 4763; 1901, c. 105; C. S. 6424.)

Action by the Insured.—The statute does not make the policy void in the hands of the assured. The defendant company could not take advantage of its own wrong by receiving the premium and not being responsible." Hay & Bro. v. Union Fire Ins. Co., 167 N. C. 82, 83, 85 S. E. 24.

Action by Licensed Companies.—When such foreign corporation has complied with our laws, our courts are open to it for the enforcement of its rights—and should it become insolvent and pass into the hands of a receiver—he, by comity, will be allowed to sue here to enforce the liability of a policy holder. Commonwealth Mut. Fire Ins. Co. v. Edwards, 124 N. C. 166, 32 S. E. 404.

Policies Issued by Brokers.—This section allows an out-of-state company, that is, one that has not complied with our laws, to be sued but not to sue. Its evident purpose was to allow such companies to adjust claims without thereby making themselves liable for penalties or taxes. It certainly never intended to permit such companies to practically nullify our insurance laws by the legal fiction of doing business in this state through a broker. Our insurance laws, applicable equally to domestic and to foreign corporations, are intended not simply for purposes of revenue, but primarily for the protection of our people. Commonwealth Mut. Fire Ins. Co. v. Edwards, 124 N. C. 166, 119, 32 S. E. 404.

§ 58-165. Citizens authorized to procure policies in unlicensed foreign companies.

1. What applicant must show.—The commissioner of insurance, upon the annual payment of a fee of twenty dollars, may issue licenses to citizens of this state, subject to revocation at any time, permitting the person named therein to procure policies of fire insurance on property in this state in foreign insurance companies not authorized to transact business in the state. Before the person named in such a license may procure any insurance in such companies or on any property in this state, he must execute and file with the commissioner of insurance an affidavit that he is not an officer in companies admitted to do business in the state the amount of insurance necessary to protect such property, and may only procure insurance under such license after he has procured insurance in companies admitted to do business in this state to the full amount which those companies are willing to provide.
write on the property; but such licensed person shall not be required to offer any portion of such insurance to any company which is not possessed of cash assets amounting to at least twenty-five thousand dollars, or one which has, within the period of twelve months, been in an impaired condition.

2. Account and report.—Each person so licensed must keep a separate account of the business done under the license, a certified copy of which account he shall forthwith file with the commissioner of insurance, showing the exact amount of such insurance placed by any person, firm, or corporation, the gross premium charged thereon, the companies in which the same is placed, the date and terms of the policies, and also a report in the same detail of all such policies canceled and the gross return premium thereon.

3. Bond filed.—Before receiving such license the applicant therefor shall execute and deliver to the commissioner of insurance a bond in the penal sum of one thousand dollars, with such sureties as the commissioner of insurance may approve, with a condition that the licensee will faithfully comply with all the requirements of this section, and will file with the commissioner of insurance, in January of each year, a sworn statement of the gross premiums charged for insurance procured or placed, and the gross returned premiums on such insurance canceled under such license during the year ending on the thirty-first day of December next preceding, and at the time of filing such statement will pay into the treasury of the state a sum equal to five per centum of such gross premiums, less return premiums, so reported, or pay such tax at the time of taking out and delivering such policy or policies.

4. Broker may obtain license.—Any broker licensed under this section may, upon application to the commissioner of insurance, be allowed to place policies of insurance with any mutual fire insurance company not doing or licensed to do business in this state, not paying commissions upon business, not having agents to solicit business, and doing only one class of fire insurance business, if he files with the insurance department a certified copy of the charter of each such company, a statement of its financial condition on a blank of the department, and certificate of its authority to do business at its home office, and also receives from the commissioner of insurance a license for each company to do business through him on the payment by him of the license, taxes, and fees required by law. All such contracts of insurance placed through any such broker are valid and legal, and the risks upon which such policies are placed may be examined and inspected by regular agents or inspectors licensed by the insurance department upon the application of the broker writing the insurance.

5. Each resident broker, authorized to procure insurance in nonadmitted companies, shall pay an annual license tax of twenty dollars, and also a tax of five per cent on his gross premium receipts. (Rev., ss. 4715, 4769; 1899, c. 54, ss. 68, 95; 1903, c. 680; C. S. 6425.)

Liability of the Insurer.—Where a citizen of this State applies for a policy in a foreign company through a broker here, and the application is accepted and the policy is delivered, the broker will be deemed to be the agent of the company, and the contract to be made here, subject to the laws of this State. Commonwealth Mut. Fire Ins. Co. v. Edwards, 124 N. C. 115, 32 S. E. 404.

§ 58-165. An insurance company that issues policies to residents of this state, but does not issue them through a broker in this state is not subject to an action under this section. Ivy River Land, etc., Co. v. National Fire, etc. Co., 192 N. C. 115, 133 S. E. 424.

§ 58-166. Punishment for failure to file affidavit and statements.—If any person licensed to procure insurance in an unauthorized foreign company shall procure, or act in any manner in the procurement or negotiation of, insurance in any unauthorized foreign company, and shall neglect to make and file the affidavit and statements required by the preceding section, he shall forfeit his license and be punished by a fine of not less than one hundred nor more than five hundred dollars, or by imprisonment for not more than one year, or by both. (Rev., ss. 3483, 4769; 1899, c. 54, ss. 68, 95; C. S. 6426.)


§ 58-167. Tax deducted from premium; reports filed.—When any person or corporation shall insure any property located in this state with an insurance company not licensed to do business in this state, it shall be the duty of such person or corporation to deduct from the premium charged on the policy or policies issued for such insurance five per centum of the premium and remit the same to the commissioner of insurance of the state, at the time of filing the report to the commissioner of insurance the name of the company or companies issuing the policy or policies, the location of the property insured, and the premium charged. The commissioner of insurance shall pay the said amounts to the treasurer of the state. If such report is not made on or before the thirtieth days of July and January of each year for the business done prior to July first and January first preceding, there shall be added to the amount of taxes thereon the sum of one per centum on the first day of each month thereafter. (1915, c. 109, s. 8; C. S. 6427.)

Referred to in Ivy River Land, etc., Co. v. National Fire, etc., Co., 192 N. C. 115, 133 S. E. 424.

§ 58-168. Resident agents required. —Foreign fire insurance companies legally authorized to do business in this state through regularly commissioned and licensed agents located in the state shall not make contracts of fire insurance on property herein, except through such resident agents as are regularly commissioned by them and licensed to write policies of fire insurance in this state. This section does not apply to direct insurance covering the rolling stock of railroad corporations or property in transit while in the possession and custody of railroad corporations or other common carriers. (Rev., s. 4764; 1899, c. 54, s. 107; 1901, c. 391, s. 8; C. S. 6428.)

§ 58-169. Policies through nonresident agent prohibited. —Every fire insurance company authorized to do business in the state is prohibited from authorizing or allowing any person, agent, firm, or corporation who is a nonresident of this state, to issue or cause to be issued, except through a licensed agent, any policy of insurance
on property located in the state. (Rev., s. 4765; 1903, c. 488, s. 1; 1905, c. 170; C. S. 6429.)

Validity as to Insured.—Where a foreign insurance company, authorized to do business here under our laws, issues its policy on property situated within the State, but through an agency in another State which is unauthorized to write it here, because of this section, the policy is valid as to the right of action of the insured thereon. Hay & Bros. v. Union Fire Ins. Co., 167 N. C. 82, 83 S. E. 241.

§ 58-170. Licensed agents not to pay commissions to nonresident or unlicensed persons.—Any person, firm, or corporation licensed by the commissioner of insurance to act as a fire insurance agent in this state is prohibited from paying directly or indirectly any commission, brokerage, or other valuable consideration on account of any policy covering property in this state, to any person, firm, or corporation who is a nonresident of the state, or to any person, firm, or corporation not duly licensed by the commissioner of insurance as a fire insurance agent; but a fire insurance agent licensed in the state may pay a commission not exceeding fifty per centum of the regular commissions allowed upon the issuance of such policies to a licensed nonresident broker. The commissioner of insurance is authorized to license a nonresident as a broker when he applies therefor on a proper blank of the department and makes affidavit that he will not during the fiscal year place directly or indirectly any fire insurance on any property located in North Carolina except through licensed resident agents of the state, that he is a broker in good faith and proposes to hold himself out as such. The fee for this license and seal is ten dollars. (Rev., s. 4766; 1903, c. 488, s. 2; 1905, c. 170, s. 2; 1923, c. 4, s. 70; 1925, c. 70, s. 6; C. S. 6430.)

§ 58-171. Revocation of license for violation; power of commissioner.—When the commissioner of insurance has information of a violation of any of the provisions of §§ 58-169 and 58-170, he shall immediately investigate or cause to be investigated such violation, and if a fire insurance company has violated any of such provisions he shall immediately revoke its license for not less than three months and not more than six months for a first offense, and for each offense thereafter for not less than one year. If a person, firm, or corporation licensed by the commissioner of insurance as a fire insurance agent violates or causes to be violated any of the provisions of those sections, he shall for the first offense have his license revoked for not less than three nor more than six months, and for the second offense he shall have his license revoked for all companies for which he has been licensed for not less than three nor more than six months, and for the second offense he shall have his license revoked for all companies for which he is licensed, and he shall not thereafter be licensed for any company for one year from the date of the revocation. For the purpose of enforcing the provisions of those sections the commissioner of insurance is authorized and empowered to examine persons, administer oaths, and send for papers and records. A failure or refusal on the part of any fire insurance company, person, firm, or corporation licensed to do business in this state to appear before the commissioner of insurance when requested to do so, or to produce records and papers, or answer under oath, subjects such company, person, firm, or corporation to the penalties of this section. (Rev., s. 4767; 1903, c. 488, ss. 3, 4; C. S. 6431.)

§ 58-172. Agreements restricting agent's compensation; penalty.—It is unlawful for any fire insurance company, association, or partnership doing business in this state employing an agent who is employed by another fire insurance company, association, or partnership, either directly or through any organization or association, to enter into, make or maintain any stipulation or agreement in restraint of or limiting the compensation which said agent may receive from any other fire insurance company, association, or partnership, or forbidding or prohibiting reinsurance of the risks of a domestic fire insurance company in whole or in part by any company holding membership in or cooperating with such bureau or board. The penalty for any violation of this section shall be a fine of not less than two hundred and fifty dollars nor more than five hundred dollars and the forfeiture of license to do business in this state for a period of twelve months thereafter. (Rev., ss. 3491, 4768; 1905, c. 424; 1915, c. 166, ss. 2, 3; C. S. 6432.)

§ 58-173. Punishment for issuing fire policies contrary to law.—Any insurance company or agent who makes, issues, or delivers a policy of fire insurance in wilful violation of the provisions of this chapter which prohibit the issuance of a fire insurance policy for more than the fair value of the property or for a longer term than seven years; or which prohibit stipulations in insurance contracts restricting the jurisdiction of courts, or limiting the time within which an action may be brought to less than one year after the cause of action accrues or to less than six months after a nonsuit by the plaintiff, shall forfeit for each offense not less than fifty nor more than two hundred dollars; but the policy shall be binding upon the company issuing it. (Rev., s. 4832; 1899, c. 54, s. 99; 1903, c. 438, c. 10; C. S. 6433.)


§ 58-174. Terms and conditions must be set out in policy.—In all insurance against loss by fire the conditions of insurance must be stated in full, and the rules and by-laws of the company are not a warranty or a part of the contract, except as incorporated in full into the policy. (Rev., s. 4758; 1899, c. 54, s. 42; C. S. 6434.)

§ 58-175. Items to be expressed in policies; agent to inspect risks.—Upon request there shall be printed, stamped, or written on each fire policy issued in this state the basis rate, deficiency charge, the credit for improvements, and the rate at which written, and whenever a rate is made or changed on any property situated in this state upon request a full statement thereof showing in detail the basis rate, deficiency charges and credits, as well as rate proposed to be made, shall be delivered to the owner or his representative having the insurance on the property in charge, by the company, association, their agent or representative, with a notice to the effect that the rate is promulgated and filed [534]
§ 58-176. Standard policy adopted.—No fire insurance company shall issue fire insurance policies on property in this state other than those of the standard form filed in the office of the commissioner of insurance of the state, known and designated as the standard fire insurance policy of the state of North Carolina, except as follows: (a) A company may print on or in its policies its name, location, and date of incorporation, the amount of its paid-up capital stock, the names of its officers and agents, the number and date of the policy, and if it is issued through an agent, the words: “This policy shall not be valid until countersigned by the duly authorized manager or agent of the company at .......” and after the words “Standard Fire Insurance Policy of the State of North Carolina,” on the back of the form, the names of such other states as have adopted this standard form. (b) A company may use in its policies written or printed forms of description and specification of the property insured. (c) A company insuring against damage by lightning may print in the clause enumerating the perils insured against, the additional words, “also any damage by lightning, whether fire ensues or not,” and in the clause providing for an apportionment of loss in case of other insurance, the words, “whether by fire, lightning, or both.” (d) A company insuring against damage by windstorm, cyclones and tornadoes may print in the clause enumerating the perils insured against, the additional words, “also any damage by windstorm, cyclones and tornadoes, whether fire ensues or not,” and in the clause providing for apportionment of loss in case of other insurance, the words, “whether by fire, windstorm, cyclones, tornadoes or all.” Such company may also print after the other conditions of the standard fire policy such provisions and conditions especially applicable to windstorms, cyclones, and tornadoes. The company may also make such change in the heading and preliminary statements of such combined policy form as may be necessary, all in such form as may be approved by the commissioner of insurance. (e) A company may write or print upon the margin or across the face of a policy, or write or print in type not smaller than long primer or ten point Roman-faced upon separate slips or riders to be attached thereto, provisions adding to or modifying those contained in the standard form, and all such slips, riders, and provisions must be signed by the officers or agents of the company so using them. The iron safe or any other depository to be attached to or modifying those contained in the standard form, and all such slips, riders, and provisions must be signed by the officers or agents of the company so using them. The iron safe or any other depository to be attached thereto, provisions adding to or modifying those contained in the standard form, and all such slips, riders, and provisions must be signed by the officers or agents of the company so using them. The iron safe or any other depository to be attached thereto, provisions adding to or modifying those contained in the standard form, and all such slips, riders, and provisions must be signed by the officers or agents of the company so using them. The iron safe or any other depository to be attached thereto, provisions adding to or modifying those contained in the standard form, and all such slips, riders, and provisions must be signed by the officers or agents of the company so using them. The iron safe or any other depository to be attached thereto, provisions adding to or modifying those contained in the standard form, and all such slips, riders, and provisions must be signed by the officers or agents of the company so using them. The iron safe or any other depository to be attached thereto, provisions adding to or modifying those contained in the standard form, and all such slips, riders, and provisions must be signed by the officers or agents of the company so using them. (f) Every mutual company shall cause to appear in the body of its policy the total amount for which the assured may be liable under the charter of the company. (g) The company may print on or in its policy, with the approval of the commissioner of insurance, if the same is not already included in such standard form, any provision which any such corporation is required by law to insert in its policies not in conflict with the provisions of such standard form. Such provisions shall be printed apart from the other provisions, agreements, or conditions of the policy, under a separate title, as follows: “Provisions Required by Law to be Inserted in This Policy.” (Acts, s. 6. 1759: 1899, c. 54, s. 43: 1901, c. 391, s. 4: 1907, c. 800, s. 1: 1915, c. 109, s. 10: 1925, c. 70, s. 5: C. S. 614.)

Cross Reference.—See § 58-177 and notes thereto.

Validity and Binding Effect.—The terms and conditions of the standard form of a fire insurance policy, as provided for in this section and the section following, and the stipulations as to a valid waiver thereof, are valid and binding on the parties. Midkiff v. North Carolina Home Ins. Co., 197 N. C. 139, 147 S. E. 812.

§ 58-177. Form of standard policy.—The standard form of policy must be plainly printed, no part of it may be in type smaller than that used in printing the form on file in the office of the commissioner of insurance, and shall be as follows:

[Space for insertion of name of company or companies issuing the policy and other matter permitted to be stated at the head of the policy.]

Amount $.... Rate .... Premium $....

In consideration of the stipulations herein named and of ........ dollars premium does insure ........ dollars premium does insure ........ dollars premium does insure ........ dollars premium does insure ........ dollars premium does insure ........ dollars premium does insure ........ dollars premium does insure 

and legal representatives, to the extent of the actual cash value (ascertained with proper deductions for depreciation) of the property at the time of loss or damage, but not exceeding the amount which it would cost to repair or replace the same with material of like kind and quality within a reasonable time after such loss or damage, without allowance for any increased cost of repair or reconstruction by reason of any ordinance or law regulating construction or repair and without compensation for loss resulting from interruption of business or manufacture, for the term of the day of ........ from the 19th at noon, to the day of ........ at noon, against all direct loss and damage by fire and by removal from premises endangered by fire except as herein provided, to an amount not exceeding ............ dollars to the following described property located as described herein, or pro rata for five days at each proper place to which any of the property shall necessarily be removed for preservation from fire, but not elsewhere, to wit:

[Space for description of property.]

This policy is made and accepted subject to the foregoing stipulations and conditions, and to the stipulations and conditions printed on the back hereof, which are hereby made a part of the policy, together with such other provisions, stipulations, and conditions as may be endorsed hereon or added hereto as herein provided. In witness whereof, this company has executed and attested these presents.

[Space for date and for signatures and titles of officers and agents.]

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Fraud, misrepresentation, etc.—This entire policy is void if the insured has concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss.

Property which cannot be insured.—This policy shall not cover accounts, bills, currency, deeds, evidences of debt, money, notes or securities.

Hazards not covered.—This company shall not be liable for loss or damage caused directly or indirectly by invasion, insurrection, riot, civil war, or commotion, or military or usurped power, or by order of any civil authority; or by theft; or by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire or when the property is endangered by fire in neighboring premises.

This entire policy is void, unless otherwise provided by agreement in writing added hereto.

Ownership, etc.—(a) if the interest of the insured is other than unconditional and sole ownership; or (b) if the subject of insurance is a building on ground not owned by the insured in fee simple; or (c) if, with the knowledge of the insured, foreclosure proceedings are commenced or notice given of sale of any property insured hereunder by reason of any mortgage or trust deed; or (d) if any change, other than by the death of an insured, takes place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard); or (e) if this policy is assigned before a loss.

Unless otherwise provided by agreement in writing added hereto, this company is not liable for loss or damage occurring—

Other insurance.—(a) while the insured has any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy; or

Increase of hazard.—(b) while the hazard is increased by any means within the control or knowledge of the insured, or

Repairs, etc.—(c) while mechanics are employed in building, altering, or repairing the described premises beyond a period of fifteen days; or

Explosives, gas, etc.—(d) while illuminating gas or vapor is generated on the described premises; or while (any usage or custom to the contrary notwithstanding) there is kept, used, or allowed on the described premises fireworks, greek fire, phosphorus, explosives, benzine, gasoline, naphtha, or any other product of petroleum of greater inflammability than kerosene oil, gunpowder exceeding twenty-five pounds, or kerosene oil exceeding five barrels; or

Factories.—(e) if the subject of insurance is a manufacturing establishment while operated in whole or in part between the hours of ten p.m. and five a.m., or while it ceases to be operated beyond a period of ten days; or

Unoccupancy.—(f) while a described building, whether intended for occupancy by owner or tenant, is vacant or unoccupied beyond a period of ten days; or

Excepted property.—(g) to bullion, manuscripts, mechanical drawings, dyes, or patterns; or

Explosion, lightning.—(h) by explosion or lightning, unless fire ensues, and, in that event, for loss or damage by fire only.

Chattel mortgage.— Unless otherwise provided by agreement in writing added hereto this company is not liable for loss or damage to any property insured hereunder while encumbered by a chattel mortgage, and during the time of such encumbrance this company is liable only for loss or damage to any other property insured hereunder.

Fall of building.—If a building, or any material part thereof, falls, except as the result of fire, for all insurance by this policy on such building or its contents immediately ceases.

Added clauses.—The extent of the application of insurance under this policy and of the contribution to be made by this company in case of loss or damage, and any other agreement not inconsistent with or a waiver of any of the conditions or provisions of the policy, may be provided for by rider added hereto.

Waiver.—No one has power to waive any provision or condition of this policy except such as by the terms of the policy is the subject of agreement added hereto, nor shall any such provision or condition be waived unless the waiver is in writing added hereto, nor shall any provision or condition of this policy or any forfeiture be waived by any requirement, act, or proceeding on the part of this company relating to appraisal or to any examination herein provided for; nor shall any privilege or permission affecting the insurance hereunder exist or be claimed by the insured unless granted herein or by rider added hereto.

Cancellation of policy.—This policy will be canceled at any time at the request of the insured, in which case the company shall, upon demand and surrender of the policy, refund the excess of paid premium above the customary short rates for the expired time. The policy may be canceled at any time by the company by giving to the insured a five days written notice of cancellation with or without tender of the excess of paid premium above the pro rata premium for the expired time, which excess, if not tendered, shall be refunded on demand. Notice of cancellation must state that the excess premium (if not tendered) will be refunded on demand.

Pro rata liability.—This company will not be liable for a greater proportion of any loss or damage than the amount hereby insured bears to the whole insurance covering the property, whether valid or not and whether collectible or not.

Noon.—The word "noon" herein means noon of standard time at the place of loss or damage.

Mortgagee.—If loss or damage is made payable, in whole or in part, to a mortgagee, this policy may be canceled as to such interest by giving to the mortgagee a ten days written notice of cancellation. Upon failure of the insured to render proof of loss, such mortgagee shall, as if named as insured hereunder, but within sixty days after such failure, render proof of loss and
be subject to the provisions hereof as to appraisal and time of payment. On payment to a mortgagee of any sum for loss or damage hereunder, if this company claims that as to the mortgagor or owner no liability existed, it shall, to the extent of such payment, be subrogated to the mortgagee's right of recovery and claim upon the collateral to the mortgage debt, but without impairing the mortgagee's right to sue; or it may pay the mortgage debt and require an assignment thereof and of the mortgage. Except as stated in this section, the agreement between a mortgagor and this company shall be only as stated by rider added hereto.

Requirements in case of loss.—The insured shall give immediate notice, in writing, to this company, of any loss or damage, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, furnish a complete inventory of the destroyed, damaged and undamaged property, stating the quantity and cost of each article and the amount claimed thereon; and the insured shall, within sixty days after the fire, unless such time is extended in writing by this company, render to this company a proof of loss, signed and sworn to by the insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and of all others in the property; the cash value of each item thereof, and the amount of loss or damage thereto; all encumbrances thereon; all other contracts of insurance, whether valid or not, covering any of said property; and a copy of all the descriptions and schedules in all policies; any changes in the title, use, occupation, location, possession, or exposures of said property since the issuing of this policy; and by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of fire; and shall furnish, if required, verified plans and specifications of any building, fixtures, or machinery destroyed or damaged. The insured, as often as is reasonably required, shall exhibit to any person designated by this company all that remains of any property herein described, and submit to examinations under oath by any person named by this company, and subscribe the same; and, as often as is reasonably required, shall produce for examination all books of account, bills, invoices, and other vouchers, or certified copies thereof, if originals are lost, at such reasonable time and place as is designated by this company or its representative, and shall permit extracts and copies thereof to be made.

Appraisal.—In case the insured and this company fail to agree as to the amount of loss or damage, each shall, on the written demand of either, select a competent and disinterested appraiser. The appraisers shall first select a competent and disinterested umpire, and failing for fifteen days to agree upon such umpire, then, on request of the insured or this company, the umpire shall be selected by a judge of a court of record in the state in which the property insured is located. The appraisers shall then appraise the loss and damage, stating separately sound value and loss or damage to each item; and failing to agree, shall submit their differences only to the umpire. An award in writing, so itemized, of any two, when filed with this company, shall determine the amount of sound value and loss or damage. Each appraiser shall be paid by the party selecting him, and the expenses of appraisal and umpire shall be paid by the parties equally.

Company's options.—It is optional with this company to take all, or any part, of the articles at the agreed or appraised value, and also to repair, rebuild, or replace the property lost or damaged with other of the like kind and quality within a reasonable time, on giving notice of its intention so to do within thirty days after the receipt of the proof of loss herein required; but

Abandonment.—There can be no abandonment to this company of any property.

When loss payable.—The amount of loss or damage for which this company may be liable shall be payable sixty days after proof of loss, as herein provided, is received by this company and ascertainment of the loss or damage is made either by agreement between the insured and this company expressed in writing or by the filing of this company of an award as herein provided.

Suit.—No suit or action on this policy, for the recovery of a claim, shall be sustainable in any court of law or equity unless the insured has complied with all the requirements of this policy, nor unless commenced within twelve months next after the fire.

Subrogation.—This company may require from the insured an assignment of all right of recovery against any party for loss or damage to the extent that payment therefor is made by this company.

Standard Fire Insurance Policy of the State of

Expires

Property

Amount

Premium

No...

It is important that the written portions of all policies covering the same property read exactly alike. If they do not, they should be made uniform at once. (Rev. s. 4760; 1899, c. 54; 1901, c. 391, s. 4; 1915, c. 109, s. 9; C. S. 6437.)

I. The Application and Contract in General.

II. Title or Interest of Insured.

III. Certain Other Conditions.

IV. Liability of Company in Case of Loss.

V. Liability of Agent.

Cross Reference. See § 58-31 and notes thereto.

I. THE APPLICATION AND CONTRACT IN GENERAL.

Editor's Note.—See 12 N. C. Law Rev. 98.

Part of Law.—The material provisions of the standard form of a fire insurance policy written in accordance with this section are those of the law. Greene v. Insurance Co., 296 N. C. 335, 145 S. E. 616.

Rights of Parties Determined from Instrument.—When a policy of insurance, in the form prescribed by this section, has been issued by an insurance company and accepted by the insured, and has thereby become effective for all purposes as their contract, the rights and liabilities of both the insurer and the insured, under the policy, must be ascertained and determined in accordance with its terms and provisions. These terms and provisions have been prescribed by statute, and are valid in all respects; they are just both to the insurer and to the insured. Each is presumed to know all the terms, provi-
II. TITLE OR INTEREST OF INSURED.

Unconditional Ownership.—The provision in a policy of fire insurance written in accordance with the standard statutory form, that the policy shall be void if the insured is not the unconditional owner of the property insured, does not prevent the binding effect of a parol agreement of insurance, looking to the delivery of the policy according to the form prescribed and evidenced by a written memorandum thereof, called a binder; and when such is shown to have been made in a manner to bind the company, it is in force from that time, and thereafter the insurer is responsible for the loss in accordance with the terms of the statutory form of policy. Lea v. Atlantic Fire Ins. Co., 168 N. C. 478, 84 S. E. 813.

Binder Slips Not Contrary to Law.—Our statute, by establishing a standard form of fire insurance, does not prevent the insurer from waiving the effect of the statutory form, which derive no extra validity by reason of the fact that the form is prescribed by law. Atlantic Joint Stock Land Bank v. Foster, 217 N. C. 415, 8 S. E. (2d) 235. The commencement of foreclosure against insured property so affects the condition therein of sole and unconditional ownership of the property insured that the condition is waived and forfeit its benefit, if made without the knowledge or consent of the insurer, and the insurer is not bound by the insurance contract, unless the company thereafter, by its acts, conduct and statements has waived the effect of the mortgage and is estopped to assert its forfeiture. Modlin v. Atlantic Fire Ins. Co., 151 N. C. 35, 65 S. E. 635.

Assignment for Creditors.—Making an assignment for creditors as a condition precedent to the issuance of a policy of fire insurance, does not prevent that the policy issued is valid and binding. Roper v. National Fire Ins. Co., 161 N. C. 151, 76 S. E. 869.

The commencement of foreclosure against insured property terminates the policy, there being in the policy a provision to that effect. Sasser v. Pilot Fire Ins. Co., 203 N. C. 333, 165 S. E. 669.

Title under Executory Contract.—A vendee of land occupying a portion of the price, and on which he has erected a building, is an "unconditional and sole owner" of the property so occupying it. Cuthberton v. North Carolina Home Ins. Co., 133 N. C. 407, 45 S. E. 773. A mortgagor under a statutory form of policy, stipulating, among other things, that the mortgagee not give a mortgage thereon which is canceled four days before the destruction of the machine by fire, this loss coming within the terms of the policy, the cancellation of the mortgage revives the original statute of the policy, the temporary violation of the stipulation being immaterial, and puts the policy again in force, the effect of the mortgage being to invalidate the policy during the continuance of the lien, or to suspend the policy to the company during the violation of the stipulation. Cottingham v. Maryland Motor Car Ins. Co., 168 N. C. 229, 84 S. E. 274.

Additional Insurance—In General.—The condition against additional insurance on the property than the policy permits, is void in accordance with the statutory form. Roper v. National Fire Ins. Co., 161 N. C. 151, 76 S. E. 869. Where a standard fire insurance policy under this section, the property and the insurer can hardly be contested at this late day. It does not apply to an agreement to insure a vested right, so that the insurer is not bound by the condition of the title after the condition is waived. Gerringer v. Atlantic Fire Ins. Co., 151 N. C. 35, 65 S. E. 635.

Right of Insurer to Know of Encumbrances.—"In referring to this principle of law in Weddington v. Piedmont Fire Ins. Co., 141 N. C. 234, 54 S. E. 271, Mr. Justice Walker says: The validity of a provision in a policy of insurance against the creating of encumbrances without the consent of the insurer can hardly be contested at this late day. It has been regarded in the preceding doctrine that facts in regard to title, ownership, encumbrances, and possession of the insured property are all important to be known by the insurer; and alteration of the title is often affected by these circumstances." Watson v. North Carolina Home Ins. Co., 159 N. C. 638, 640, 75 S. E. 1105.

Misrepresentations as to Title.—Misrepresentations as to title of part of the premises insured avoids the contract of insurance. Cuthberton v. North Carolina Home Ins. Co., 96 N. C. 480, 2 S. E. 555, citing note in 19 L. R. A. 212.

Existing Lien Will Not Invalidate Provision.—The stipulation in a fire insurance policy that the insurer is not bound by the existence of a lien on the property, is void in accordance with the statutory form of policy. Roper v. Southern Ins. Co., 153 N. C. 285, 69 S. E. 214.

Mortgagee May WAIVE WAIVER.—The mortgagee in the provision in the loss and damage clause of a fire insurance policy taken out by the mortgagee that the mortgagee will pay the premium on demand should the mortgagee not do so, is held to be a condition precedent to the protection afforded by the policy as a special contract made in his favor, and not as a covenant that he will pay the premium on demand of the insurer, upon the mortgagee's default; and upon the mortgagee's refusal or neglect to pay the premium, the insurer is entitled, with the mortgagor's demand, to claim his mortgage property from the mortgagor, and the latter may after ten days' written notice cancel the policy. Whitehead v. Wilson Knitting Mills, 194 N. C. 281, 139 S. E. 456, 56 A. L. R. 674, and cases there cited.

The insurer under Executive Contract.—A vendee of land occupying it under an executory contract, on which he has paid a portion of the purchase price, and on which he has erected a building is an "unconditional and sole owner" of the property so occupying it, and waives the condition therein of sole and unconditional ownership for the purpose of providing that it shall be void if the interest of the insured is other than sole ownership of fee title. Jordan v. Hanover Fire Ins. Co., 151 N. C. 341, 56 S. E. 456.

Mortgage Invalidates Policy.—Where the insured fails to show that the property was mortgaged, when in fact it was mortgaged, the policy providing that the contract of insurance shall be void if the insured property is mortgaged, invalidates the policy, though the omission was made without the intent to deceive. Hayes v. United States Fire Ins. Co., 132 N. C. 703, 44 S. E. 494.

Execution of a mortgage on the insured property so affects the title, as will avoid an insurance policy then existing thereon and forfeit its benefit, if made without the knowledge or consent of the insurer, and not attested as preserved by the policy or file, unless the company thereafter, by its acts, conduct and statements has waived the effect of the mortgage and is estopped to assert its forfeiture. Smith v. Southern National Fire Ins. Co., 193 N. C. 346, 137 S. E. 310.

III. CERTAIN OTHER CONDITIONS.

Additional Insurance—In General.—The condition against additional insurance on the property than the policy permits, is void in accordance with the statutory form. Black v. Atlantic Home Ins. Co., 148 N. C. 169, 61 S. E. 672.

And when under a fire insurance policy the insured has violated the provision of the policy by placing more considerable insurance on the property than the policy permits, the policy is invalid in accordance with the statutory form. Roper v. National Fire Ins. Co., 161 N. C. 151, 76 S. E. 869.

Where a standard fire insurance policy under this section provides that the policy shall be void if the policyholder procures other contemporaneous insurance on the same property during the term covered, unless the insurer agrees to reimbursement, the benefit of the agreement is void, and the policy void and binding. Johnson v. Aetna Ins. Co., 201 N. C. 362, 160 S. E. 454.
A policy of fire insurance was issued to the devisee of the insured person's estate to a large extent in favor of other beneficiaries under the will. Thereafter the guardian of such other beneficiaries took out a policy to protect the interests of the devisee. The insuring company, in removing the policy to the guardian may not avoid liability thereon, on the ground of the additional insurance issued to the owner of the fee, since such additional insurance was not under the consent of the insurer. Hence, the policy is void. Grubbs v. North Carolina Home Ins. Co., 186 N. C. 269, 119 S. E. 362. See also, Coggins v. Attna Ins. Co., 144 N. C. 7, 56 S. E. 506.

The Insurer's Waiver of Condition.—Where the insurer was told that it was all right, this constituted a waiver of the condition. Grubbs v. North Carolina Home Ins. Co., 108 N. C. 472, 13 S. E. 236.

The Iron-Safe Clause.—The "iron-safe clause" in policies of insurance is upheld by the courts as a reasonable contract limitation or rate of risk. Coggins v. Attna Ins. Co., 144 N. C. 7, 56 S. E. 506. A substantial compliance with this provision will suffice. Arnold v. Indemnity Fire Ins. Co., 152 N. C. 557, 62 S. E. 574. And an inventory of a stock of general merchandise containing the number of articles and cost of each class at a date made about one month before the fire, and testified to in court as the same at the time of the fire, is a substantial compliance with the inventory provision in the standard form of a fire insurance policy, and is competent as evidence upon the trial. Mort v. Vermont, etc., Ins. Co., 131 S. E. 867. See also, Coggins v. Attna Ins. Co., 144 N. C. 7, 56 S. E. 506.

Same—Waiver.—If the company, knowing the insured has not complied with any provision or requirement of the policy, recognizes the validity and binding force and effect of the policy it has issued, "it should not be heard to insist upon the introduction of records, the keeping of which it has thus tacitly waived."


Proof of Loss.—A clause in a policy requiring proof of loss and forbidding the bringing of any suit against the policy unless sixty days thereafter notice is given to the insurer is not a provision that the insurer has not complied with and the insurer may not avoid liability for failure to file proof within sixty days of the fire. Higson v. North River Ins. Co., 187 N. C. 472, 13 S. E. 236.

The insurer's denial of liability upon its fire insurance policy is a waiver of its right to require the proof of loss therein specified. Profit Mercantile Co. v. State Mut. Fire Ins. Co., 176 N. C. 545, 97 S. E. 476.

As to limitations, see post, this note, "Liability of Company in Case of Loss.

Operating Mill at Night.—Where an insured mill was operated at night, in violation of a policy, but under a permit from the insurance agent, such operation was no defense to an action on the policy for a loss happening three months later. The insurer was not a party to the contract between the insured and the contractor, and no notice of such violation of the policy was made to the insurer. Johnson v. Rhode Island Ins. Co., 172 N. C. 142, 186 N. C. 269, 119 S. E. 362.


Upon paying the loss by fire, insurer is entitled to subrogation to the rights of insured against the third person causing the loss, to the extent of the amount paid, both under the provisions of the statute and the general principles. Buckner v. United States Fire Ins. Co., 209 N. C. 640, 184 S. E. 520.

This section does not provide that insurer should be subrogated to rights of the mortgagee against the mortgagor.
and under the facts of this case insurer is not entitled to the subrogation claimed upon any equitable principle, and in- insurer's subrogation receipt from the mortgagee is not valid on binding as against the owner mortgagor. Id.

Where the mortgagee has insured the mortgaged property, and where the mortgagor has assumed the risk of loss under his contract of purchase, the insurer having paid the loss in question, the right of the insurer to recover may not be sold or transferred. Stuyvesant Ins. Co. v. Reid, 171 N. C. 513, 88 S. E. 779.

V. LIABILITY OF AGENT.

Where the general agent of a fire insurance company has upon petition removed a cause from the State to the Federal Court upon a policy of insurance that was void in that jurisdiction, but not in the jurisdiction of the court of this State, and the Federal Court has adjudicated that the plaintiff could not recover under the contract for a loss by fire, the plaintiff may thereafter bring action in the State court against the agents and recover damages from them in not inserting a blank in the policy that would have rendered it valid, the subject-matter of the latter action being based upon negligence and not on the policy contract, and the application of the doctrine of the election of remedies has no force. Case v. Ewbanks, Ewbanks & Co., 194 N. C. 775, 140 S. E. 709.

Where a nonresident defendant fire insurance company has upon petition removed a cause from the State to the Federal Court upon a policy of insurance that was void in that jurisdiction, but not in the jurisdiction of the court of this State, and the Federal Court has adjudicated that the plaintiff could not recover under the contract for a loss by fire, the plaintiff may thereafter bring action in the State court against the agents and recover damages from them in not inserting a blank in the policy that would have rendered it valid, the subject-matter of the latter action being based upon negligence and not on the policy contract, and the application of the doctrine of the election of remedies has no force. Case v. Ewbanks, Ewbanks & Co., 194 N. C. 775, 140 S. E. 709.

§ 58-178. Size of policy; notice; umpire; statement and blanks; policy issued to husband or wife on joint property.—No provisions of this chapter limit insurance companies to use of any particular size or manner of folding the paper upon which their policies are issued. If notice in writing signed by the insured, or his agent, is given before loss or damage by fire to the property of the company of any fact or condition stated in paragraphs (a), (b), (c), (d), (e), (f), of the standard form of policy set out in § 58-177, it is equivalent to an agreement in writing added thereto, and has the force of the agreement in writing referred to in the foregoing form of policy with respect to the liability of the company and the insurer; but this notice does not affect the right of the company to cancel the policy as therein stipulated.

The resident judge of the superior court of the district in which the property insured is located is designated as the judge of the court of record to select the umpire referred to in the foregoing form of policy. When any company demands or requires the insured, under any fire insurance policy, to select the umpire referred to in the foregoing form of policy, and has the force of the agreement in writing referred to in the foregoing form of policy with respect to the liability of the company and the insurer; but this notice does not affect the right of the company to cancel the policy as therein stipulated.

Art. 20. Deposits by Foreign Fire Insurance Companies.

§ 58-182. Amount and nature of deposits re-quired.—Unless otherwise provided in this article, every fire insurance company chartered by any other state or foreign government shall, by their general agent or through some authorized officer, deliver under oath to the commissioner of insurance of this state a statement of the amount of capital stock of the company, and deposit with him bonds of the United States, or of the state of North Carolina, or of the cities or counties of this state, or first mortgages on real estate situated in this state to be approved by the commissioner of insurance, as follows: Companies whose capital stock is five hundred thousand dollars or less, ten thousand dollars; companies whose capital stock is more than five hundred thousand dollars and not over one million dollars, twenty thousand dollars; companies whose capital stock is in excess of one million dollars, twenty-five thousand dollars; and every insurance company writing a fidelity, surety or casualty business in this state
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shall be required to deposit with the state securities of the same class enumerated above in the following amounts: Companies whose premium income derived from this state is less than $100,000.00 per annum, $25,000.00; companies whose premium income is in excess of $100,000.00 per annum, $50,000.00; and the commissioner of insurance shall thereupon give the agent a receipt for the same. With securities so deposited the company shall at the same time deliver to the commissioner of insurance a power of attorney authorizing him to transfer said securities or any part thereof for the purpose of paying any of the liabilities provided for in this article. The commissioner of insurance shall require each company to make good any depreciation or reduction in value of the securities. The securities required to be deposited by each insurance company in this article shall be delivered for safekeeping by the commissioner of insurance to the treasurer of the state, who shall receipt him therefor. For securities so deposited the faith of the state is pledged that they shall be returned to the parties entitled to receive them or disposed of as herein provided for. The securities deposited by any company under this article shall not, on account of such securities being in this state, be subjected to taxation, but shall be held exclusively for the protection of contract holders. (1909, c. 923, s. 1; 1911, c. 164, s. 1; Ex. Sess. 1913, c. 62, ss. 1, 2, 3; 1915, c. 166, s. 6; 1933, c. 60; C. S. 6442.)

Editor's Note.—Public Laws of 1933, c. 60, inserted the clause, about the middle of the section, requiring special deposits from casualty and surety companies.

§ 58-183. Right of company to receive interest on deposits.—The commissioner of insurance, at the time of receiving the securities, shall give to the company authority to draw the interest thereon, as the same may become due and payable, for the use of the company, and this authority shall continue in force until the company fails to pay any liability arising upon any policy made in favor of any person, firm, or corporation which shall be, at the time the liability arises, a resident of this state, or which shall own property in the state covered by policies issued. In case of such failure the corporation charged with which were paid. (1909, c. 923, s. 5; C. S. 6446.)

§ 58-184. Sale of deposits for payment of liabilities.—If the company fails to pay any of its liabilities on its contracts according to the terms thereof, after the liabilities have been adjusted between the parties in the manner prescribed by the contracts, if any manner is prescribed therefor, or after the same have been ascertained in any manner agreed upon by the parties or by the judgment, order, or decree of the court having jurisdiction of the subject, the commissioner of insurance shall, upon application of the party to whom the debt or money is due, and upon satisfactory proof that the notice herein required has been given to the company, proceed to sell at public auction such an amount of the securities as, with the interest in his hands, will pay the sum due and expenses of sale, and out of the proceeds of sale pay said sums and expenses; and the company shall be required forthwith to make good any deficit in the amount of the deposit caused by such sale. The party making application shall give to the company or to its agent in this state twenty days notice of his intention to apply to the commissioner of insurance for the sale of securities. The commissioner of insurance shall advertise the sale of the securities for thirty days prior to the day of the sale in some daily newspaper published in the city of Raleigh, and shall state in the advertisement the securities to be sold and the company depositing them, and shall mail a copy to the company. (1909, c. 923, s. 3; C. S. 6444.)

§ 58-185. Lien of policyholders; action to enforce.—Upon the securities deposited with the commissioner of insurance by any such insurance company, the holders of all contracts of the company who are citizens or residents of this state at such time, or who hold policies issued upon property in the state, shall have a lien for the amounts due them, respectively, under or in consequence of such contracts for just compensation of values, return premiums, or otherwise, and shall be entitled to be paid ratably out of the proceeds of said securities, if such proceeds be not sufficient to pay all of said contract holders. When any company depositing securities as aforesaid becomes insolvent or bankrupt or makes an assignment for the benefit of its creditors, any holder of such contract may begin an action in the superior court of the county of Wake to enforce the lien for the benefit of all the holders of such contracts. The commissioner of insurance shall be a party to the suit, and the funds shall be distributed by the court, but no cost of such suit shall be adjudged against the commissioner of insurance. (1909, c. 923, s. 4; C. S. 6446.)


§ 58-186. Substitution for securities paid.—Where the principal of any of the securities so deposited is paid to the commissioner of insurance, he shall notify the company or its agent in this state, and pay the money so received to the company upon receiving other securities of the character named in this article to an equal amount, or, upon the failure of the company for thirty days after receiving notice to deliver such securities to an equal amount to the commissioner of insurance, he may invest the money in any manner is prescribed therefor, or after the same have been ascertained in any manner agreed upon by the parties or by the judgment, order, or decree of the court having jurisdiction of the subject, the commissioner of insurance shall, upon application of the party to whom the debt or money is due, and upon satisfactory proof that the notice herein required has been given to the company, proceed to sell at public auction such an amount of the securities as, with the interest in his hands, will pay the sum due and expenses of sale, and out of the proceeds of sale pay said sums and expenses; and the company shall be required forthwith to make good any deficit in the amount of the deposit caused by such sale. The party making application shall give to the company or to its agent in this state twenty days notice of his intention to apply to the commissioner of insurance for the sale of securities. The commissioner of insurance shall advertise the sale of the securities for thirty days prior to the day of the sale in some daily newspaper published in the city of Raleigh, and shall state in the advertisement the securities to be sold and the company depositing them, and shall mail a copy to the company. (1909, c. 923, s. 3; C. S. 6444.)

§ 58-185. Lien of policyholders; action to enforce.—Upon the securities deposited with the commissioner of insurance by any such insurance company, the holders of all contracts of the company who are citizens or residents of this state at such time, or who hold policies issued upon property in the state, shall have a lien for the amounts due them, respectively, under or in consequence of such contracts for just compensation of values, return premiums, or otherwise, and shall be entitled to be paid ratably out of the proceeds of said securities, if such proceeds be not sufficient to pay all of said contract holders. When any company depositing securities as aforesaid becomes insolvent or bankrupt or makes an assignment for the benefit of its creditors, any holder of such contract may begin an action in the superior court of the county of Wake to enforce the lien for the benefit of all the holders of such contracts. The commissioner of insurance shall be a party to the suit, and the funds shall be distributed by the court, but no cost of such suit shall be adjudged against the commissioner of insurance. (1909, c. 923, s. 4; C. S. 6446.)


§ 58-186. Substitution for securities paid.—Where the principal of any of the securities so deposited is paid to the commissioner of insurance, he shall notify the company or its agent in this state, and pay the money so received to the company upon receiving other securities of the character named in this article to an equal amount, or, upon the failure of the company for thirty days after receiving notice to deliver such securities to an equal amount to the commissioner of insurance, he may invest the money in any such securities and hold the same as he held those which were paid. (1909, c. 923, s. 5; C. S. 6446.)

§ 58-187. Return of deposits.—If such company ceases to do business in this state, and its liabilities, whether fixed or contingent upon its contracts, to persons residing in this state or having policies upon property situated in this state have been satisfied or have been terminated, upon satisfactory evidence of this fact to the commissioner of insurance the state treasurer shall deliver to such company, upon the order of the commissioner of insurance, the securities in his possession belonging to it, or such of them as
§ 58-188. Deposit required before license granted; exception.—When any fire insurance company files an application with the commissioner of insurance to be admitted to do business in this state, he shall require of it a compliance with the provisions of this article before issuing a license to such company; but this article shall not apply to companies licensed to do a reinsurance business only. (1909, c. 923, s. 7; 1915, c. 166, s. 6; C. S. 6448.)


§ 58-189. Commissioner of insurance to procure insurance.—It is the duty of the commissioner of insurance to prepare a schedule of the different properties of the state and to procure policies of insurance thereon according to these schedules for such amounts as he is able to provide for with the provisions and appropriations for the insurance of state property, and to inspect and pass upon all policies of insurance, and he shall not permit the property to be insured or other property belonging to the state, as regards the form of contract, rate, description, and such other things as are necessary to have the policies in proper form. He shall keep a record in his department, showing the number and date of policy, the name of company, the amount insured, the amount of premium, date of expiration, the property insured, and its location. (Rev., s. 4825; 1901, c. 710, ss. 1, 2; 1903, c. 771, s. 1; 1905, c. 441; C. S. 6449.)

§ 58-190. Payment of premiums by state treasurer.—When the commissioner of insurance has placed the insurance on state property as provided for in this article and approved the bill for the same, the bill shall be paid out of the insurance appropriation of the department for which the insurance is effected, in an amount sufficient to insure the property up to fifty per centum of the scheduled value of such property, but this shall not apply to insurance on property of, or in charge of, the agricultural department and state prison. (Rev., s. 4827; 1905, c. 441, s. 2; 1919, c. 155; Ex. Sess. 1921, c. 61; 1923, c. 248; 1929, c. 100; C. S. 6450.)

§ 58-191. Payment of premiums by officers in charge.—The insurance on the property of, or in charge of, the agricultural department and the state’s prison shall be for the amount agreed upon by the commissioner of insurance and the officer or officers having such property in charge, and the premiums shall be paid out of the special funds of the agricultural department and state’s prison on the order of the commissioner of insurance. Before such board, public officer, or other person charged with the custody or safekeeping of any public building or other property of the state may pay any sum of money as premium for a policy of insurance thereon, they shall receive and file among their records a certificate of the commissioner of insurance that he has examined and approved of the policies of insurance, giving the number, amount, date, and term of such policies, the property covered, and the names of the companies in which they are written. (Rev., ss. 4826, 4827; 1901, c. 710, ss. 1, 2; 1903, c. 771, ss. 2, 3; 1905, c. 441, s. 2; C. S. 6451.)

§ 58-192. Information furnished commissioner by officers in charge.—It is the duty of the different officers or boards having in their custody any property belonging to the state to inform the commissioner, giving him in detail a full description of same, and to keep him informed of any changes in such property or its location or surroundings. (Rev., s. 4828; 1901, c. 710, ss. 1, 2; 1903, c. 771, s. 2; C. S. 6452.)

§ 58-193. Commissioner to inspect state property; plans submitted.—It is the duty of the commissioner at least once in each year, or oftener, if deemed necessary, to visit, inspect, and thoroughly examine each state institution or other state property with a view to its protection from fire, as well as to the safety of its inmates or the property therein in case of fire, and call to the attention of the board or officer having the same in charge any defect noted by him or any improvement deemed necessary. No board, commission, superintendent, or other person or persons authorized and directed by law to select plans and erect buildings for the use of the state of North Carolina or any institution thereof or for the use of any county, city, or incorporated town or school district shall receive and approve of any plans until they are submitted to and approved by the commissioner of insurance of the state as to the safety of the proposed buildings from fire, as well as the protection of the inmates in case of fire. (Rev., s. 4830; 1901, c. 710, ss. 1, 2; 1903, c. 771, s. 3; 1909, c. 880; 1919, c. 186, s. 3; C. S. 6453.)

§ 58-194. Report required of commissioner.—The commissioner of insurance must submit annually to the governor a full report of his official action under this article, with such recommendations as commend themselves to him, and it shall be embodied in or attached to his biennial report to the general assembly. (Rev., s. 4830; 1901, c. 710, ss. 1, 2; 1903, c. 771, s. 4; C. S. 6454.)

SUBCHAPTER IV. LIFE INSURANCE.

Art. 22. General Regulations of Business.

§ 58-195. Life insurance company defined; requisites of contract.—All corporations, associations, partnerships, or individuals doing business in this state, under any charter, compact, agreement, or statute of this or any other state, in involving an insurance, guaranty, contract, or pledge in this state with any citizen, or resident thereof, which does not distinctly involve an insurance, guaranty, contract, or pledge in this state with any citizen, or resident thereof, which does not distinctly state the amount of benefits payable, the manner of payment, and the consideration therefor. (Rev., s. 4773; 1899, c. 54, ss. 55; C. S. 6455.)

Editor's Note.—Many of the decided cases pertaining to
life insurance are necessarily determined by construing the particular policy issued in a given case, others depend upon the adjudication therewith of any conflicting stipulations in con- tracts and agency. None of these cases directly construes any provision of this code and are consequently not set out here. The following is a comprehen- sive treatment of the subject in the digests.

§ 58-196. Foreign companies; requirements for admission.—A company organized under the laws of any other country than the United States, in addition to the above require- aggregate amount of not less than five hundred thousand dollars. Any life company organized under the laws of any other country than the United States, in addition to the above require- ments, must make and maintain the deposit re- quired of such companies by article four of this chapter. (Rev. s. 4775; 1899, c. 54, s. 56; C. S. 6456.)

§ 58-197. Soliciting agent represents the company.—A person who solicits an application for in- surance upon the life of another, in any contro- versy relating thereto between the insured or his beneficiary and the company issuing a policy upon such application, is the agent of the company and not of the insured. (1907, c. 958, s. 1; C. S. 6457.)

This section does not attempt to prescribe the extent of the agent's authority or to convert a special or limited agency into one with general powers. Fountain v. Mutual Life Ins. Co., 53 F. (2d) 120, 125. See also Provident Mut. Life Ins. Co. v. Parsons, 70 F. (2d) 863.

Insurer Liable for Delay of Agent.—"If the defendant's agent wrongfully failed to deliver the policy within a rea- sonable short time after its receipt, during which time the plaintiff's intestate was in good health and ready, able, and willing to pay the premium on delivery, as stipulated, and plaintiff not made ill, the defendant could not withhold the delivery so as to release it from responsibility. American Trust Co. v. Life Ins. Co., 173 N. C. 158, 56, 92 S. E. 706." Fox v. Volunteer State Life Ins. Co., 185 N. C. 121, 124, 116 S. E. 256.

§ 58-198. Discrimination between insurers for- bidden.—A life insurance company doing busi- ness in this state shall not make any distinction or discrimination in favor of individuals between insurers of the same class and equal expectation of life in the amount of payment of premiums or rates charged for policies of life or endowment insurance, or in the dividends or other benefits payable thereon, or in any of the terms and conditions of the contracts it makes; nor shall any such company or any agent thereof make any contract of insurance or agreement as to such contract other than as plainly expressed in the policy issued thereon, nor pay or allow as induce- ment to insurance any rebate of premium payable on the policy, or any special favor or advantage in the dividends or other benefit to accrue thereon, or any valuable consideration or inducement whatever not specified in the policy contract of insurance; nor give, sell, or purchase, or offer to give, sell, or purchase as inducement to insurance or in any consideration therefor, any stocks, bonds, or other securities of any insurance company or other corporation, association, or partnership, or any dividends or profits to accrue therein, or anything of value whatsoever not specified in the policy. (Rev., s. 4775; 1899, c. 54, s. 57; 1903, c. 435, ss. 5, 10; 1911, c. 196, s. 7; C. S. 6458.)

Purpose of Section.—"The express provision and obvious purpose and policy of the statute are to prevent discrimi- nation as to the amount of risks accepted by insurance companies and, in aid and furtherance of this desirable purpose, to secure publicity by requiring that all the stipulations of the contract and all agreements between the insurer and the company in reference thereto shall be plainly expressed in the policy." Smathers v. Bankers Life Ins. Co., 151 N. C. 98, 102, 65 S. E. 746.

The purpose of the statute is to require the parties to incorporate in the contract of insurance anything which may pertain to the validity of the contract at the time it is written. New York Life Ins. Co. v. Gwyes, 22 F. Supp. 645.

Collateral Agreements with Agents of Insurer.—Transac- tions up to the issuance of a policy of life insurance merge therein upon its issuance and acceptance by the insured, and, in aid of furtherance of this desirable purpose, to secure publicity by requiring that all the stipulations of the contract and all agreements between the insurer and the company in reference thereto shall be plainly expressed in the policy. Smathers v. Bankers Life Ins. Co., 151 N. C. 98, 102, 65 S. E. 746.

When a collateral agreement delivered to insured with his policy of life insurance for the reduction of his premium thereon was made the condition of the delivery, it was necessarily a part of the contract and was to be evidenced in the policy. See Provident Mut. Life Ins. Co. v. Parsons, 70 F. (2d) 863

§ 58-199. Security life insurance—Payment of premiums. —Security life insurance may be admitted to do business in this state if it complies with the requirements of this chapter and, in aid and furtherance of this desirable purpose, to secure publicity by requiring that all the stipulations of the contract and all agreements between the insurer and the company in reference thereto shall be plainly expressed in the policy. Smathers v. Bankers Life Ins. Co., 151 N. C. 98, 102, 65 S. E. 746.

When a collateral agreement delivered to insured with his policy of life insurance for the reduction of his premium thereon was made the condition of the delivery, it was necessarily a part of the contract and was to be evidenced in the policy. Smathers v. Bankers Life Ins. Co., 151 N. C. 98, 102, 65 S. E. 746.

Same.—Effect on Note Given in Payment of Policy. —When the insured has given his note for the premiums on his life insurance policy, and has received for one year, in consideration of the policy, the first premium to be paid thereon, he cannot avoid the note by paying the premium on the ground of his having collaterally contracted with the company for deduction of certain amount by the insurer from the advantage of the provisions of this section. Security Life, etc., Co. v. Cost- ner, 149 N. C. 293, 63 S. E. 304.

Contract Not Void under Statute.—This section does not declare that a contract with a local agent which is prohibited by the statute and not enforceable. Smathers v. Bankers Life Ins. Co., 151 N. C. 98, 102, 65 S. E. 746.

Securities Life, etc., Co. v. Cost- ner, 149 N. C. 293, 63 S. E. 304.

"It would seem that the insured has a right to presume that the insurer has complied with all the requirements of law. Accordingly, it is held by the great weight of authority that when the insured attempts to enforce such a contract, made in good faith, against the unlicensed insurer, the latter will be estopped to escape liability under the contract by pleading his own infraction of law." Robinson v. Security Life, etc., Co., 163 N. C. 415, 421, 79 S. E. 681.

But a policyholder cannot enforce against the insurance company a severable collateral agreement to his policy contract of life insurance which is prohibited by this statute, upon the principle that the insurer is estopped from the purpose of the statute is to prevent discrimi- nation among policy holders of like class and expectancy, and, in aid and furtherance of this desirable purpose, to secure publicity by requiring that all the stipulations of the contract and all agreements between the insurer and the company in reference thereto shall be plainly expressed in the policy. Smathers v. Bankers Life Ins. Co., 151 N. C. 98, 102, 65 S. E. 746.

Purpose of Section.—"The express provision and obvious purpose and policy of the statute are to prevent discrimi- nation as to the amount of risks accepted by insurance companies and, in aid and furtherance of this desirable purpose, to secure publicity by requiring that all the stipulations of the contract and all agreements between the insurer and the company in reference thereto shall be plainly expressed in the policy. Smathers v. Bankers Life Ins. Co., 151 N. C. 98, 102, 65 S. E. 746.

Collateral Agreements with Agents of Insurer.—Transac- tions up to the issuance of a policy of life insurance merge therein upon its issuance and acceptance by the insured, and, in aid and furtherance of this desirable purpose, to secure publicity by requiring that all the stipulations of the contract and all agreements between the insurer and the company in reference thereto shall be plainly expressed in the policy. Smathers v. Bankers Life Ins. Co., 151 N. C. 98, 102, 65 S. E. 746.

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The exercise of an option given by a mutual life insurance company to one of its policyholders of greater value than that given to the others is illegal and void, and the policy is void under the provisions of Section 58-199. Misrepresentations of policy forbidden. No life insurance company doing business in this state, and no officer, director, solicitor, or other agent thereof, shall make, issue, or circulate, or cause to be made, issued, or circulated any estimate, illustration, circular, or statement of any sort misrepresenting the terms of the policy issued by it or the dividends or share of surplus to be received thereon, or shall use any name or title of any policy or class of policies misrepresenting the true nature thereof. Nor shall any such company, agent, or broker make any statement or misrepresentation to any person insured in said company of or in any other company, the purpose of inducing or tending to induce such person to lapse, forfeit, or surrender his said insurance. (1913, c. 95; C. S. 6459.)

§ 58-200. Medical examination required.—No life insurance company organized under the laws of this state, or doing business in this State shall enter into any contract of insurance in any twelve months' period in an amount in excess of five thousand dollars ($5,000) upon any one life within this State without having previously made or caused to be made a prescribed medical examination of the insured by a registered medical practitioner; and provided further, that where there has been no medical examination the policy shall not be rendered void nor shall payment be resisted on account of any misrepresentation as to the physical condition of the applicant, except in cases of fraud; and provided further, that this section shall not apply to contracts of insurance issued under the group plan. (Rev., s. 4779; 1899, c. 54, s. 58; 1903, c. 438, s. 5; 1919, c. 156, s. 5; 1925 c. 82; 1927, c. 384, s. 5; 1937, c. 660.)

It was not the purpose of this section to permit a recovery on an insurance policy issued without medical examination irrespective of the facts surrounding the transaction; otherwise the expression “except in cases of fraud” would have neither meaning nor significance. Potts v. Life Ins. Co., 206 N. C. 257, 260, 174 S. E. 121.

“In cases of fraud” a policy issued without medical examination stands upon the same footing as policies issued upon other forms of examination.

Statute A Part of Contract.—The provisions of this section, that where a policy of life insurance in a sum less than $5,000 is issued without a medical examination, insurer may not avoid the policy for fraudulent misrepresentation, but that insured did not procure the policy by false and fraudulent statements, insurer may not avoid liability under the policy, the provisions of the policy in conflict with the statute being unavailing to insurer. Eckard v. Metropolitan Life Ins. Co., 190 N. C. 422, 135 S. E. 861.

But Fraud Need Not Be Alleged in Direct Terms.—Where in an action upon an insurance policy it was conceded without proof of fraud that the insured made an application for reinstatement of a lapsed policy as well as an initial contract, it was held that the insurer’s answer set out elements of fraudulent misrepresentation sufficient to give rise to an issue and introduce the question in direct terms. Petty v. Pacific Mut. Life Ins. Co., 210 N. C. 500, 187 S. E. 806.

§ 58-199. Misrepresentations of policy forbidden. But Fraud Need Not Be Alleged if Policy Not Issued under This Section.—A policy not issued under the provisions of this section may be avoided for material misrepresentations which induce insurer to take the risk which it would not otherwise assume; therefore insurer need not prove that the misrepresentations were intentionally made. Equitable Life Assur. Soc. v. Ashby, 215 N. C. 280, 1 S. E. (2d) 680.

Policy Cannot Be Avoided unless Misrepresentations Were Fraudulently Made.—Where the jury finds that insured in a policy issued without medical examination was suffering with certain diseases stipulated in the policy as grounds for avoidance, but that insured did not procure the policy by false and fraudulent statements, insurer may not avoid liability under the policy, the provisions of the policy in conflict with the statute being unavailing to insurer. Eckard v. Metropolitan Life Ins. Co., 190 N. C. 422, 135 S. E. 861.

§ 58-201. Domestic companies to report outstanding policies and reinsurance fund calculated. —It is the duty of every life insurance company incorporated by the laws of this state to make returns in January of each year to the commissioner of insurance, showing all its policies and annuity

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bonds in force on the first day of that month, with such particulars of the same as are necessary for the valuation thereof as hereinafter directed. The commissioner of insurance shall thereupon compute, or cause to be computed, the value of such policies and bonds, or what is known as the reinsurance fund thereof, according to the American actuarial experience table of mortality and interest at the rate of four and a half per cent, or according to the actuaries' mortality and four per centum interest, or according to any other recognized standard of valuation as he deems best for the security of the business and the safety of the persons insured. Upon this valuation being made and a certificate thereof furnished by the commissioner of insurance, each company shall pay to such officer, to defray the expenses thereof, the sum of one cent for every thousand dollars of the whole amount insured by its policies so valued. The reserve fund hereinafter provided for shall not be available for or used for any other purpose than the discharge of policy obligations, but is a trust fund to be held and expended only for the benefit of policyholders. In case of the insolvency of the company, the reserve of outstanding policies may, with the consent of the commissioner of insurance, be used for the reinsurance of its policies to the extent of their pro rata part thereof. (Rev., s. 4777; 1903, c. 536, s. 4; 1905, c. 410; 1907, c. 1000, s. 7; C. S. 6461.)

§ 58-202. Reinsurance of risks regulated.—No domestic life insurance company may reinsure its risks without the permission of the commissioner of insurance, except to the extent of one-half of any individual risk. The receiver of any life insurance company organized under the laws of this state, when the assets of the company are sufficient for that purpose, and the consent of two thirds of its policyholders has been secured in writing, may reinsure all the policy obligations of such company in some other solvent life insurance company, or, when the assets are insufficient to secure the reinsurance of all the policies in full, he may reinsure such a percentage of each and every policy outstanding as the assets will permit, but there must be no preference or discrimination as against any policyholder, and the contract for such reinsurance by the receiver must be approved by the commissioner of insurance of this state before it has effect. (Rev., s. 4777; 1899, c. 54, s. 58; 1903, c. 536, s. 9; C. S. 6462.)

§ 58-203. Punishment for violation of law as to reinsurance and medical examination.—If any domestic life insurance company shall reinsure its risks, except by permission of the commissioner of insurance, exceeding one-half of any individual risk, or if any life insurance company organized under the laws of, or doing business in, this state shall enter into any contract of insurance upon lives within this state without having previously made or caused to be made a prescribed medical examination of the insured by a registered medical practitioner, such insurance company, or any officer, agent, or other person soliciting or effecting or attempting to effect, a contract of insurance contrary to this section, shall be deemed guilty of a misdemeanor, and shall be punished by a fine not exceeding one hundred dollars for each offense. (Rev., s. 3417; 1899, c. 54, s. 58; C. S. 6463.)

§ 58-204. Insurable interest as between stockholders, partners, etc.—Where two or more persons own stock or interests in the same corporation, partnership or business association and have heretofore contracted or hereafter contract with one another for the purchase, at the death of one, by the survivor or survivors of the stock, share or interest of the deceased, the person or persons making the contract of purchase shall be deemed to have, and are hereby declared to have, an insurable interest in the life or lives of the person or persons contracting to sell. (1941, c. 201.)

Editor's Note.—For comment on this enactment, see 19 N. C. Law Rev. 490.

§ 58-205. Rights of beneficiaries.—When a policy of insurance is effected by any person on his own life, or on another life in favor of some person other than himself having an insurable interest therein, the lawful beneficiary thereof, other than himself or his legal representatives, is entitled to its proceeds against the creditors and representatives of the person effecting the insurance. The person to whom a policy of life insurance is made payable may maintain an action thereon in his own name. Every policy of life insurance made payable to or for the benefit of a married woman, or after his issue assigned, transferred, or in any way made payable to a married woman, or to any person in trust for her or for her benefit, whether procured by herself, her husband, or by any other person, inures to her separate use and benefit and to that of her children, if she dies in his lifetime. (Rev., ss. 4771, 4772; Const., Art. X, s. 7; 1899, c. 54, s. 59; C. S. 6464.)

Cross References.—As to wife insuring life of husband, see § 52-9. As to payment of sum due minor insurance beneficiary, see § 2-52.

See § 58-206 and notes thereto.

Editor's Note.—See 13 N. C. Law Rev. 95.

Change of Beneficiary by Insolvent Insured.—While formerly an insolvent insured could not change, according to a provision in his policy, the beneficiary of his policy of life insurance from his estate to his wife, without consideration, against the rights of his creditors, this is now changed by this section. A Pearsall v. Bloodworth, 140 N. C. 628, 140 S. E. 333; Meadows Fert. Co. v. Godley, 204 N. C. 243, 167 S. E. 816.

A beneficiary in a policy of life insurance has only a contingent interest therein, and where the insured retains the right to change the beneficiary by the terms of the policy, he may do so, and where upon the death of the beneficiary the insured changes the beneficiary, in accordance with the terms of the policy, to a trustee for the use of certain creditors and heirs at law of the insured, the other creditors may not claim that the change in the beneficiary was void as being fraudulent as to them. Teague v. Fleet Life Ins. Co., 200 N. C. 450, 157 S. E. 421.

Rights Vest on Delivery of Policy.—"A policy of insurance is essentially like a gift by will, the only difference being that in the case of a policy of insurance the beneficiary acquires a vested interest when a policy is delivered, which becomes vested in possession or enjoyment at the death of the assured; while in the case of a gift by will it does not vest until the death of the testator. In other respects, and particularly in the case of a testamentary gift, they are alike. If a bequest is made to A. for life, with remainder to his children, those in esse at the death of the testator take a vested estate, which is open, however, and let in any after-born child of the testator's own stock or interests in the same corporate body, and if it takes the policy, as a contract between the company and the assured, as to those then in esse, but will come and let in any after-born child, and, in this case, whether of the first or second marriage. If they come within the general description, they will share under the policy." And in case
of death of one of the children his or her share will go to the personal representative of that child. Scull v. Aetna Life Ins. Co., 132 N. C. 30, 31, 43 S. E. 504.

Same—Beneficiary Dead.—When a person effecting a life insurance contract for the benefit of his wife and children, and at the time the policy was issued he had no wife, but did have two children, one of whom died before A.: Held, that upon A.'s death the money due on the policy should be divided between the surviving child and the administrator of the dead child. The insertion of "his wife" as a beneficiary, when he had no wife living, was a nullity. Hooker v. Sugg, 102 N. C. 115, 8 S. E. 775.

Relation of Beneficiary to Insurer.—The terms of the policy constitute a contract of the company to pay the specified amount to the beneficiary, and create direct legal rights between them. Hooker v. Sugg, 102 N. C. 115, 8 S. E. 919; Simmons v. Biggs, 99 N. C. 236, 5 S. E. 235. Under an ordinary policy the beneficiary has such an interest in the policy as to be entitled to the company to recover upon the death of the insured if the premiums have been paid and the insurance policy is otherwise in force, unless the insurance company can show it had been lawfully surrendered by her consent, or that the insured had duly and legally exercised the power reserved or permitted, and whether the policy is made payable to the person so effecting the same, whether or not the right to change the beneficiary is reserved or permitted, and whether or not the policy is made payable to the person whose life is insured if the beneficiary or assignee thereof, other than the insured or the person so effecting such insurance, or his executors or administrators, shall be entitled to its proceeds and avails against creditors and representatives of the insured and of the person effecting the same, whether or not the right to change the beneficiary is reserved or permitted, and whether or not the policy is made payable to the person whose life is insured if the beneficiary or assignee thereof shall predecease such person: Provided, that subsection (b) of this section shall not apply to life insurance policies written before the effective date of the statute. Com'r of Banks v. Yelverton, 204 N. C. 441, 168 S. E. 505.

58-206. Creditors deprived of benefits of life insurance policies except in cases of fraud.—If a policy of insurance, is effected by any person on his own life or on another life, in favor of a person other than himself, or, except in cases of transfer with intent to defraud creditors, if a policy of life insurance is assigned or in any way made payable to any such person, the lawful beneficiary is reserved or permitted, and whether or not the policy is made payable to the person so effecting such insurance, or his executors or administrators, shall be entitled to its proceeds and avails against creditors and representatives of the insured and of the person effecting the same, whether or not the right to change the beneficiary is reserved or permitted, and whether or not the policy is made payable to the person whose life is insured if the beneficiary or assignee thereof shall predecease such person: Provided, that subsection (b) of this section shall not apply to life insurance policies written before the effective date of the statute. Com'r of Banks v. Yelverton, 204 N. C. 441, 168 S. E. 505.

Editor's Note.—This section, in form an independent statute, contains provisions generally similar to §§ 58-207. § 58-207. Notice of nonpayment of premium required before forfeiture.—No life insurance corporation doing business in this state shall, within one year after the default in payment of any premium, installment, or interest, declare forfeited or lapsed any policy hereafter issued or renewed and not issued upon the payment of monthly or weekly premiums, or unless the same is a term insurance contract for one year or less, nor shall any such policy be forfeited or lapsed by reason of nonpayment, when due, of any premium, interest, or installment or any portion thereof required by the terms of the policy to be paid, within one year from the failure to pay such premium, interest, or installment, unless a written or printed notice stating the amount of such premium, interest, installment, or portion thereof due on such policy, the place where it shall be paid, and the person to whom the same is payable has been duly addressed and mailed, postage paid, to the person whose life is insured or the assignee of the policy, if notice of the assignment has been given to the corporation, at his or her last known postoffice address in this state, by the corporation or by any officer thereof or person appointed by it to collect such premium, at least fifteen and not more than forty-five days prior to the day when the same is payable, as regards policies which do not contain a provision for grace or are not entitled to grace in the payment of premiums and at least five and not more than forty-five days prior to the day when the same is payable, as regards policies which do contain a provision for grace or are entitled to grace in the payment of premiums. The notice shall also state that unless such premium, interest, installment, or portion thereof then due shall be paid to the corporation or to the duly appointed agent or person authorized to collect such premium, by or before the day it falls due, the policy and all payments thereon will become forfeited and void, except as to the right to a surrender value or paid-up policy, as in the contract provided. If the payment demanded by such notice shall be made within its time limit therefor, it shall be taken to be in full compliance with the requirements of the policy in respect to the due date of such payment, and no such policy shall in any case be forfeited or declared forfeited or lapsed until the expiration of thirty days after the mailing of such notice. The affidavit of any officer, clerk, or agent of the corporation, or of any one authorized to mail such notice, that the notice required by this section was duly addressed and mailed by the
corporation issuing such policy, shall be presumptive evidence that such notice has been duly given and shall constitute a waiver of the insured's rights, if the same is received within three years from the day upon which default was made in paying the premium, installment, interest, or portion thereof for which it is claimed that forfeiture ensued.

No insurance company doing business in this State and issuing health and/or accident insurance policies, other than contracts of group insurance or disability and/or accidental death benefits in connection with policies of life insurance, the premium for which is to be collected in weekly, monthly, or other periodical installments by authority of a payroll deduction order executed by the assured and delivered to such insurance company or the assured's employer authorizing the deduction of such premium in the form of a payroll deduction, wages, shall, during the period for which such policy is issued, declare forfeited or lapse any such policy hereafter issued or renewed until and unless a written or printed notice of the failure of the employer to remit said premium or installment thereof stating the amount or portion thereof due on such policy and to whom it must be paid, has been duly addressed and mailed to the person who is insured under such policy at least fifteen days before said policy is cancelled or lapse.

Editor's Note.—The Act of 1929 added the last two sentences to the first paragraph of this section. The Act of 1941 added the second paragraph.

Forfeiture by Unpaid Check.—"An agreement that a check is received in satisfaction of a note is not implied from the tender open. An application for reinstatement does not constitute a waiver by the insurer of forfeiture. Sellers v. Life Ins. Co. of Virginia, 222 N. C. 742, 743, 24 S. E. 2d (1943)." By authority of a payroll deduction order executed by the assured and delivered to such insurance company, or the assured's employer, the premium for which is to be collected in weekly, monthly, or other periodical installments from the assured's salary or wages, shall, during the period for which such policy is issued, declare forfeited or lapse any such policy hereafter issued or renewed until and unless a written or printed notice of the failure of the employer to remit said premium or installment thereof stating the amount or portion thereof due on such policy and to whom it must be paid, has been duly addressed and mailed to the person who is insured under such policy at least fifteen days before said policy is cancelled or lapse.

Editor's Note.—The Act of 1929 added the last two sentences to the first paragraph of this section. The Act of 1941 added the second paragraph.

Forfeiture by Unpaid Check.—"An agreement that a check is received in satisfaction of a note is not implied from the surrender or cancellation of the note. Until the check was presented for payment, it was the duty of the insurer, as holder of a note, to make demand on the person from whom the note was due the time to which it was extended, the policy was by its terms forfeited. Forfeitures, it is true, are not favored in the law, but promptness of payment is essential in the business of life insurance. Philadelphia Life Ins. Co. v. Hayworth, 296 Fed. 339, 343.

Notice of Forfeiture.—It is incumbent upon the insurance company to give notice that the premiums are due and that policy is not subject to forfeiture until 30 days after such notice is given. Aiken v. Atlantic Life Ins. Co., 173 N. C. 400, 92 S. E. 184.

Same.—Policy Issued before Statute.—Where an old policy issued before this statute was withdrawn and a new policy issued after this statute, notice must be given in accordance with the statute in order to have a legal forfeiture. Garland v. Jefferson Standard Life Ins. Co., 179 N. C. 67, 101 S. E. 516.

Same.—After Reinstatement.—Where there has been a default in payment of premiums, a new certificate and secured a reinstatement and an extension of time for payment, it is not necessary to again give the statutory notice of the time when the extension notes will become due. Philadelphia Life Ins. Co. v. Hayworth, 296 Fed. 339.

Waiver of Forfeiture.—Where a policy of life insurance is forfeited for failure to pay at maturity, notice given for the extension of payment of premium, the mailing of notice of the next regular quarterly premium by the insurer in compliance with this section, which notice does not demand payment of the balance due on the extended premium, is not a waiver by the insurer of forfeiture. Sellers v. Life Ins. Co., 205 N. C. 355, 171 S. E. 328.

Making Sufficient Tender.—After tender and failure of insurer to accept the tender the insurer must have to keep the tender open. An application for reinstatement does not alter the insured's rights, if the policy has not been forfeited. Aiken v. Atlantic Life Ins. Co., 173 N. C. 400, 92 S. E. 184.

Three Year Limitation.—In an action for the recovery of premiums paid on forfeited policies issued on the lives of relatives, where the evidence was to the effect that such policies were canceled for the nonpayment of premiums on 19 March, 1936, and that summons was issued 17 February, 1942, the action was barred by this section and § 1-52. Byrnes v. Life Ins. Co. of Virginia, 222 N. C. 742, 743, 24 S. E. 2d (1943).


§ 58-208. Minimum premium rates for assessment life insurance companies.—No assessment life insurance corporation, organization or association of any kind issuing policies or contracts upon the life of any resident of this state shall hereafter be organized or exist by the commissioner of insurance unless such corporation, organization or association adopt premium rates based upon the attained age of the assured at the time of issuance of the contract and such rates shall not be less than those fixed by the American Experience Table of Mortality or any other recognized table of mortality approved by the commissioner of insurance. Nothing contained in this section shall be construed to affect burial associations regulated under §§ 58-224 to 58-241, or railroad burial associations. (1939, c. 161.)

Editor's Note.—For comment on this enactment, see 17 N. C. Law Rev. 352.

§ 58-209. Distribution of surplus in mutual companies.—Every life insurance company doing business in this state upon the principle of mutual insurance, or the members of which are entitled to share in the surplus annually, or once in two, three, four, or five years, as its directors determine. In determining the amount of the surplus to be distributed there shall be reserved an amount not less than the aggregate net value of all the outstanding policies, this value to be computed by the American Experience Table of Mortality with interest not exceeding four and one-half per cent. (Rev., s. 4776; 1903, c. 536, s. 10; C. S. 6466.)

§ 58-210. Definition of group life insurance.—Group life insurance is hereby declared to be that form of life insurance covering not less than fifty employees with or without medical examination, written under a policy issued to the employer, the premium on which is to be paid by the employer or by the employer and employees jointly, and insuring only all of his employees, or all of any class or classes thereof determined by conditions pertaining to the employment, for amounts of insurance based upon any plan which will preclude individual selection, for the benefit of persons other than the employer: Provided, however, that when the premium is to be paid by the employer and employees jointly and the benefits of the policy are offered to all eligible employees, not less than seventy-five per centum of such employees may be so insured. Such group policy may provide that the term "employees" shall include the officers, managers and employees of subsidiary or affiliated corporations and the individual proprietors, partners and employees of affiliated individuals and firms, when the business of such subsidiary or affiliated corporations, firms or individuals is controlled by the common
employer through stock ownership, contract or otherwise.

The following form of life insurance is hereby declared to be group life insurance within the meaning of this law: Life insurance issued to a creditor or vendor, who or which shall be deemed to be the policyholder and for the purpose of this section the employer, insuring only all of the members, or only all of the members except those as to whom the evidence of insurability submitted is not satisfactory to the insurer, of a group of debtors or vendees, defined as follows: All of the borrowers, or borrowers and guarantors of borrowers, from one financial or other institution or from such institution and its subsidiary or affiliated companies, or all of the purchasers of securities, merchandise or other property from one vendor, or all of any class or classes of such debtors or purchasers determined by conditions pertaining to the type of indebtedness or purchase, under agreements by such debtors or such purchasers for the payment of the sum borrowed or the balance of the purchase price, as the case may be, in installments over a period of not more than ten years; when the premium, or any part thereof, for such insurance is to be paid, either directly or indirectly, by the insured debtors, guarantors, or debtors or vendees and the benefits of the policy are offered to all eligible debtors, guarantors of debtors or vendees, not less than seventy-five per centum of such debtors, guarantors of debtors or vendees may be so insured; no such group shall be eligible for insurance hereunder unless the new entrants to such group number at least one hundred persons annually; such policy may be issued to an assignee to whom such group shall be eligible for insurance hereunder and that no such statement shall be used in defense to a claim under the policy, unless it is contained in a written application.

(a) A provision that the policy shall be contestable after two years from its date of issue, except for nonpayment of premium and except for violation of the conditions of the policy relating to military or naval service in time of war.

(b) A provision that the policy, the application of the employer and the individual applicants, if any, of the employees insured, shall constitute the entire contract between the parties, and that all statements made by the employer or by the individual employees shall, in the absence of fraud, be deemed representations and not warranties, and that no such statement shall be used in defense to a claim under the policy, unless it is contained in a written application.

(c) A provision for the equitable adjustment of the premiums or the amount of insurance payable in the event of a misstatement in the age of the employee.

(d) A provision that the company will issue to the employer for delivery to the employee whose life is insured under such policy, an individual certificate setting forth a statement as to the insurance protection to which he is entitled, to whom payable, together with provision to the effect that in case of the termination of the employment for any reason whatsoever the employee shall be entitled to have issued to him by the company, without evidence of insurability, and upon application made to the company within thirty-one days after such termination, and upon the payment of the premium applicable to the class of risk to which he belongs and to the form and amount of the policy at his then attained age, a policy of life insurance in any one of the forms customarily issued by the company, except term insurance, in an amount equal to the amount of his protection under such group insurance policy at the time of such termination. The provisions of this subsection shall not apply to policies described in the second paragraph of § 58-210.

(e) A provision that to the group or class thereof originally insured shall be added from time to time all new employees of the employer eligible to insurance in such group or class.

Except as provided in this chapter it shall be unlawful to make a contract of life insurance covering a group in this State. Policies of group life insurance, when issued in this State by any
company not organized under the laws of this State, may contain, when issued, any provision required by the law of the state, territory, or district of the United States under which the company is organized; and policies issued in other states or countries by companies organized in this State, may contain any provision required by the laws of the State, territory, district or county in which the same are issued, anything in this section to the contrary notwithstanding. Any such policy may be issued or delivered in this State which in the opinion of the commissioner of insurance contains provisions on any one or more of the several foregoing requirements more favorable to the employer or to the employee than hereinbefore required. (1925, c. 58, s. 5; 1943, c. 597, s. 2.)

Editor's Note.—The 1943 amendment added the second sentence of subsection (6).

§ 58-212. Voting power under policies of group life insurance.—In every group policy issued by a domestic life insurance company, the employer shall be deemed to be the policyholder for all purposes within the meaning of this chapter, and, if entitled to vote at meetings of the company, shall be entitled to one vote thereat. (1925, c. 58, s. 3.)

§ 58-213. Exemption from execution. — No policy of group insurance, nor the proceeds there[or, when paid to any employee or employees thereunder, shall be liable to attachment, garnishment, or other process, or to be seized, taken, appropriated or applied by any legal or equitable process or operation of law, to pay any debt or liability of such employee, or his beneficiary, or any other person who may have a right thereunder, either before or after payment; nor shall the proceeds thereof, when not made payable to a named beneficiary, constitute a part of the estate of the employee for the payment of his debts. (1925, c. 58, s. 4.)

Art. 23. Registered Policies.

§ 58-214. Deposits to secure registered policies.—Any life insurance company, incorporated under the laws of this state, may deposit with the commissioner of insurance securities of the kind described in article six of this chapter, for the investment of the capital of insurance companies, or farm loan bonds issued by the federal land banks, or notes secured by real estate situated in another state approved by the committee hereinafter designated, to any amount not less than ten thousand dollars, which shall be legally transferred by it to him as commissioner of insurance and his successors for the common benefit of all the holders of its "registered" policies and annuity bonds issued under the provisions of this article; and these securities shall be held by him and his successors in office in trust for the purposes and objects specified herein.

All securities offered to the commissioner of insurance for deposit under this section shall, before acceptance by him, be approved by a committee, composed of the commissioner, the state treasurer, and the attorney-general; and when the securities are of the character prescribed by law and approved by a majority of the committee, the commissioner of insurance shall list them in a book of records kept in his department for that purpose. The committee shall endorse on the record, at the end of the list of the securities, its approval of the securities named in the list. The record shall contain a separate list or account of the securities deposited by each insurance company, so kept as to show at all times the total value of all securities on deposit for each company. No security may be withdrawn or substituted except upon the approval of the committee. All the securities, after being approved and listed, shall be deposited with the state treasurer, who shall give his receipt to the commissioner of insurance for them. The committee shall, twice a year, in the months of June and December, review and assess the value of all securities on deposit under this section. (Rev., s. 4780; 1905, c. 504, s. 12; 1009, c. 920, ss. 1, 2; 1911, c. 140, s. 1; 1917, c. 191, s. 2; C. S. 6467.)

Cross References.—As to investments in bonds guaranteed by the United States, see § 53-44. As to investments in bonds and notes secured by mortgages insured by the Federal Housing Administration, see § 33-45. See also § 10-50 as to investments in Federal Farm loan bonds, and see § 142-29 as to investments in refunding bonds of North Carolina.

§ 58-215. Additional deposits may be required.—Each company which has made deposits herein provided for shall make additional deposits from time to time, as the commissioner of insurance prescribes, in amounts of not less than five thousand dollars and of such securities as are described in the preceding section, so that the market value of the securities deposited shall always equal the net value of the registered policies and annuity bonds issued by the company, less such liens not exceeding such value as the company has against it. No company organized under this chapter shall be required to make such deposit until the net value of the policies in force, as ascertained by the commissioner of insurance, exceeds the amount deposited by said company under the preceding section. As long as any licensed company maintains its deposits as herein prescribed at an amount equal to or in excess of the net value of its registered policies and annuity bonds, as aforesaid, it is the duty of the commissioner of insurance to sign and affix his seal to the certificates, as required in this article, on every policy and annuity bond presented to him for that purpose by any company so depositing. (Rev., s. 4781; 1905, c. 504, s. 15; 1009, c. 920, s. 8; 1911, c. 140, s. 2; 1917, c. 191, s. 3; C. S. 6468.)

§ 58-216. Withdrawal of deposits.—Any such company whose deposits exceed the net value of all registered policies and annuity bonds it has in force, less such liens not exceeding such value as the company holds against them, may withdraw such excess or it may withdraw any of such securities at any time by depositing in their place others of equal value and of the character authorized by law; and as long as such company remains solvent and keeps up its deposits, as herein required, it may collect the interest and coupons on the securities deposited as they accrue; and any life insurance company may withdraw such securities by and with the consent of the policyholder only; and in case of such withdrawal, the certificate of registration in each case must be surrendered for cancellation, or a receipt
from the policyholder, satisfactory to the commissioner of insurance, must be produced before such withdrawal of deposits shall be allowed. (Rev., s. 4782; 1905, c. 504, s. 18; 1911, c. 134; C. S. 6469.)

§ 58-217. Manner of keeping deposits. — The securities deposited under this article shall be deposited and kept in the manner required by law for the keeping of other deposits of insurance companies, but separate from other deposits of the company. (Rev., s. 4783; 1905, c. 504, s. 19; C. S. 6470.)

§ 58-218. Record of securities kept by commissioner; deficit made good. — The commissioner of insurance shall keep a careful record of the securities deposited by each company, and when furnishing the annual certificates of value hereafter required in this article, he may enter thereon the face and market value of the securities deposited by such company. If at any time it appears from such certificate or otherwise that the value of securities held on deposit is less than the net value of the registered policies and annuity bonds issued by such companies, it is not lawful for the commissioner of insurance to execute the certificate on any additional policies or annuity bonds of such company until it has made good the deficit. If any company fails or neglects to make such deposits for sixty days it shall be deemed to be insolvent and shall be proceeded against in the manner provided by law in such cases. (Rev., s. 4784; 1905, c. 504, s. 16; C. S. 6471.)

§ 58-219. Registered policies certified. — After making the deposits provided for in this article no company may issue a policy of insurance or endowment or an annuity bond known or designated as "registered" unless it has upon its face a certificate in the following words: "This policy or annuity bond is registered and secured by pledge of bonds and stocks, or securities deposited with this department as provided by law," which certificate shall be signed by the commissioner of insurance and sealed with the seal of his office. Such policies and bonds shall be numbered as "registered" policies and annuity bonds, and a sample copy of such kind, class, and issue shall be kept in the office of the commissioner of insurance. All policies and bonds of each kind and class issued, and the copies thereof, filed in the office of the commissioner of insurance must have imprinted thereon some appropriate designating letter, combination of letters or terms identifying the special forms of contract, together with the year of adoption of such form, and whenever any change or modification is made in the form of contracts, policy, or bond, the designating letters or terms and year of adoption thereon shall be changed accordingly. (Rev., s. 4785; 1905, c. 504, s. 33; C. S. 6472.)

§ 58-220. Deposit for, and registration of, unregistered policies. — Every company which has made the deposit herein provided for may, at any time after the date on which it was made, deposit with the commissioner of insurance securities of the kind herein mentioned and in accordance with the provisions hereof, in an amount, inclusive of any amount deposited under the provisions of this law, equal to the net value of any nonregistered policies and annuity bonds which it has in force at that time, less such liens not exceeding such actual cash value as the company has against them, and the commissioner of insurance shall, when requested so to do, furnish such company with a certificate of the description mentioned in § 58-219, to be attached to each of said policies and annuity bonds. The commissioner of insurance shall enter upon each of such certificates the number of the policy or annuity bond to which it belongs and make a record of the same in his department. (Rev., s. 4786; 1905, c. 504, s. 17; C. S. 6473.)

§ 58-221. Record to be kept by commissioner; valuation; mutilated policies. — The commissioner of insurance shall prepare and keep such registers of registered policies and annuity bonds of such company until it has made the deposit herein provided for may, at any time after the date on which it was made, deposit with the commissioner of insurance securities of the kind herein mentioned and in accordance with the provisions hereof, in an amount, inclusive of any amount deposited under the provisions of this law, equal to the net value of any nonregistered policies and annuity bonds which it has in force at that time, less such liens not exceeding such actual cash value as the company has against them, and the commissioner of insurance shall, when requested so to do, furnish such company with a certificate of the description mentioned in § 58-219, to be attached to each of said policies and annuity bonds. The commissioner of insurance shall enter upon each of such certificates the number of the policy or annuity bond to which it belongs and make a record of the same in his department. (Rev., s. 4786; 1905, c. 504, s. 17; C. S. 6473.)

§ 58-222. Power of commissioner in case of insolvency. — If at any time the affairs of a life insurance company which has deposited securities under the provisions of this article, in the opinion of the commissioner of insurance, appear in such condition as to render the issuing of additional policies and annuity bonds by such company injurious to the public interest, the commissioner of insurance may take such proceedings against the
§ 58-223. Fees for registering policies.—Every company making deposits under the provisions of this article must pay to the commissioner of insurance for each certificate on registered policies or annuity bonds, including seal, a fee of fifty cents for those exceeding ten thousand dollars in amount and twenty-five cents for all under ten thousand dollars in amount, except policies for one hundred dollars and not exceeding five hundred dollars the fee shall be fifteen cents; for policies of one hundred dollars or less the fee shall be ten cents; for each certificate, including seal, for nonregistered policies issued in accordance with the provisions of this article, the fee shall be twenty-five cents. (Rev., s. 4788; 1905, c. 504, s. 20; C. S. 6475.)


§ 58-224. Mutual burial associations placed under supervision of burial association commissioner.—All mutual burial associations now organized and operating in the state of North Carolina, and all mutual burial associations hereafter organized and operating within said state, shall be under the general supervision of a burial association commissioner to be appointed by the governor of the state of North Carolina, whose term shall be for a period of four years and his salary to be fixed by the governor. (1941, c. 130, s. 2.)

Editor's Note.—This and the following sections down through § 58-241 are effective from July 1, 1941.

§ 58-225. Maintenance of separate branches, when operated for benefit of both races.—All burial associations now operating in the state of North Carolina and all burial associations hereafter organized and operated in the state of North Carolina, for the benefit of both races, shall maintain and operate two separate branches, and the provisions of article 24 shall apply to each branch as a separate association, except as hereinafter provided. (1941, c. 130, s. 3.)

§ 58-226. Requirements as to rules and by-laws.—All burial associations now operating within the state of North Carolina, and all burial associations hereafter organized and operating within the state of North Carolina shall have and maintain rules and by-laws embodying in substance the following:

Article 1. The name of this association shall be ………, which shall indicate that said association is a mutual burial association.

Article 2. The objects and purposes for which this association is formed and the purposes for which it has been organized, and the methods and plan of operation of any association already organized, shall be to provide a plan for each member of this association for the payment of one funeral benefit for each member, which benefit shall consist of a funeral in merchandise and service, with no free embalming or free ambulance service included in such benefits; and in no case shall any cash be paid. That no other free service or any other thing free shall be held out, promised or furnished in any case. Such funeral benefit shall be in the amount of one hundred dollars ($100.00) of merchandise and service, without free embalming or free ambulance service, for persons of the age of ten years and over, and in the amount of fifty dollars ($50.00) for persons under the age of ten years.

Article 3. Any person of either the white or colored race who has passed his or her first birthday, and who has not passed his or her sixteenth birthday, and who is in good health and not under treatment of any physician, nor confined in any institution for the treatment of mental or other disease, may become a member of such burial association by the payment of a membership fee of such person, or for such person and his family. (1905, c. 504, s. 21; C. S. 6475.)
modified as may be made or authorized by an act of the general assembly. The secretary-treasurer shall keep a record of all assessments made, dues collected and benefits paid. The books of the association, together with all records and bank accounts shall be at all times open to the inspection of the burial association commissioner or his duly constituted auditors or representatives.

It shall be the duty of the secretary or secretary-treasurer of each association to keep the books of the association posted up to date so that the financial standing of the association may be readily ascertained by the burial association commissioner or any auditor or representative employed by him. Upon the failure of any secretary or secretary-treasurer to comply with this provision, it shall be the duty of the burial association commissioner to employ an auditor or bookkeeper to take charge of the books of the association and do whatever work is necessary to bring the books up to date. The burial association commissioner shall have the power and authority to set a fee sufficient to pay the said auditor or bookkeeper for the work done upon the books of said association and the secretary or secretary-treasurer of the association shall pay the fees so specified by the burial association commissioner out of the funds of the burial association. This fee must be included in the twenty-five per cent allowed by law for the operation of the burial associations.

Article 5. Upon the death of any officer, his successor shall be elected by the board of directors for the unexpired term. The president, vice-president and secretary-treasurer shall be elected for a term of from one to five years, and shall hold office until his successor is elected and qualified, subject to the power of the board of directors to remove any officer for good cause shown: Provided, that any officer removed by the board of directors shall have the right of appeal to the membership of the association, such appeal to be heard at the next ensuing annual meeting of said membership.

Article 6. Each member shall be assessed according to the following schedule (or in multiples thereof) at the age of entry of the member: Provided such person shall at the age of entry of the member: Provided such person shall at the age of entry of the member:

Assessment Rate for Age Groups:

<table>
<thead>
<tr>
<th>Age Group</th>
<th>Assessment Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>First to tenth birthday</td>
<td>five cents (5c)</td>
</tr>
<tr>
<td>Tenth to thirtieth birthday</td>
<td>ten cents (10c)</td>
</tr>
<tr>
<td>Thirtieth to fiftieth birthday</td>
<td>twenty cents (20c)</td>
</tr>
<tr>
<td>Fiftieth to sixty-fifth birthday</td>
<td>thirty cents (30c)</td>
</tr>
</tbody>
</table>

(Ages shall be defined as having passed a certain birthday instead of nearest birthday.) Assessment shall always be made on the entire membership in good standing.

Article 7. No benefit will be paid for natural death occurring within thirty days from the date of the certificate of membership, which certificate shall express the true date such person becomes a member of this association, and the certificate issued shall be in acknowledgment of membership in this association. Benefits will be paid for death caused by accidental means occurring any time after date of membership certificate. No benefits will be paid in case of suicidal death of any member within one year from the date of the membership certificate. No agent or other person shall have authority to issue membership certificates in the field, but such membership certificates shall be issued at the home office of the association by duly authorized officers: The president, vice-president or secretary, and a record thereof duly made.

Article 8. Any member failing to pay any assessment within thirty days after notice shall be in bad standing, and unless and until restored, shall not be entitled to benefits. Notice shall be presumed duly given when mailed, postage paid, to the last known address of such members: Provided, moreover, that notice to the head of a family shall be construed as notice to the entire membership of such family in said association. Any member or head of a family changing his or her address shall give notice to the secretary-treasurer in writing of such change, giving the old address as well as the new, and the head of a family notifying the secretary-treasurer of change in address shall list with the secretary in such notice all the members of his or her family having membership in said association. Any member in bad standing may, within ninety days after the date of an assessment notice, be reinstated to good standing by the payment of all delinquent dues and assessments. Provided such person shall at the same time submit to the secretary-treasurer satisfactory evidence of good health, in writing, and no benefit will be paid for natural death occurring within thirty days after reinstatement. In case of death caused by accidental means, benefit will be in force immediately after reinstatement. Any person desiring to discontinue his membership for any reason shall communicate such desire to the secretary-treasurer immediately and surrender his or her certificate of membership. Any adult member who is the head of a family, and who, with his family, has become in bad standing, shall furnish to the secretary-treasurer satisfactory evidence of the good health of each member desired to be reinstated in writing.

Article 9. The benefits herein provided are for the purpose of furnishing a funeral and burial service for a deceased member. The service shall be in keeping with the services and casket, sold at the same price, similar to that provided and charged by reputable funeral directors of this or other like communities.

Article 10. It is understood and stipulated that the funeral and burial service provided in article nine hereof shall be rendered by (give name of funeral director and town) as and until the funeral director is designated in these rules and by-laws as the official funeral director of this association, and such funeral director shall be, by the secretary-treasurer of this association, immediately notified upon the death of any member, and upon the death of any member it shall be the duty of his or her nearest relative to notify the secretary-treasurer of the association of the death of such member. In the event a member in good standing shall die at a place beyond the territory served by the above named funeral director, the secretary of this association, being notified of such death, shall cause the deceased to receive a funeral and burial service equal to that provided for in these
by-laws. The benefits provided for are to be payable to the funeral director rendering such funeral and burial service, which payment the secretary-treasurer is authorized to make. If the secretary-treasurer of the association shall fail, on demand, to provide the benefits as listed in article nine of these rules and by-laws by arrangement with the official funeral director serving the community in which the services are required, then the benefits shall be paid in cash to the representative of the deceased qualified under law to receive such payments.

Article 11. If the proceeds of one assessment on the entire membership produces more than enough for burial or burials, on account of which said assessment is made, then the balance shall be placed in the treasury of the association to apply on future burials. Assessments shall be made in such multiples of the assessment rate as is necessary to provide a fund to take care of anticipated deaths. Whenever possible, assessments will be made at definitely stated intervals so as to reduce the cost of collection and to prevent lapse.

Article 12. In the event the proceeds of one assessment on the entire membership does not prove sufficient at any time to yield the benefit provided for in these by-laws, then the secretary-treasurer shall notify the burial association commissioner who shall be authorized, unless the membership is increased to that point where such assessment is sufficient, to cause liquidation of said association, and may transfer all members in good standing to a like organization or association.

Article 13. All legitimate operating expenses of the association shall be paid out of the assessments made at definitely stated intervals so as to reduce the cost of collection and to prevent lapse. In the expenses of operation shall be included an amount sufficient to pay burial association commissioner and two or more auditors, with office expenses, all not to exceed an outlay of twenty-five thousand dollars ($25,000.00) per year.

Article 14. Special meetings of the association membership may be called by the secretary-treasurer when by him deemed necessary or advisable, and he shall call a meeting when petitioned to do so by sixty-six and two-thirds per cent of the members of said association who are in good standing.

Article 15. The secretary-treasurer shall, upon satisfactory evidence that membership was granted to any person not qualified at the time of entry as provided under article three of these by-laws, refund any amounts paid as assessment, and shall record the same in the membership roll.

Article 16. Any member may call a meeting when petitioned to do so by fifty per cent of the members present in good standing. In case of a tie vote, the secretary-treasurer shall have full power and authority to issue such license upon proof satisfactory to such commissioner that such person is capable of soliciting burial association memberships, is of good moral character and recommended by the association in behalf of which such membership solicitations are to be made. The burial association commissioner may reject the application of any person who does not meet the requirements set out by him as to capacity and moral fitness on recommendations by the association. Upon the issuing of a license to solicit membership in any burial association, such person shall be required to pay in cash, at the time of issuing license to such applicant, to the burial association commissioner, the sum of ten dollars ($10.00); moneys derived from this fee or charge to be and remain in the department or office of such burial association commissioner, for supervision of burial associations in this state, subject to withdrawal for expenses of supervision by authority of the burial association commissioner. It shall not be necessary that the president or secretary-treasurer of any burial association shall ob-
tain a license for soliciting membership in any association, of which such person is president or secretary-treasurer. Membership certificates shall not be issued by a solicitor in the field, but shall be reported to the office of the association and there issued and a record made of such issuance at the time such certificate is so issued. (1941, c. 130, s. 5.)

§ 58-228. Assessments against associations for supervision expense.—In order to meet the expense of supervision, the burial association commissioner shall prorate the amount of supervisory cost over and above any other funds in his hands for this purpose and assess each association on a pro rata basis in accordance with the number of members of each association, which assessment shall in no case exceed twenty-five thousand dollars ($25,000.00), and such association shall remit to the burial association commissioner his pro rata part of the assessment as fixed by the burial association commissioner, which expense shall be included in the twenty-five per cent expense allowance as provided in article thirteen. This assessment shall be made on the first day of July of each and every year and said assessment shall be paid within thirty days thereafter. In case any association shall fail or refuse to pay such assessment within thirty days, it shall be the duty of the burial association commissioner to transfer all memberships and assets of every kind and description to the association or other organization or official thereof. (1941, c. 130, s. 6; 1943, c. 272, s. 2.)

Editor's Note.—The 1943 amendment added the second and third sentences, and inserted in the first sentence the words "which assessment shall in no case exceed twenty-five thousand dollars ($25,000.00)."

§ 58-229. Unlawful to operate without written authority of commissioner.—It shall be unlawful for any person, firm or corporation, association or organization to organize, operate, or in any way solicit members for a burial association, or for participation in any plan, scheme, or device similar to burial associations, without the written authority of the burial association commissioner, and any person, firm or corporation violating the provisions of this section shall be guilty of a misdemeanor and upon conviction thereof shall be fined not less than two hundred and fifty dollars ($250.00) or imprisoned not less than thirty days in jail, or both, in the discretion of the court. (1941, c. 130, s. 7.)

§ 58-230. Penalty for failure to operate in substantial compliance with article 24.—If any burial association or other organization or official thereof, or any person operates or allows to be operated a burial association on any plan, scheme or by-laws not in substantial compliance with the by-laws set forth in § 58-226, the burial association commissioner may revoke any authority or license granted for the operation of such burial association, and any person, firm or corporation or association convicted of the violation of this section shall be guilty of a misdemeanor and shall be fined not less than two hundred and fifty dollars ($250.00) or imprisoned not less than one year in jail, or both, in the discretion of the court. (1941, c. 130, s. 8.)

§ 58-231. Penalty for wrongfully inducing person to change membership.—Any burial association official, agent or representative thereof or any person who shall use fraud or make any promise not part of the printed by-laws, or who shall make or allow to be made any false entry on the books of the association with intent to deceive or defraud any member thereof, or with intent to conceal from the burial association commissioner or his deputy or agent, or any auditor authorized to examine the books of such association, under the supervision of the burial association commissioner, shall be guilty of a misdemeanor and upon conviction thereof shall be fined not less than two hundred and fifty dollars ($250.00), or imprisoned in the common jail for not less than twelve months, or both, in the discretion of the court. (1941, c. 130, s. 9.)

§ 58-232. Penalty for making false and fraudulent entries.—Any burial association official who makes or allows to be made any false entry on the books of the association with intent to deceive or defraud any member thereof, or with intent to conceal from the burial association commissioner or his deputy or agent, or any auditor authorized to examine the books of such association, shall be guilty of a misdemeanor and upon conviction thereof shall be fined not less than two hundred and fifty dollars ($250.00), or imprisoned in the common jail for not less than twelve months, or both, in the discretion of the court. (1941, c. 130, s. 10.)

§ 58-233. Accepting application without collecting fee.—Any burial association official, agent or representative, or any other person who shall accept an application for membership in any association without collecting the fee from any such person making such application for membership, shall be guilty of a misdemeanor and upon conviction thereof shall be fined not less than two hundred and fifty dollars ($250.00), or imprisoned not less than twelve months in the common jail, or both, in the discretion of the court. (1941, c. 130, s. 11.)

§ 58-234. Removal of secretary-treasurer for failure to maintain proper records.—Any burial association secretary or secretary-treasurer who fails to maintain records to the minimum standards required by the burial association commissioner shall be by such commissioner removed from office and another elected in his stead, such election to be immediate and by the board of directors of said burial association upon notice of such removal. (1941, c. 130, s. 12.)

§ 58-235. Acceptance of donations, failure to make proper assessments, etc., made misdemeanor.—Any person or persons who accept donations from any source, or who contribute money or funeral services or free embalming, free ambulance service or any other thing free of charge, acting for any burial association, directly or indirectly, or who so acting shall in any way fail to assess for the amount needed to pay death losses and allowable expenses, shall be guilty of a misdemeanor
§ 58-236. Right of appeal upon revocation of license.—Upon the revocation of any license or authority by the burial association commissioner, under any of the provisions of article 24, the said association or individual whose license has been revoked, shall have right of appeal from the action of said burial association commissioner revoking such license or authority to the superior court of the county in which such burial association may be located: Provided, said association shall give notice of appeal in writing to the burial association commissioner within ten days from the date of order revoking the said license and the said association giving notice of appeal shall deposit with the burial association commissioner an amount sufficient to cover appeal fees, which the burial association commissioner shall pay to the clerk of the superior court. Upon receipt of said notice of appeal, the burial association commissioner shall file with the clerk of the superior court of the county in which the burial association is located the decision of the burial association commissioner and the clerk of the superior court shall transfer the appeal to the civil issue docket as in cases of appeal from a justice of the peace and the same shall be heard de novo. If upon the revocation of a license of a burial association by the burial association commissioner and where the burial association gives the proper notice of appeal, the burial association shall be permitted to operate until a final decision has been made by the higher court. (1941, c. 130, s. 14; 1943, c. 272, s. 4.)

Editor's Note.—The 1943 amendment struck out the words "as in other cases of appeal, and the matter shall be heard de novo," formerly ending the first sentence, and inserted in place thereof all of the section beginning with the proviso

§ 58-237. Bond of secretary or secretary-treasurer of burial associations.—The secretary or secretary-treasurer of any burial association shall, before entering upon the duties of his office and for the faithful performance thereof, execute a bond payable to the association in some bonding company licensed to do business in this state, to be approved by the burial association commissioner, in a sum not less than twenty-five per cent of the surplus of the said association as shown by the financial statement rendered December thirty-first of each year, but in no event shall said bond be less than one thousand dollars ($1,000.00) and the said bond shall be deposited with the burial association commissioner for safekeeping: Provided, that if any association operates a branch for members of a colored race and the officers of both associations are the same, then the provisions of this section shall apply as of one association: Provided, further, however, that any burial association, with the consent and approval of the burial association commissioner, may give a bond secured by deed of trust on real estate situated in North Carolina, in lieu of procuring said bond from a bonding company; and the bond thus given is not to exceed tax value for the current year of the real estate securing the same. The said deed of trust is to be deposited with the burial association commissioner and the said deed of trust must constitute a first lien on the property secured by the deed of trust. (1941, c. 130, s. 15; 1943, c. 272, s. 5.)

Editor's Note.—The 1943 amendment rewrote this section.

§ 58-237.1. Number of assessments; reduction and increase.—Each association shall make not less than eight single or four double assessments per annum until such association shall have on hand a surplus of three dollars ($3.00) per member as shown on the annual statement herein required to be filed by the association. When any association has accumulated such surplus, the association, with the consent of the burial association commissioner may reduce the number of assessments to be made in any one year, which number shall be fixed by the burial association commissioner: Provided, however, that the burial association commissioner shall have the power to increase the number of assessments to be made in any one year when in his opinion the same shall be necessary in order to take care of the death loss. (1943, c. 272, s. 6.)

§ 58-237.2. Minimum membership required.—Each burial association shall at all times maintain an active membership of at least eight hundred members and should any association fail to secure the same within ninety days from the date of the granting of its charter, or at any time allow its active membership to fall below eight hundred members, the burial association commissioner shall revoke its license and transfer its membership to another association. (1943, c. 272, s. 6.)

§ 58-237.3. Procedure where burial association official or employee transacts business fraudulently, etc.—When after examination the burial association commissioner is satisfied that any burial association official, employee, or representative has failed to comply with any provision of § 58-226, or is exceeding its powers, or is not carrying out its contracts in good faith, or is transacting business fraudulently, the burial association commissioner shall call a meeting of all officers of said association and present the facts and the officers of said association shall immediately call a meeting of the said association membership. A meeting of the said association membership shall constitute a quorum when as many as fifteen of the members are present. When the membership shall meet, it shall be the duty of the burial association commissioner to submit all of the facts relative thereto to the officers and membership present in the said meeting. It shall then become the duty of the membership to proceed to the election of a new officer to fill the unexpired term of the officer whom the charges have been brought against by the burial association commissioner. If the membership of the burial association fails and refuses to elect a new officer, then it shall be the duty of the burial association commissioner to cancel the license of the said burial association and transfer its membership, together with all of its assets to another association that is found by the burial association commissioner to be in good sound financial condition. The burial association shall have the right of appeal from this decision as set up in § 58-236. (1943, c. 272, s. 6.)

§ 58-237.4. Making false or fraudulent statement a misdemeanor.—Any officer or employee of
any burial association authorized to do business under this article, who shall knowingly or wilfully make any false or fraudulent statement or representation in or with reference to any application for membership or for the purpose of obtaining money from or benefit any burial association transacting business under this article, or who shall make any false financial statement to the burial association commissioner or to its membership shall be guilty of a misdemeanor and shall be fined or imprisoned in the discretion of the court. (1943, c. 272, s. 6.)

§ 58-238. State-wide organization of associations.—It shall be lawful for the several mutual burial associations of the state of North Carolina, in good standing, to organize and provide for a state-wide organization of mutual burial associations, which organization shall be for the mutual and general suggestive control of mutual burial associations in the state of North Carolina. Such organization shall have such name as agreed upon by the membership and article of organization shall have such name as agreed upon by the membership in meetings, and to be composed of members as are lawfully operating in the state and who pay their dues to such association. (1941, c. 130, s. 16.)

§ 58-239. Article 24 deemed exclusive authority for organization, etc., of mutual burial associations.—Article 24 shall be deemed and held exclusive authority for the organization and operation of mutual burial associations within the state of North Carolina, and such associations shall not be subject to any other laws respecting insurance companies of any class. (1941, c. 130, s. 17.)

§ 58-240. Operation of association in violation of law prohibited.—No person, firm or corporation shall operate as a burial association in this state unless incorporated under the laws of the state of North Carolina, or be composed of a membership constituting an association complying with all the rules, regulations, sections and articles of article 24; and licensed and approved by the burial association commissioner of the state of North Carolina. (1941, c. 130, s. 18.)

§ 58-241. Appointment and removal of burial association commissioner; bond.—The burial association commissioner provided for in this act shall be appointed by the governor for a term of four years, subject to removal for cause, and shall hold office until his successor is appointed and qualified. Such burial association commissioner shall give bond approved by the insurance commissioner of the state of North Carolina in the sum of ten thousand dollars ($10,000.00), conditioned for his faithful application of all funds coming into his hands by virtue of his office. (1941, c. 130, s. 19.)

§ 58-241.1. Election for benefits or return of assessments on death of member in armed forces.—If any member of a burial association who is in good standing should die while serving in the military or naval forces of the United States, the good standing should die while serving in the military or naval forces of the United States, the body of the deceased is returned for burial to the territory served by the burial association. Such election must be made within one year from the official notification of death. Acceptance by the spouse or the next of kin of paid-in assessments shall be a complete release to the burial association. In the event the spouse or the next of kin shall not elect to receive the paid-in assessments as settlement of all claims against the burial association, then the spouse or the next of kin shall be entitled to the benefits prescribed by the by-laws of the burial association at any time the body of the deceased is returned for burial to the territory served by the burial association. (1943, c. 732, s. 1.)

§ 58-241.2. Member in armed forces failing to pay assessments; reinstatement.—If a member of a burial association who is in the military or naval forces of the United States fails to pay any assessment, he shall be in bad standing, and unless and until restored, shall not be entitled to benefits. However, the said member shall be reinstated in the burial association upon application made by him at any time until twelve months after his discharge from the military or naval forces of the United States, notwithstanding his physical condition and without the payment of assessments which have become due during his service in the military or naval forces of the United States. Benefits will be in force immediately after such reinstatement. (1943, c. 732, s. 2.)

§ 58-241.3. Prior death of member in armed forces.—If a member of a burial association who was in good standing, has, before March 9, 1943, died while serving in the military or naval forces of the United States, the provisions of § 58-241.1 shall be applicable: Provided, the spouse, if there is one, or the next of kin in the event there is no spouse, must elect to receive the paid-in assessments within one year after March 9, 1943, or be deemed to have elected to receive benefits provided by the by-laws of the burial association. (1943, c. 732, s. 3.)

SUBCHAPTER V. AUTOMOBILE LIABILITY INSURANCE.

Art. 25. Regulation of Automobile Liability Insurance Rates.

§ 58-242. Approval by commissioner of insurance of automobile liability insurance rates.—Every person, association or corporation authorized to transact automobile liability and/or property damage and/or collision insurance business within this state shall file with the commissioner of insurance on or before their effective date, the classification of risks, rules, rates, and rating plans, for writing such insurance, approved or made by such insurer or by any rating organization of which it is a member, none of which shall become effective until approved by the commissioner of insurance. The commissioner of insurance shall within ten days after the filing of each classification of risks, rules, rates and rating plans, indicate in writing his approval or disapproval thereof with his reasons therefor. Such filing may be made on behalf of an insurer by the rating organization of which it is a member. Any bureau organized in this state for making and/or administering automobile rates and rating plans shall provide for equal representation of stock and non-stock insurers upon its governing and all other committees.
and shall admit to membership any insurer applying therefor. (1933, c. 283, s. 1.)

The most important feature of this legislation is the authorization of rate regulation by the commissioner of insurance. Insurance premium rate regulation has been generally upheld as an exercise of the police power, since insurance is a business affected with a public interest. See N. C. Law Rev. 225.

§ 58-243. Compliance with fixed rates mandatory.—Every person, association, or corporation authorized to transact the aforesaid insurance business within this state shall comply with the rates and rules affecting such rates of the rating organization in which it has membership or whose rates it adopts as its standard, or with the rates and rules which such insurer has filed with the commissioner of insurance. (1933, c. 283, s. 2.)

§ 58-244. Adjustment of unreasonable rates.—It shall be the duty of the commissioner of insurance, after due notice and a hearing before him, to order an adjustment of rates on any such risks or classes of risks whenever it shall be found by him that such rates are excessive or unreasonable or that any insurer is discriminating unfairly between its policyholders whose risks are of essentially the same hazard. The findings, determinations and orders of the commissioner of insurance shall be subject to review on their merits by appeal to the superior court of Wake county. (1933, c. 283, s. 3.)

§ 58-245. Refunds by mutuals and exchanges unaffected.—Nothing in this article shall be construed to limit the method of determining rates or the plan of operations of any mutual insurance company or inter-insurance exchange in this state, or prevent refund to all policyholders of the same class of any portion of the annual premium not required to defray the expense of such insurance. (1933, c. 283, s. 4.)

§ 58-246. North Carolina automobile rate administrative office created; objects and functions.—There is hereby created a bureau to be known as the North Carolina automobile rate administrative office which office shall be established in the compensation rating and inspection bureau of North Carolina, created under § 97-102 and shall be a branch and under the management of the general manager of the compensation rating and inspection Bureau of North Carolina, with the following objects, functions and sources of income:

(a) To maintain rules and regulations and fix maximum rates for automobile bodily injury, property damage and collision insurance and equitably adjust the same as far as practicable in accordance with the hazard of the different classes of risks as established by said bureau.

(b) To furnish upon request of any person carrying this form of insurance in the state or to any member of the North Carolina automobile rate administrative office, upon whose risk a rate has been promulgated, information as to the rating, including the method of its capitation, and to encourage safety on the highways and streets of the state, by offering reduced premium rates under a uniform system of experience rating as may be approved by the commissioner of insurance. (1939, c. 394, s. 1.)

§ 58-247. Membership as a prerequisite for writing insurance; governing committee; rules and regulations; expenses; commissioner of insurance ex-officio chairman.—Before the commissioner of insurance shall grant permission to any stock, nonstock, or reciprocal insurance company or any other insurance organization to write automobile bodily injury, property damage and collision insurance in this state, it shall be a requisite that they shall subscribe to and become members of the North Carolina automobile rate administrative office.

(a) Each member of the North Carolina automobile rate administrative office writing the above classes of insurance in North Carolina shall, as a requisite thereto, be represented in the aforesaid bureau and shall be entitled to one representative and one vote in the administration of the affairs of the bureau. They shall, upon organization, elect a governing committee which governing committee shall be composed of equal representation by stock and nonstock members.

(b) The bureau, when created, shall adopt such rules and regulations for its orderly procedure, as shall be necessary for its maintenance and operation. The expense of such bureau shall be borne by its members by quarterly contributions to be made in advance, such contributions to be made in advance by prorating such expense among the members in accordance with the amount of gross premiums derived from automobile bodily injury, property damage and collision insurance in North Carolina during the preceding year ending December 31, 1938, and members entering such bureau since that date to advance an amount to be fixed by the governing committee. After the first fiscal year of operation of the bureau the necessary expense of the bureau shall be advanced by the members in accordance with rules and regulations to be established and adopted by the governing committee.

(c) The commissioner of insurance of the state of North Carolina, or such deputy as he may appoint, shall be ex-officio chairman of the North Carolina automobile rate administrative office and shall preside over all meetings of the governing committee and other meetings of the bureau and it shall be his duty to determine any controversy that may arise by reason of a tie vote between the members of the governing committee. (1939, c. 394, s. 2.)

§ 58-248. Personnel and assistants; general manager; authority of commissioner of insurance.—In order to carry into effect the objects of §§ 58-246 to 58-248, the bureau members shall immediately elect its governing committee who shall employ and fix the salaries of such personnel and assistants as are necessary, but the general manager of the compensation rating and inspection bureau of North Carolina shall be the general manager also of the North Carolina automobile rate administrative office and the commissioner of insurance is hereby authorized to compel the production of all books, data, papers and records and any other data necessary to compile statistics for the purpose of determining the pure cost and expense loading of automobile bodily injury, property damage and collision insurance in North Carolina and this information shall be available and for the use of the North Carolina automobile rate administrative office for the capitulation and promulgation of rates on automobile bodily injury, prop-
erty damage and collision insurance. All such rates compiled and promulgated by such bureau shall be submitted to the commissioner of insurance for approval and no such rates shall be put into effect in this state until approved by the commissioner of insurance and not subsequently disapproved: Provided §§ 58-246 to 58-248 shall not apply to publicly owned vehicles. (1939, c. 394, s. 3.)

SUBCHAPTER VI. ACCIDENT AND HEALTH INSURANCE.


§ 58-249. Form, classification, and rates to be approved by commissioner of insurance.—No policy of insurance against loss or damage from the sickness or the bodily injury or death of the insured by accident shall be issued or delivered to any person in this state until a copy of the form thereof and of the classification of risks and the premium rates pertaining thereto have been filed with the commissioner of insurance; nor shall it be so issued or delivered until the expiration of thirty days after it has been filed unless the commissioner shall sooner give his written approval thereto. If the commissioner shall notify, in writing, the company, society, or other insurer which has filed such form that it does not comply with the requirements of law, specifying the reasons for his opinion, it shall be unlawful thereafter for any such insurer to issue any policy in such form. The action of the commissioner in this regard shall be subject to review by any court of competent jurisdiction; but nothing in this article shall be construed to give jurisdiction to any court not already having jurisdiction. (1911, c. 209, s. 1; 1913, c. 91, s. 1; C. S. 6477.)

§ 58-250. Specifications as to form of policy.—No such policy shall be so issued or delivered (1) unless the entire money and other considerations therefor are expressed in the policy; nor (2) unless the time at which the insurance thereunder takes effect and terminates is stated in a portion of the policy preceding its execution by the insurer; nor (3) if the policy purports to insure more than one person; nor (4) unless every printed portion thereof and of any endorsements or attached papers shall be plainly printed in type of which the face shall be not smaller than fourteen point; nor (5) unless a brief description thereof be printed on its first page, and on its filing back in type of which the face shall not be smaller than fourteen point; nor (6) unless the exceptions of the policy be printed with the same prominence as the benefits to which they apply: Provided, however, that any portion of such policy which purports, by reason of the circumstances under which a loss is incurred, to reduce any indemnity promised therein to an amount less than that provided for the same loss occurring under ordinary circumstances shall be printed in bold-face type and with greater prominence than any other portion of the text of the policy. (1913, c. 91, s. 2; C. S. 6478.)

§ 58-251. Standard provisions in policy.—Every such policy so issued shall contain certain standard provisions, which shall be in the words and in the order hereinafter set forth and be preceded in every policy by the caption "Standard Provisions." In each standard provision, wherever the word "insurer" is used, there shall be substituted therefor "company" or "corporation" or "association" or "society" or such other word as will properly designate the insurer.

1. Provisions Relative to Contract.—A standard provision relative to the contract may be in either of the following two forms: Form (A) to be used in policies which do not provide for reduction of indemnity on account of change of occupation, and Form (B) to be used in policies which do so provide. If Form (B) is used and the policy provides indemnity against loss from sickness, the words "or contracts sickness" may be inserted therein immediately after the words "in the event that the insured is injured."

(A) This policy includes the endorsements and attached papers, if any, and contains the entire contract of insurance. No reduction shall be made in any indemnity herein provided by reason of change in the occupation of the insured or by reason of his doing any act or thing pertaining to any other occupation.

(B) This policy includes the endorsements and attached papers, if any, and contains the entire contract of insurance except as it may be modified by the insurer's classification of risks and premium rates in the event that the insured is injured after having changed his occupation to one classified by the insurer as more hazardous than that stated in the policy, or while he is doing any act or thing pertaining to any occupation so classified, except ordinary duties about his residence or while engaged in recreation, in which event the insurer will pay only such portion of the indemnities provided in the policy as the premium paid would have purchased at the rate but within the limits so fixed by the insurer for such more hazardous occupation.

If the law of the state in which the insured resides at the time this policy is issued requires the deposit to its issue a statement of the premium rates and classification of risks pertaining to it shall be filed with the state official having supervision of insurance in such state, then the premium rates and classification of risks mentioned in this policy shall mean only such as have been last filed by the insurer in accordance with such law; but if such filing is not required by such law then they shall mean the insurer's premium rates and classification of risks last made effective by it in such state prior to the occurrence of the loss for which the insurer is liable.

2. Changes in the Contract.—A standard provision relative to changes in the contract shall be in the following form: No statement made by the applicant for insurance not included herein shall avoid the policy or be used in any legal proceeding hereunder. No agent has authority to change this policy or to waive any of its provisions. No change in this policy shall be valid unless approved by an executive officer of the insurer and such approval be endorsed hereon.

3. Reinstatement of Policy.—A standard provision relative to reinstatement of policy after lapse may be in either of the three following...
forms: Form (A) to be used in policies which insure only against loss from accident; Form (B) to be used in policies which insure only against loss from sickness; and Form (C) to be used in policies which insure against loss from both accident and sickness.

(A) If default be made in the payment of the agreed premium for this policy, the subsequent acceptance of a premium by the insurer or by any of its duly authorized agents shall reinstate the policy, but only to cover loss resulting from accidental injury thereafter sustained.

(B) If default be made in the payment of the agreed premium for this policy, the subsequent acceptance of a premium by the insurer or by any of its duly authorized agents shall reinstate the policy, but only to cover such sickness as may begin more than ten days after the date of such acceptance.

(C) If default be made in the payment of the agreed premium for this policy, the subsequent acceptance of a premium by the insurer or by any of its duly authorized agents shall reinstate the policy, but only to cover accidental injury thereafter sustained and such sickness as may begin more than ten days after the date of such acceptance.

4. Time of Notice of Claim.—A standard provision relative to time of notice of claim may be in either of the three following forms: Form (A) to be used in policies which insure only against loss from accident: Form (B) to be used in policies which insure only against loss from sickness, and Form (C) to be used in policies which insure against loss from both accident and sickness. If Form (A) or Form (C) is used the insurer may at its option add thereto the following sentence: “In event of accidental death immediate notice thereof must be given to the insurer.”

(A) Written notice of injury on which claim may be basied must be given to the insurer within twenty days after the date of the accident causing such injury.

(B) Written notice of sickness on which claim may be basied must be given to the insurer within ten days after the commencement of the disability from such sickness.

(C) Written notice of injury or of sickness on which claim may be basied must be given to the insurer within twenty days after the date of the accident causing such injury or within ten days after the commencement of disability from such sickness.

5. Sufficient Notice of Claim.—A standard provision relative to sufficiency of notice of claim shall be in the following form, and the insurer shall insert in the blank space such office and its location as it may desire to designate for the purpose of notice:

Such notice given by or in behalf of the insured or beneficiary, as the case may be, to the insurer at ……… or to any authorized agent of the insurer, with particulars sufficient to identify the insured, shall be deemed notice to the insurer. Failure to give notice within the time provided in this policy shall not invalidate any claim, if it shall be shown not to have been reasonably possible to give such notice and that notice was given as soon as was reasonably possible.

6. Furnishing Forms for Proof of Loss.—A standard provision relative to furnishing forms for the convenience of the insured in submitting proof of loss shall be as follows:

The insurer, upon receipt of such notice, will furnish to the claimant such forms as are usually furnished by it for filing proofs of loss. If such forms are not so furnished within fifteen days after the receipt of such notice the claimant shall be deemed to have complied with the requirements of this policy as to proof of loss upon submitting within the time fixed in the policy for filing proofs of loss, written proof covering the occurrence, character, and extent of the loss for which claim is made.

7. Filing Proof of Loss.—A standard provision relative to filing proof of loss shall be in such one of the following forms as may be appropriate to the indemnities provided:

(A) Affirmative proof of loss must be furnished to the insurer at its said office within ninety days after the date of the loss for which claim is made.

(B) Affirmative proof of loss must be furnished to the insurer at its said office within ninety days after the date of the termination of the period of disability for which the company is liable.

(C) Affirmative proof of loss must be furnished to the insurer at its said office within ninety days after the date of the termination of the period of disability for which the company is liable, and in case of claim for any other loss within ninety days after the date of such loss.

8. Examination of Person and Autopsy.—A standard provision relative to examination of the person of the insured and relative to autopsy shall be in the following form: The insurer shall have the right and opportunity to examine the person of the insured when and so often as it may reasonably require during the pendency of claim hereunder, and also the right and opportunity to make an autopsy in case of death where it is not forbidden by law.

9. Time of Payments.—A standard provision relative to the time within which payments other than those for loss of time on account of disability shall be made may be in either of the following two forms, which may be omitted from any policy providing only indemnity for loss of time on account of disability. The insurer shall insert in the blank space either the word “immediately” or appropriate language to designate such period of time, not more than sixty days, as it may desire: Form (A) to be used in policies which do not provide indemnity for loss of time on account of disability, and Form (B) to be used in policies which do so provide.

(A) All indemnities provided in this policy will be paid ………… after receipt of due proof.

(B) All indemnities provided in this policy for loss other than that of time on account of disability will be paid ………… after receipt of due proof.

10. Periodical Payments.—A standard provision relative to periodical payments of indemnity for loss of time on account of disability shall be
in the following form, and may be omitted from any policy not providing for such indemnity. The insurer shall insert in the first blank space of the form appropriate language to designate the proportion of accrued indemnity it may desire to pay, which proportion may be all or any part not less than one-half, and in the second blank space shall insert any period of time not exceeding sixty days:

Upon request of the insured and subject to due proof of loss ............ accrued indemnity for loss of time on account of disability will be paid at the expiration of each ............ during the continuance of the period for which the insurer is liable, and any balance remaining unpaid at the termination of such period will be paid immediately upon receipt of due proof.

11. Indemnity Payments.—A standard provision relative to indemnity payments may be in either of the two following forms: (A) to be used in policies which designate a beneficiary, and (B) to be used in policies which do not designate any beneficiary other than the insured:

(A) Indemnity for loss of life of the insured is payable to the beneficiary, if surviving the insured, and otherwise to the estate of the insured. All other indemnities of this policy are payable to the insured.

(B) All the indemnities of this policy are payable to the insured.

12. Cancellation of Policy by Insured.—A standard provision providing for cancellation of the policy at the instance of the insured shall be in the following form: If the insured shall at any time change his occupation to one classified by the insurer as less hazardous than that stated in the policy, the insurer, upon written request of the insured, and surrender of the policy, will cancel the same and return to the insured the unearned premium.

13. Rights of Beneficiary.—A standard provision relative to the rights of the beneficiary under the policy shall be in the following form and may be omitted from any policy not designating a beneficiary: Consent of the beneficiary shall not be requisite to surrender or assignment of this policy, or to change of beneficiary, or to any other changes in the policy.

14. Limiting Time of Action.—A standard provision limiting the time within which suit may be brought upon the policy shall be as follows: No action at law or in equity shall be brought to recover on this policy prior to the expiration of sixty days after proof of loss has been filed in accordance with the requirements of this policy, nor shall such action be brought at all unless brought within two years from the expiration of the time within which proof of loss is required by the policy.

15. Time Limitations.—A standard provision relative to time limitations of the policy shall be as follows: If any time limitation of this policy with respect to giving notice of claim or furnishing proof of loss is less than that permitted by the law of the state in which the insured resides at the time this policy is issued, such limitation is hereby extended to agree with the minimum period permitted by such law. (1911, c. 209, s. 1; 1913, c. 91, s. 3; C. S. 6479.)
which the premium has been paid; or, (3) providing for the deduction of any premium from the amount paid in settlement of claim; or, (4) relative to other insurance by the same insurer; or, (5) relative to the age limits of the policy; unless such provisions, which are hereby designated as optional standard provisions, shall be in the words and in the order in which they are set forth in the next section, but the insurer may at its option omit from the policy any such optional standard provisions. Such optional standard provisions if inserted in the policy shall immediately succeed the standard provisions named in this article. (1911, c. 209, s. 2; 1913, c. 91, s. 4; C. S. 6480.)

§ 58-253. Optional standard provisions.—The optional standard provisions which may be used in the policy are as follows:

1. Cancellation of Policy by Insurer.—The insurer may cancel this policy at any time by written notice delivered to the insured or mailed to his last address as shown by the records of the insurer, together with cash or the insurer’s check for the unearned portion of the premiums actually paid by the insured, and such cancellation shall be without prejudice to any claim originating prior thereto.

2. Reduction of Indemnity.—If the insured shall carry with another company, corporation, association, or society other insurance covering the same loss without giving written notice to the insurer, then in that case the insurer shall be liable only for such portion of the indemnity promised as the said indemnity bears to the total amount of like indemnity in all policies covering such loss, and for the return of such part of the premiums paid as shall exceed the pro rata for the indemnity thus determined.

3. Deduction of Premium.—Upon the payment of claim hereunder any premium then due and unpaid or covered by any note or written order may be deducted therefrom.

4. Other Insurance.—An optional standard provision relative to other insurance by the same insurer which shall be in such one of the following forms as may be appropriate to the indemnities provided, and in the blank spaces of which the insurer shall insert such upward limits of indemnity as are specified by the insurer’s classification of risks, filed as required by this article:

(A) If a like policy or policies, previously issued by the insurer to the insured be in force concurrently herewith, making the aggregate indemnity in excess of $--------, the excess insurance shall be void, and all premiums paid for such excess shall be returned to the insured.

(B) If a like policy or policies, previously issued by the insurer to the insured be in force concurrently herewith, making the aggregate indemnity for loss of time on account of disability in excess of $-------- weekly, the excess insurance of either kind shall be void, and all premiums paid for such excess shall be returned to the insured.

(C) If a like policy or policies, previously issued by the insurer to the insured be in force concurrently herewith, making the aggregate indemnity for loss other than that of time on account of disability in excess of $--------, or the aggregate indemnity for loss of time on account of disability in excess of $-------- weekly, the excess insurance of either kind shall be void, and all premiums paid for such excess shall be returned to the insured.

5. Age Limits.—An optional standard provision relative to the age limits of the policy, which shall be in the following forms and in the blank spaces of which the insurer shall insert such number of years as it may elect: The insurance under this policy shall not cover any person under the age of ______ years nor over the age of ______ years. Any premium paid to the insurer for any period not covered by this policy will be returned upon request. (1911, c. 209, s. 2; 1913, c. 91, s. 4; C. S. 6481.)

§ 58-254. Conflicting provisions forbidden; terms in policy.—No such policy shall be issued or delivered if it contains any provision contradictory, in whole or part, of any provisions hereinafter in this article designated as “Standard Provisions” or as “Optional Standard Provisions”; nor shall any endorsement or attached papers vary, alter, extend, be used as a substitute for, or in any way conflict with any of the “Standard Provisions” or the “Optional Standard Provisions”; nor shall such policy be issued or delivered if it contains any provision purporting to make any portion of the charter, constitution, or by-laws of the insurer a part of the policy unless such portion of the charter, constitution, or by-laws shall be set forth in full in the policy, but this prohibition shall not be deemed to apply to any statement of rates or classification of risks filed with the commissioner of insurance in accordance with the provisions of this article. (1911, c. 209, s. 3; 1913, c. 91, s. 5; C. S. 6482.)

Art. 27. General Regulations.

§ 58-255. False statement in application.—The falsity of any statement in the application for any policy covered by this subchapter shall not bar the right to recovery thereunder unless such false statement was made with actual intent to deceive or unless it materially affected either the acceptance of the risk or the hazard assumed by the insurer. (1913, c. 91, s. 6; C. S. 6483.)

§ 58-256. Waiver by insurer.—The acknowledgment by any insurer of the receipt of notice given under any policy covered by this subchapter, or the furnishing of forms for filing proofs of loss, or the acceptance of such proofs, or the investigation of any claim thereunder, shall not operate as a waiver of any of the rights of the insurer in defense of any claim arising under such policy. (1913, c. 91, s. 7; C. S. 6484.)

§ 58-257. Alteration of application.—No alteration of any written application for insurance by erasure, insertion, or otherwise, shall be made by any person other than the applicant without his written consent, and the making of any such alteration without the consent of the applicant shall be a misdemeanor. If such alteration shall be made by any officer of the insurer, or by any employee of the insurer, with the insurer’s knowledge or consent, then such act shall be deemed to have been performed by the insurer thereafter issuing the policy upon such altered application. (1913, c. 91, s. 8; C. S. 6485.)
§ 58-258. Construction of policy.—A policy issued in violation of this subchapter shall be held valid, but shall be construed as provided in this subchapter, and when any provision in such a policy is in conflict with any provision of this subchapter, the rights, duties, and obligations of the insurer, the policyholder, and the beneficiary shall be governed by the provisions of this subchapter. (1913, c. 91, s. 9; C. S. 6486.)

§ 58-259. Provisions of laws of other states.—The policies of insurance against accidental bodily injury or sickness issued by an insurer not organized under the laws of this state may contain, when issued in this state, any provision which the law of the state, territory, or district of the United States under which the insurer is organized, prescribed for insertion in such policies; and the policies of insurance against accidental bodily injury or sickness issued by an insurer organized under the laws of the state may contain, when issued or delivered in any other state, territory, district, or country, any provisions required by the laws of the state, territory, district, or country in which the same are issued, anything in this subchapter to the contrary notwithstanding. (1911, c. 209, s. 4; 1913, c. 91, s. 10; C. S. 6487.)

§ 58-260. Discrimination forbidden.—Discrimination between individuals of the same class in the amount of premiums or rates charged for any policy of insurance covered by this subchapter, or in the benefits payable thereon, or in any of the terms or conditions of such policy, or in any other manner whatsoever, is prohibited. (1913, c. 91, s. 11; C. S. 6488.)

§ 58-261. Certain policies of insurance not affected.—1. Nothing in this subchapter shall apply to or affect any policy of liability or workmen’s compensation insurance or any general or blanket policy of insurance issued to any municipal corporation or department thereof, or to any corporation, copartnership, association, or individual employer, police or fire department, underwriters’ corps, salvage bureau, or like associations or organizations, where the officers, members, or employees of the classes or departments thereof are insured for their individual benefit against specified accidental bodily injuries or sickness while exposed to the hazards of the occupation or otherwise, in consideration of a premium intended to cover the risks of all the persons insured under such policy.

2. Nothing in this subchapter shall apply to or in any way affect contracts supplemental to contracts of life or endowment insurance where such supplemental contracts contain no provisions except such as operate to safeguard such insurance against lapse or to provide a special surrender value therefor in the event that the insured shall be totally and permanently disabled by reason of accidental bodily injury or by sickness, nor to contracts issued as supplements to life insurance contracts or contracts of endowment insurance, and intended to increase to the amount insured by such life or endowment contracts in the event that the death of the insured shall result from accidental bodily injuries: Provided, That no such supplemental contracts shall be issued or delivered to any person in this state unless and until a copy of the form thereof has been submitted to and approved by the commissioner of insurance under such reasonable rules and regulations as he shall make concerning the provisions in such contracts, and their submission to an approval by him.

3. Nothing in this subchapter shall apply to or in any way affect fraternal benefit societies.

4. The provisions of this subchapter contained in clause (5) of § 58-250, and clauses two, three, eight, and twelve of § 58-251, may be omitted from railroad ticket policies sold only at railroad stations or at railroad ticket offices by railroad employees. (1911, c. 209, s. 5; 1913, c. 91, s. 12; 1921, c. 136, s. 5; C. S. 6489.)

§ 58-262. Punishment for violation.—Any company, association, society, or other insurer or any officer or agent thereof, which or who issues or delivers to any person in this state any policy in wilful violation of the provisions of this subchapter, shall be punished by a fine of not more than five hundred dollars for each offense, and the commissioner of insurance may revoke the license of any company, corporation, association, society, or insurer of another state or country, or of the agent thereof, which or who willfully violates any provision of this subchapter. (1911, c. 209, s. 6; 1913, c. 91, s. 13; C. S. 6490.)

SUBCHAPTER VII. FRATERNAL ORDERS AND SOCIETIES.

Art. 28. Fraternal Orders.

§ 58-263. General insurance law not applicable.—Nothing in the general insurance laws, except such as apply to fraternal orders or fraternal societies, shall be construed to extend to benevolent associations, incorporated under the laws of this state that only levy an assessment on the members to create a fund to pay the family of a deceased member and make no profit therefrom, and do not solicit business through agents. Such benevolent associations providing death benefits in excess of three hundred dollars to any one person, or disability benefits not exceeding three hundred dollars in any one year to any one person, or both, shall be known as “fraternal benefit societies”; and those providing benefits of three hundred dollars or less shall be known as “fraternal orders.” (Rev., s. 4794: 1899, c. 54, s. 87; 1901, c. 706, s. 2; 1913, c. 46; C. S. 6491.)

Cross Reference.—As to other assessment insurance, see §§ 58-185 et seq.

Editor’s Note.—See 12 N. C. Law Rev. 274.

Laws Governing.—Williams v. Supreme Conclave, 172 N. C. 787, 90 S. E. 688, and Wilson v. Supreme Conclave, 174 N. C. 358, 94 S. E. 441, were decided in regard to policies issued before this act. This statute makes it clear that fraternal and assessment orders shall be governed by their own rules and regulations as authorized by the state of their origin. Hollingsworth v. Supreme Council, 121 N. C. 65, 56 S. E. 81. This case gives a long discussion of the application of this law and alters the rule as applied in former cases.

Same.—Fraternal Benefit Associations.—This section groups benevolent life insurance companies providing death benefits in excess of $300, in any year to any one person, as fraternal benefit associations, and those of $300 or less, as fraternal orders, and sec. 58-254, relating to fraternal orders, does not apply, and hence fraternal benefit associations fall within the provision of sec. 58-126, that statements or descriptions in the application for the policy are deemed representations and not warranties, which will not avoid a recovery, when untrue, unless material. Gay v. Woodmen of the World, 179 N. C. 210, 102 S. E. 195.

§ 58-264. Fraternal orders defined.—Every in-
corporated association, order, or society doing business in this state on the lodge system, with ritualistic form of work and representative form of government, for the purpose of making provision for the payment of benefits of three hundred dollars or less in case of death, sickness, temporary or permanent physical disability, either as the result of disease, accident, or old age, formed and organized for the sole benefit of its members and their beneficiaries, and not for profit, is hereby declared to be a "fraternal order." Societies and orders which do not make insurance contracts or collect dues or assessments therefor, but simply pay burial or other benefits out of the treasury of their orders, and use their funds for the purpose of building homes or asylums for the purpose of caring for and educating orphan children and aged and infirm people in this state, shall not be considered as "fraternal orders" or "fraternal benefit societies" under this subchapter; and such order or association paying death or disability benefits may also create, maintain, apply, or disburse among its membership a reserve or emergency fund as may be provided in its constitution or by-laws; but no profit or gain may be added to the payments made by a member. (Rev., s. 4795; 1899, c. 54, s. 88; 1901, c. 706, s. 3; 1907, c. 936; 1913, c. 46; C. S. 6492.)

Cross Reference.—See § 58-263 and note thereto.

§ 58-265. Funds derived from assessments and dues.—The fund from which the payment of benefits, as provided for in § 58-264, shall be made, and the fund from which the expenses of such association, order or society shall be defrayed, shall be derived from assessments or dues collected from its members. Such societies or associations shall be governed by the laws of the state governing fraternal orders or societies, and are exempt from the provisions of all general insurance laws of this state, and no law hereafter passed shall be applicable to such societies unless fraternal orders or societies are designated therein. (Rev., s. 4796; 1899, c. 54, s. 89; 1901, c. 706, s. 2; 1913, c. 46; C. S. 6493.)

Use of Funds Received.—The funds received from assessment are trust funds for orphans and widows and are not subject to use for any other purpose, therefore attachment will not lie. Brenizer v. Royal Arcanum, 141 N. C. 409, 53 S. E. 835.

Assessments Not Governed by Insurance Law.—A fraternal society or association is governed by its own charter and by-laws and an assessment in accordance with its own laws is valid. Hollingsworth v. Supreme Council, 175 N. C. 615, 96 S. E. 81.

§ 58-266. Appointment of member as receiver or collector; appointee as agent for order or society; rights of members.—Assessments and dues referred to in §§ 58-264 and 58-265 may be collected, received, and remitted by a member or officer of any local or subordinate lodge of any fraternal order or society when so appointed or designated by any grand, district, or subordinate lodge or officer, deputy, or representative of the same, there being no regular licensed agent or deputy of said grand lodge charged with said duties; but any person so collecting said dues or assessments shall be the agent or representative of such fraternal order or society, or any department thereof, and shall bind them by their acts in collecting and remitting said amounts so collected. Under no circumstances, regardless of any agreement, by-laws, contract, or notice, shall said officer or collector be the agent or representative of the individual member from whom any such collection is made; nor shall said member be responsible for the failure of such officer or collector to safely keep, handle, or remit said dues or assessments so collected, in accordance with the rules, regulations, or by-laws of said society; nor shall said member, regardless of any rules, regulations, or by-laws to the contrary, forfeit any rights under his certificate of membership in said fraternal benefit society by reason of any default or misconduct of any said officer or member so acting. (1921, c. 139; C. S. 6493(a).)

Where plaintiff's evidence showed that it had been the custom of defendant mutual benefit association's collecting agents, to collect dues after the due date but within thirty days thereof, that defendant's home office knew of this custom, and that insured made payment of the dues for the preceding month within thirty days of the due date and died prior to the customary time for the collection of dues for the following month, it was held that the evidence was sufficient to be submitted to the jury on the question of defendant's waiver of the provisions of its certificate and by-laws, requiring certificate of good health before reinstating a policy upon payment of premium after the due date, and upon the verdict of the jury plaintiff was entitled to judgment for the amount of the policy, less the dues for the month not paid. Shackelford v. Sovereign Camp, W. O. W., 269 N. C. 633, 184 S. E. 691.

§ 58-267. Meetings of governing body; principal office; separation of races.—Any such society or order incorporated and organized under the laws of this state may provide for the meetings of its governing body or governing body in any other state, province, or territory wherein such society has subordinate lodges, and all business transacted at such meetings is as valid in all respects as if the meetings were held in this state; but the principal business office of such society shall always be kept in this state. No fraternal order or society or beneficiary association shall be authorized to do business in this state under the provisions of this article, whether incorporated under the laws of this or any other state, province, or territory, which associates with, or seeks in this state to associate with, as members of the same lodge, fraternity, society, association, the white and colored races with the objects and purposes provided in this article. (Rev., s. 4797; 1899, c. 54, s. 91; 1913, c. 46; C. S. 6494.)

§ 58-268. Conditions precedent to doing business.—Any such fraternal, beneficiary order, society, or association as defined by this chapter, chartered and organized in this state or organized and doing business under the laws of any other state, district, province, or territory, having the characteristics of domestic societies of like character, upon satisfying the commissioner of insurance that its business is proper and legitimate and so conducted, may be admitted to transact business in this state upon the same conditions as are prescribed by this chapter for admitting and authorizing foreign insurance companies to do business in this state, except that such fraternal orders shall not be required to have the capital required of such insurance companies. (Rev., s. 4798; 1899, c. 54, s. 92; 1901, c. 706, s. 2; 1903, c. 438, s. 9; 1913, c. 46; C. S. 6495.)

Requirements for Admission to Do Business.—Fraternal insurance orders are subject to the same rules, regulations, and supervision as foreign insurance companies, when operated from beyond the State, except that they are not
required to make the deposit or have the paid up capital required of other companies. State v. Arlington, 157 N. C. 640, 73 S. E. 122.

Attachment of Funds.—Assessments received are impressed with a trust for widows and orphans and cannot be reached by attachment. Brenizer v. Royal Arcanum, 141 N. C. 499, 51 S. E. 835; Blackwell v. Mutual Reserve Fund Life Ass'n, 141 N. C. 117, 53 S. E. 833.

§ 58-269. Certain lodge systems exempt.—The following beneficial orders or societies shall be exempt from the requirements of this chapter, and shall not be required to pay any license tax or fees nor make any report to the commissioner of insurance, unless the assessment collected for death benefits by the supreme lodge amount to at least three hundred dollars in one year: Beneficial fraternal orders, or societies incorporated under the laws of this state, which are conducted under the lodge system which have the supreme lodge or governing body located in this state, and which are so organized that the membership consists of members of subordinate lodges; that the subordinate lodges accept for membership only residents of this state in which such subordinate lodge is located; that each subordinate lodge issues certificates, makes assessments, and collects a fund to pay benefits to the widows and orphans of its own deceased members and their families, each lodge independently of the others, for itself and independently of the supreme lodge; that each lodge controls the fund for this purpose; that in addition to the benefits paid by each subordinate lodge to its own members, the supreme lodge provides for an additional benefit for such of the members of the subordinate lodges as are qualified, at the option of the subordinate lodge members; that such organization is not conducted for profit, has no capital stock, and has been in operation for ten years in this state.

The commissioner of insurance may require the chief or presiding officer, or the secretary, to file annually an affidavit that such organization is entitled to this exemption. (1911, c. 199; C. S. 6496.)

§ 58-270. Fraternal benefit society defined.—Any corporation, society, order, or voluntary association, without capital stock, organized and carried on solely for the mutual benefit of its members and their beneficiaries, and not for profit, and having a lodge system with ritualistic form of work and representative form of government, and which makes provision for the payment of benefits as hereafter prescribed in this article, is declared to be a fraternal benefit society. (1913, c. 89, s. 1; C. S. 6497.)

Applied in Equitable Trust Co. v. Widows' Fund of Oasis, etc., Temples, 237 N. C. 534, 177 S. E. 799.

§ 58-271. Lodge system defined.—A society having a supreme governing or legislative body and subordinate lodges or branches, by whatever name known, into which members are elected, initiated, and admitted in accordance with its constitution, laws, rules, regulations, and prescribed ritualistic ceremonies, which subordinate lodges or branches are required by the laws of such society to hold regular or stated meetings at least once in each month, is deemed to be operating on the lodge system. (1913, c. 89, s. 2; C. S. 6498.)

§ 58-272. Representative form of government defined.—A society is deemed to have a representative form of government when it provides in its constitution and laws for a supreme legislative or governing body, composed of representatives elected either by the members or by delegates elected directly or indirectly by the members, together with such other members as may be prescribed by its constitution and laws: Provided, that the elective members constitute a majority in number and have not less than two-thirds of the votes, nor less than the votes required to amend its constitution and laws; and Provided further, that the meetings of the supreme or governing body, and the election of officers, representatives, or delegates, are held as often as once in four years. The members, officers, representatives, or delegates of a fraternal benefit society shall not vote by proxy. (1913, c. 89, s. 3; C. S. 6499.)

§ 58-273. Organization.—1 Application.—Ten or more persons, citizens of the United States, and a majority of whom are citizens of this state, who desire to form a fraternal benefit society, as defined by this article, may make and sign (giving their addresses) and acknowledge before some officer competent to take acknowledgment of deeds, articles of incorporation in which shall be stated:

a. The proposed corporate name of the society, which shall not so closely resemble the name of any society or insurance company already transacting business in this state as to mislead the public or lead to confusion.

b. The purpose for which it is formed—which shall not include more liberal powers than are granted by this article: Provided, that any lawful social, intellectual, educational, charitable, benevolent, moral, or religious advantages may be set forth among the purposes of the society—and the mode in which its corporate powers are to be exercised.

c. The names, residences, and official titles of all the officers, trustees, directors, or other persons who are to have and exercise the general control and management of the affairs and funds of the society for the first year or until the ensuing election at which all such officers shall be elected by the supreme legislative or governing body, which election shall be held not later than one year from the date of the issuance of the permanent certificates.

2. Papers and Bond Filed.—Such articles of incorporation and duly certified copies of the constitution and laws, rules and regulations, and copies of all proposed forms of benefit certificates, applications therefor, and circulars to be issued by such society, and a bond in the sum of five thousand dollars, with sureties approved by the commissioner of insurance, conditioned upon the return of the advance payments, as provided in this section, to applicants, if the organization is not completed within one year, shall be filed with the commissioner of insurance, who may require such further information as he deems necessary.

3. Preliminary License.—If the purposes of the society conform to the requirements of this article, and all provisions of law have been complied with, the commissioner of insurance shall so certify to the secretary of state and upon his issuing the articles of incorporation shall furnish the incorporators a preliminary license authorizing the society to solicit members as hereinafter provided.
4. Completion of Organization.—Upon receipt of such license from the commissioner of insurance the society may solicit members for the purpose of completing its organization, and shall collect from each applicant the amount of not less than one regular monthly payment, in accordance with its table of rates as provided by its constitution and laws, and shall issue to each applicant a receipt for the amount so collected. But no such society shall incur any liability other than for such advanced payments, nor issue any benefit certificate nor pay or allow, or offer or promise to pay or allow, to any person any death or disability benefit until actual bona fide applications for death benefit certificates have been secured upon at least five hundred lives for at least one thousand dollars each, or the largest amount written on any one person, and all such applicants for death benefits shall have been regularly examined by legally qualified practicing physicians, and certificates of such examinations have been duly filed and approved by the chief medical examiner of such society; nor until there shall be established ten subordinate lodges or branches into which said five hundred applicants have been initiated; nor until there has been submitted to the commissioner of insurance under oath of the president and secretary, or corresponding officers of such society, a list of such applicants, giving their names, addresses, date examined, date approved, date initiated, name and number of the subordinate branch of which each applicant is a member, amount of benefits to be granted, rate of stated periodical contributions, which shall be sufficient to provide for meeting the mortuary obligation contracted, when valued for death benefits upon the basis of the national fraternal congress table of mortality, as adopted by the national fraternal congress, August twentieth, one thousand eight hundred and ninety-nine, or any higher standard, at the option of the society, and for disability benefits by tables based upon reliable experience, and for combined death and permanent total disability benefits by tables based upon reliable experience, with an interest assumption not higher than four per cent per annum; nor until it shall be shown to the commissioner of insurance by the sworn statement of the treasurer, or corresponding officer of such society, that at least five hundred applicants have each paid in cash at least one regular monthly payment as herein provided per one thousand dollars of indemnity to be effected, which payments in the aggregate shall amount to at least twenty-five hundred dollars. Such advanced payments shall be credited to the mortuary or disability fund on account of such applicants, and no part thereof may be used for expenses, but such payments shall be held in trust and returned to the applicants if the organization is not completed within one year as hereinafter provided.

5. License Issued.—The commissioner of insurance may make such examination and require such further information as he deems advisable, and, upon presentation of satisfactory evidence that the society has complied with all the provisions of law, he shall issue to such society a certificate or license to that effect. Such certificate shall be prima facie evidence of the existence of such society at the date of such certificate.

6. One-year Limit.—No preliminary certificate or license granted under the provisions of this section shall be valid after one year from its date, or after such further period, not exceeding one year, as may be authorized by the commissioner of insurance, upon cause shown unless the five hundred applicants herein required have been secured and the organization has been completed as herein provided; and the articles of incorporation and all proceedings thereunder shall become null and void in one year from the date of such preliminary certificate, or at the expiration of such extended period, unless the society shall have completed its organization and commenced business as herein provided.

7. Discontinuance.—When any domestic society shall have discontinued business for the period of one year, or has less than four hundred members, its charter shall become null and void. (1913, c. 89, s. 11; C. S. 6500.)

§ 58-274. Constitution and by-laws.—Each society shall have power to make a constitution and by-laws for the government of the society, the admission of its members, the management of its affairs, and the fixing and readjusting of the rates of contribution of its members from time to time; it shall have the power to change or amend such constitution and by-laws, and it shall have such other powers as are necessary and incidental to carrying into effect the objects and purposes of the society. (1913, c. 89, s. 11; C. S. 6501.)

§ 58-275. Amendments to constitution and by-laws.—Every society transacting business under this article shall file with the commissioner of insurance a duly certified copy of all amendments of or additions to its constitution and laws within ninety days after the enactment of the same. Printed copies of the constitution and laws as amended, changed or added to, certified by the secretary or corresponding officer of the society, shall be prima facie evidence of the legal adoption thereof. (1913, c. 89, s. 19; C. S. 6502.)

§ 58-276. Waiver of the provisions of the laws.—The constitution and laws of the society may provide that no subordinate body, nor any of its subordinate officers or members, shall have the power or authority to waive any of the provisions of the laws and constitution of the society, and the same shall be binding on the society and each and every member thereof, and on all beneficiaries of members. (1913, c. 89, s. 17; C. S. 6503.)

Editor’s Note.—See Shackleford v. Sovereign Camp, W. O. W., 209 N. C. 633, 184 S. E. 691, where a distinction is made between waiver by local agents, prohibited by this section, and a custom of dealing established over a period of years to the knowledge of the home office.

§ 58-277. Place of meeting; location of office.—Any domestic society may provide that the meetings of its legislative or governing body may be held in any state, district, province, or territory wherein such society has subordinate branches, and all business transacted at such meetings shall be as valid in all respects as if such meetings were held in this state; but its principal office shall be located in this state. (1913, c. 89, s. 15; C. S. 6504.)

§ 58-278. No personal liability for benefits.—Officers and members of the supreme, grand, or any subordinate body of any such incorporated
§ 58-279. Qualifications for membership.—Any society may admit to beneficial membership any person not less than sixteen and not more than sixty years of age, who has been examined by a legally qualified physician, and whose examination has been supervised and approved in accordance with the laws of the society: Provided, that any beneficiary member of such society who shall apply for a certificate providing for disability benefits need not be required to pass an additional medical examination therefor. Nothing herein contained shall prevent such society from accepting general or social members. (1913, c. 89, s. 4; C. S. 6506.)

§ 58-280. Benefits.—1. Every society transacting business under this article shall provide for the payment of death benefits, and may provide for the payment of benefits in case of permanent or temporary physical disability, either as the result of disease, accident, or old age, and for monuments or tombstones to the memory of its deceased members, and for the payment of funeral benefits: Provided, the period of life at which the payment of benefits for disability on account of old age shall commence shall not be under seventy years. Such society shall have the power to give a member, when permanently disabled or on attaining the age of seventy, all or such portion of the face value of his certificate as the laws of the society may provide; but nothing contained in this article shall be construed as to prevent the issuing of benefit certificates for a term of years less than the whole of life, which are payable upon the death or disability of the member occurring within the term for which the benefit certificate may be issued. Such society shall, upon written application of the member, have the power to accept a part of the periodical contributions in cash, and charge the remainder, not exceeding one-half of the periodical contribution, against the certificate, with interest payable or compounded annually at a rate not lower than four per cent per annum; but this privilege shall not be granted except to societies which have readjusted or may hereafter readjust their rates of contributions, and to contracts affected by such readjustment. 2. Any society which shall show by the annual valuation hereinafter provided for that it is accumulating and maintaining the reserve not lower than the usual reserve computed by the American experience table and four per cent interest, may grant to its members extended and paid-up protection, or such withdrawal equities as its constitution and laws may provide; but such grants shall in no case exceed in value the portion of the reserve to the credit of such members to whom they are made. (1913, c. 89, s. 4; C. S. 6507.)

§ 58-281. Beneficiaries.—The payment of death benefits shall be confined to wife, husband, relative by blood to the fourth degree, father-in-law, mother-in-law, son-in-law, daughter-in-law, stepfather, stepmother, step-children, children by legal adoption, or to a person or persons dependent upon the member, or, with the consent of the society, any charitable institution maintained by the society; and if after the issuance of the original certificate the member shall become dependent upon an incorporated charitable institution, he shall have the privilege, with the consent of the society, to make such institution his beneficiary. Within the above restrictions each member shall have the right to designate his beneficiary, and, from time to time, have the same changed in accordance with the laws, rules and regulations of the society, and no beneficiary shall have or obtain any vested interest in such benefit until the same has become due and payable upon the death of the member. Any society may, by its laws, limit the scope of beneficiaries within the above classes.

Provided, however, that any member or insured named in any contract or certificate of insurance issued by any beneficial fraternal order, lodge, society, or other insurance association, who has neither lawful spouse nor offspring, shall have the right, without regard to the amount payable thereunder, to have the death benefit provided for in any such contract or certificate of insurance made payable, or to have the named beneficiary changed, to the estate of such member or insured, or to his or her executors or administrators, and to make, a testamentary disposition of the proceeds thereof, or to have such death benefit made payable, or to have the named beneficiary changed, to a trustee to be named and appointed by such insured, and to impress the proceeds in the hands of such trustee with a trust, the terms and provisions of the charter, rules, by-laws and regulations of any such beneficial fraternal order, lodge, society, or other insurance association, to the contrary notwithstanding: Provided further, that in case a husband or wife is designated as beneficiary and subsequently comes absolutely divorced from the member or insured, such divorce shall automatically annul the designation. (1913, c. 89, s. 5; 1931, c. 161; 1937, c. 178; C. S. 6508.)

Editor's Note.—The Act of 1931 inserted the words "or the consent of the society, any charitable institution maintained by the society," beginning in line seven of this section.

The 1937 amendment added the provisos at the end of this section.

See 13 N. C. L. Rev. 96.

This section has heretofore confined the beneficiaries of fraternal insurance policies, with minor exceptions, to relatives and dependents of the insured. As amended, this section now permits the insured to name in addition, as beneficiaries, his estate, or a trustee, anything in the constitution or by-laws of the association, to the contrary notwithstanding. A third proviso adds that after absolute divorce a wife named as beneficiary loses her rights as such. The effect of the first and third of these provisions is clear. In permitting the insured to designate his estate as beneficiary, the amendment brings fraternal insurance more closely in line with old line insurance. It perhaps renders the provision unnecessary. The 1937 amendment has herefore been prevented from so doing. In destroying the rights of a divorced wife as beneficiary, this section does not for an insured what might unintentionally have neglected to do. The provision permitting the insured to designate a trustee as beneficiary seems designed to counteract the effects of the recent case of Equitable Trust Co. v. Widows' and Orphans' Benefit Society of the City of New York, 162 N. Y. 728, 59 N. E. 799, holding invalid an attempt to name as beneficiary a corporate trustee. As amended, however, the section is
ambiguos. It does not make clear whether the trustee may be a corporation, or whether he must be a natural person. Whether the trustee, as defined by the trust must be relatives or dependants of the insured. If not, the amendment gives the insured carte blanche, by the device of a trust, to name any beneficiary he desires. Such an amendment, unless the usual device of a trust is a device of a trust, to name any beneficiary he desires. And it leaves unclear whether the beneficiaries of the device of a trust, to name any beneficiary he desires.

Certificate in force until the death of the insured a short time against Certificate or Vest Interest in It.—Where insured's the insured's brother was entitled to the proceeds there- of, to the exclusion of the wife's nephew who claimed un- cate the insured's brother was entitled to the proceeds there- ' government may, by its contract and constitution, confine der the will of the wife, the payment of dues or premiums thereafter, it was held that under the terms of the certifi- ance of a fraternal order is limited to the wife, certain rela- tions to the charter or articles of incorporation, or articles of association if a voluntary association, constitution or laws duly made or enacted subsequent to the issuance of the benefit certificate, shall bind the member and his beneficiaries, and shall govern and control the agreement in all respects the same as though such changes, additions, or amendments had been made prior to and were in force at the time of the application for membership. (1913, c. 89, s. 7; C. S. 6590.)

Recovery of Policy Holder When Policy Cancelled.—Where a fraternal benefit society has issued a policy of life insur- ance to a member, and has charged him premiums on said policy as to impair the vested rights of the insured under his con- tract, and refuses to accept the proper premium, and de- clares the policy void, the insured may maintain his action to recover the premiums paid on said policy, and the court shall pay on his policy, and simple interest thereon. Wilson v. Supreme Conclave, 174 N. C. 628, 94 S. E. 443.

Altering Constitution or By-Laws.—A general consent of a policy-holder in an assessment fraternal benefit society that the company may thereafter alter or amend its constitution or by-laws does not authorize the society to make such changes as will impair the vested right of its members and policy-holders arising under the contract of insurance with the company. Wilson v. Supreme Conclave, 174 N. C. 628, 94 S. E. 443.

Suspension or Termination of Members.—Where fraternal benefit insurance societies are required to file certified copies of changes made in their constitution and by-laws with the Insurance Commission within 90 days, and fail to do so, they may, while thus in default, suspend a member for non- compliance therewith. Wilson v. Supreme Conclave, 174 N. C. 628, 94 S. E. 443.

Proo of Forfeiture of Benefits.—A stipulation in a policy of endowment in a fraternal order requiring the member to be in good standing at the time of his death, and that "the records of the Grand Lodge shall sustain the same," must be construed in reference to provisions in the charter and by-laws of the order, that the member may only be sus- pended for failure to pay his dues for six months, of which notice shall be given him, and that in his absence will not have the effect of suspending him from benefits when there is no evidence that he had failed to pay his dues for the stated period or that notice had been given in accordance with the constitution and by-laws. Wil- kie v. National Council J. O. U. A. M., 151 N. C. 527, 66 S. E. 579, cited and distinguished. Lyons v. Knights of Pythias, 172 N. C. 408, 90 S. E. 423.

False Representations of Insured.—Where an insurance policy in a fraternal order is issued in violation of certain restrictions contained in the constitution and by-laws of the order, and the evidence tending to show that this fact was known at the time to the applicant, and the policy was issued by reason of false and material statements on the part of the applicant, the company is not estopped, as a conclusion of law, from resisting payment of the policy because of the fact that the agent of the company also knew that the applicant's statements were false. Robinson v. Brotherhood, 172 N. C. 113, 88 S. E. 537.

Waiver of Defects in Policy.—A policy in the insurance department of a fraternal order cannot be recovered on when issued by a local agent contrary to its rules and regulations as contained in its constitution and by-laws, unless the de-
§ 58-283. Benefits not subject to debts.—No money or other benefit, charity or relief or aid to be paid, provided, or rendered by any such society or association for the relief of employees including railroad and other relief associations shall be liable to attachment, garnishment, or other process, or be seized, taken, appropriated, or applied by any legal or equitable process or operation of law to pay any debt or liability of a member or beneficiary or any other person who may have a right thereunder, either before or after payment. (1913, c. 89, s. 18; 1925, c. 83; C. S. 6510.)

Funds Become Trust Funds.—Where the constitution of a foreign fraternal insurance society provided for the creation of a fund to be raised from assessments upon its members for the benefit of widows and orphans of deceased members, any money paid to such fund is impressed with the qualities of a trust for the special purposes expressed, and such fund in the hands of a local collector, which he was bound to pay over to the society's treasurer, is not subject to an attachment by a creditor of the society. Brenizer v. Royal Arcanum, 141 N. C. 499, 53 S. E. 835.

In 3 N. C. Law Rev. at p. 130 in considering this section it is said: it "provides that in the case of fraternal benefit societies, no money or other relief furnished by such societies shall be liable to attachment, garnishment, or other process, to pay any debt or liability of a member or beneficiary, either before or after payment." Chapter 83 extends this exemption so as to apply to any "society or association for the relief of employees, including railroad and other relief associations."

§ 58-284. Certificates of insurance to members.—Any fraternal benefit society authorized to do business in this state which shall accumulate and maintain the reserves, on all certificates hereafter issued, required by the American Experience Table of Mortality, with Craig's or Buttolph's Extension thereof, or the Standard Industrial Table of Mortality, with an interest assumption of not more than three and one-half per centum per annum, shall be held to meet the requirements of this article unless the society, domestic or foreign, shall hereafter be incorporated or admitted to transact business in this state which does not provide for stated periodical or other payments by the members of the society and accretions of said funds. But no society, domestic or foreign, shall hereafter be incorporated or admitted to transact business in this state which does not provide for stated periodical contributions sufficient to provide for meeting the mortality obligations contracted, when valued upon the basis of the national fraternal congress table of mortality as adopted by the national fraternal congress, August twenty-third, one thousand nine hundred and ninety-nine, or any higher standard, with interest assumption not more than four per cent per annum, nor write or accept members for temporary or permanent disability benefits except upon tables based upon reliable experience, with an interest assumption not higher than four per cent.

3. Deferred payments or installments of claims shall be considered as fixed liabilities on the happening of the contingency upon which such payments or installments are thereafter to be paid. Such liability shall be the present value of such future payments or installments upon the rate of interest and mortality assumed by the society for valuation, and every society shall maintain a fund sufficient to meet such liability regardless of proposed future collections to meet any such liabilities. (1913, c. 89, s. 9; C. S. 6511.)

§ 58-286. Investment of funds.—Every society shall invest its funds only in securities permitted by the laws of this state for the investment of the assets of life insurance companies: Provided, that any foreign society permitted or seeking to do business in this state, which invests its funds in accordance with the laws of the state in which it is incorporated where it has such laws, shall be held to meet the requirements of this article for the investment of funds. (1913, c. 89, s. 9; C. S. 6512.)

Cross References.—As to investment in bonds guaranteed by the United States, see § 53-44. As to investment in bonds or notes secured by mortgages insured by the Federal Housing Administration, see § 53-45. See also § 53-60 as to investments in Federal Farm loan bonds, and § 142-29 as to investment in refunding bonds of North Carolina.

§ 58-287. Application of funds.—Every provision of the laws of the society for payment by its members, in whatever form made, shall distinctly state the purpose thereof, the same and the proportion thereof which may be used for expenses, and no part of the money collected for mortuary purposes or the net accretions of either or any of said funds shall be used for expenses. (1913, c. 89, s. 10; C. S. 6513.)

§ 58-288. Powers of existing societies retained; reincorporation.—Any society now engaged in transacting business in this state may exercise all of the rights conferred by this article, and all the rights, powers, and privileges now exercised
or possessed by it under its charter or articles of incorporation not inconsistent with this article, if incorporated; or, if it be a voluntary association, it may incorporate hereunder. But no society already organized shall be required to reincorporate hereunder, and any such society may amend its articles of incorporation from time to time in the manner provided by law. (1913, c. 89, s. 12; C. S. 6514.)

§ 58-289. Mergers and transfers.—No domestic society shall merge with or accept the transfer of the membership or funds of any other society unless such merger or transfer is evidenced by a contract in writing, setting out in full the terms and conditions of such merger or transfer, and is filed with the commissioner of insurance of this state, together with a sworn statement of the financial condition of each of the societies, by its president and secretary or corresponding officers, and a certificate duly verified under oath of said officers of each of the contracting societies that such merger or transfer has been approved by a vote of two-thirds of the members of the supreme legislative or governing body of each of the societies.

Upon the submission of such contract, financial statements, and certificates, the commissioner of insurance shall examine the same, and if he shall find such financial statements to be correct and the contract to be in conformity with the provisions of this section, and that such merger or transfer is just and equitable to the members of each of the societies, he shall approve the merger or transfer, issue his certificate to that effect, and thereupon the contract of merger or transfer shall be of full force and effect.

In case such contract is not approved, the fact of its submission and its contents shall not be disclosed by the commissioner of insurance. (1913, c. 89, s. 13; C. S. 6515.)

§ 58-290. Accident societies may be licensed.—Any fraternal benefit society heretofore organized and incorporated, and operating within the definition set forth in this article, providing for benefits in case of death or disability resulting solely from accidents, but which does not obligate itself to pay death or sick benefits, may be licensed under the provisions of this article, and shall have all the privileges and be subject to all the provisions and regulations of this article, except the provisions requiring medical examinations, valuations of benefit certificates, and that the certificate shall specify the amount of benefits. (1913, c. 89, s. 27; C. S. 6517.)

§ 58-291. Certain societies not included.—Nothing contained in this article shall be construed to affect or apply to societies which limit their membership to any one hazardous occupation, nor to any associations of local lodges of a society now doing business in this state which provides death benefits not exceeding five hundred dollars to any one person or disability benefits not exceeding three hundred dollars in any one year to any one person, or both, nor to any contracts of reinsurance business on such plan in this state, nor to domestic societies which limit their membership to the employees of a particular city or town, designated firm, business house, or corporation, nor to domestic lodges, orders, or associations of a purely religious, charitable, and benevolent description, which do not provide for a death benefit of more than one hundred dollars, or for disability benefits of more than one hundred and fifty dollars to any one person in any one year. The commissioner of insurance may require from any society such information as will enable him to determine whether such society is exempt from the provisions of this article. (1913, c. 89, s. 26; 1925, c. 70, s. 2; C. S. 6518.)

Service on Resident Secretary Valid. — Personal service on resident secretary of fraternal insurance association allowed to do business in the State without a license under this section and §§ 58-15, 58-221, and 58-222, held valid service on the association in action on policy. Winchester v. Grand Lodge of Brotherhood of Railroad Trainmen, 203 N. C. 735, 167 S. E. 49.

§ 58-292. Reports to commissioner of insurance. 1. Annual Report.—Every society transacting business in this state shall annually, on or before the first day of March, file with the commissioner of insurance, in such form as he may require, a statement, under oath of its president and secretary or corresponding officers, of its condition and standing on the thirty-first day of December next preceding, and of its transactions for the year ending on that date, and also shall furnish such other information as the commissioner may deem necessary to a proper exhibit of its business and plan of working. The commissioner may at other times require any further statement he may deem necessary to be made relating to such society.

2. Valuation of Certificates.—In addition to the annual report herein required, each society shall annually report to the commissioner a valuation of its certificates in force on December thirty-first, last preceding, excluding those issued within the year for which the report is filed, in cases where the contributions for the first year in whole or in part are used for current mortality and expenses. Such report of valuation shall show, as contingent liabilities, the present mid-year value of the promised benefits provided in the constitution and laws of such society under certificates then subject to valuation; and as contingent assets, the present mid-year value of the future net contributions provided in the constitution and laws as the same are in practice actually collected. At the option of any society, in lieu of the above, the valuation may show the net value of the certificates subject to valuation hereinbefore provided, and the net value, when computed in case of monthly contributions, may be the mean of the terminal valuations of the last month of the preceding and of the current insurance years.

3. Valuation Ascertained.—Such valuation shall be certified by a competent accountant or actuary, or, at the request and expense of the society, verified by the actuary of the department of insurance of the home state of the society, and shall be filed with the commissioner within ninety days after the submission of the last preceding annual report. The legal minimum standard of valuation for all certificates, except for disability benefits, shall be the national fraternal congress table of mortality as adopted by the national fraternal congress, August twenty-third, one thousand eight hundred and ninety-nine, or, at the option of the society, any
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higher table; or, at its option, it may use a table based upon the society's own experience of at least twenty years and covering not less than one hundred thousand lives with interest assumption not more than four per centum per annum. Each such valuation report shall set forth clearly and fully the mortality and interest basis and the method of valuation. Any society providing for disability benefits shall keep the net contributions for such benefits in a fund separate and apart from all other benefit and expense funds and the valuation of all other business of the society: Provided, that where a combined contribution table is used by a society for both death and permanent total disability benefits, the valuation shall be according to tables of reliable experience, and in such case a separation of the funds shall not be required.

4. Test of Solvency.—The valuation herein provided for shall not be considered or regarded as a test of the financial solvency of the society, but each society shall be held to be legally solvent so long as the funds in its possession are equal to or in excess of its matured liabilities.

5. Report Mailed to Members.—A report of such valuation and an explanation of the facts concerning the condition of the society thereby disclosed shall be printed and mailed to each beneficiary member of the society not later than June first of each year; or, in lieu thereof, such report of valuation and showing of the society's condition as thereby disclosed may be published in the society's official paper, and the issue containing the same mailed to each beneficiary member of the society. (1913, c. 89, s. 20; C. S. 6519.)

§ 58-293. Additional or increased rates.—The laws of such society shall provide that if the stated periodical contributions of the members are insufficient to pay all matured death and disability claims in full, and to provide for the creation and maintenance of the funds required by its laws, additional, increased, or extra rates of contribution shall be collected from the members to meet such deficiency; and such laws may provide that, upon the written application or consent of the member, his certificate may be charged with its proportion of any deficiency disclosed by valuation, with interest not exceeding five per centum per annum. (1913, c. 89, s. 20; C. S. 6520.)

§ 58-294. Provisions to insure future security.—If the valuation of the certificates, as hereinbefore provided, on December thirty-first, one thousand nine hundred and seventeen, shall show that the present value of future net contributions, together with the admitted assets, is less than the present value of the promised benefits and accrued liabilities, such society shall thereafter maintain said financial condition at each succeeding triennial valuation in respect of the degree of efficiency as shown in the valuation as of December thirty-first, one thousand nine hundred and seventeen. If at any succeeding triennial valuation such society does not show at least the same condition, the commissioner shall direct that it thereafter comply with the requirements herein specified. If the next succeeding triennial valuation after the receipt of such notice shall show that the society has failed to maintain the condition required herein, the commissioner may, in the absence of good cause shown for such failure, institute proceedings for the dissolution of such society, in accordance with the provisions of this article, or in the case of a foreign society, its license may be canceled in the manner provided in this article.

Any such society, shown by any triennial valuation, subsequent to December thirty-first, one thousand nine hundred and seventeen, not to have maintained the condition herein required, shall, within two years thereafter, make such improvement as to show a percentage of deficiency not greater than as of December thirty-first, one thousand nine hundred and seventeen, or thereafter, as to all new members admitted, to be subject, so far as stated rates of contributions are concerned, to the provisions of this article, applicable in the organization of new societies: Provided, that the net mortuary or beneficiary contributions and funds of such new members shall be kept separate and apart from the other funds of the society. If such required improvement is not shown by the succeeding triennial valuation, then the new members may be placed in a separate class and their certificates valued as an independent society in respect of contributions and funds. (1913, c. 89, s. 20(a); C. S. 6521.)

§ 58-295. Valuation on accumulation basis; tabular basis.—In lieu of the requirements of the two preceding sections, any society accepting in its laws the provisions of this section may value its certificates on a basis herein designated "accumulation basis," by crediting each member with the net amount contributed for each year, and with interest at approximately the net rate earned and by charging him with his shares of the losses for each year, herein designated "cost of insurance," and carrying the balance, if any, to his credit. The charge for the cost of insurance may be according to the actual experience of the society applied to a table of mortality recognized by the law of this state, and shall take into consideration the amount at risk during each year, which shall be the amount payable at death, less the credit to the member. Except as specifically provided in its articles or laws or contracts, no charge shall be carried forward from the first valuation hereunder against any member of any past share of losses exceeding the contributions and credit. If, after the first valuation, any member's share of losses for any year exceeds his credit, including the contribution for the year, the contribution shall be increased to cover his share of the losses. Any such excess share of losses chargeable to any member may be paid out of a fund or contributions especially created or required for such purpose.

Any member may transfer to any plan adopted by the society with net rates on which tabular reserves are maintained, and on such transfer shall be entitled to make such application of his credit as provided in the laws of the society. Certificates issued, rerated, or readjusted on a basis providing for adequate rates with adequate reserves to mature such certificates upon assumptions for mortality and interest recognized by the law of this state, shall be valued on such basis, herein designated the "Tabular Basis": Provided, that if on the first valuation under this section a deficiency in reserve shall be shown for any such
certificate, the same shall be valued on the accumu-
lation basis.
Whenever, in any society having members upon
the tabular basis and upon the accumulation basis,
the total of all costs of insurance provided for any
year shall be insufficient to meet the actual death
and disability losses for the year, the deficiency
shall be met for the year from the available funds
after setting aside all credits in the reserve; or
from increased contributions or by an increase in
the number of assessments applied to the society
as a whole or to classes of members as may be
specified in its laws. Savings from a lower amount
of death losses may be returned in like manner as
may be specified in its laws.
If the laws of the society so provide, the assets
representing the reserves of any separate class of
members may be carried separately for such class
as if in an independent society, and the required
reserve accumulation of such class so set apart
shall not thereafter be mingled with the assets of
other classes of the society.
A table showing the credits to individual mem-
bers for each age and year of entry and showing
opposite each credit the tabular reserve required
on the whole life or other plan of insurance speci-
fied in the contract, according to assumptions for
mortality and interest recognized by the law of
this state and adopted by the society, shall be filed
by the society with each annual report, and also
be furnished to each member before July first of
each year.
In lieu of the aforesaid statement there may be
furnished to each member within the same time
a statement giving the credit for such member and
giving the tabular reserve and level rate required
for a transfer carrying out the plan of insurance
specified in the contract. No table or statement
need be made or furnished where the reserves are
maintained on the tabular basis.
For this purpose individual bookkeeping ac-
counts for each member shall not be required,
and all calculations may be made by actuarial
methods.
Nothing herein contained shall prevent the
maintenance of such surplus over and above the
credits on the accumulation basis and the reserves
on the tabular basis pursuant to its laws; nor be
construed as giving to the individual member any
right or claim to any such reserve or credit other
than in manner as expressed in the contract and its
laws; nor as making any such reserve or credits a
liability in determining the legal solvency or the
society. (1913, c. 89, s. 20(h); C. S. 6532.)
§ 58-296. Examination of domestic societies.—
The commissioner of insurance, or any person he
may appoint, shall have power of visitation and
examination into the affairs of any domestic so-
ciety. He may employ assistants for the purpose
of such examination, and he, or any person he may
appoint, shall have free access to all the books,
papers, and documents that relate to the business
of the society, and may summon and qualify as
witness under oath and examine its officers, agents,
and employees or other persons in relation to the
affairs, transactions, and condition of the society.
The expense of such examination shall be paid
by the society examined upon statement furnished
by the commissioner of insurance, and the exam-
ination shall be made at least once in three years.
(1913, c. 89, s. 21; C. S. 6533.)
§ 58-297. Proceedings for dissolution.—When
after examination the commissioner of insurance
is satisfied that any domestic society has failed to
comply with any provision of this article, or is ex-
ceeding its powers, or is not carrying out its con-
tracts in good faith, or is transacting business
fraudulently; or whenever any domestic society,
after the existence of one year or more, shall have
a membership of less than four hundred (or shall
determine to discontinue business), the commis-
sioner of insurance may present the facts relating
thereto to the attorney-general who shall, if he
deem the circumstances warrant, commence an
action in quo warranto in a court of competent juris-
diction, and such court shall thereupon notify the
officers of such society of a hearing, and if it shall
then appear that such society should be closed, it
shall be enjoined from carrying on any further
business, and a receiver shall be appointed to take
possession of its books, papers, and documents that
relate to the business of the society, and may search
and take all necessary and proper legal action and
proceedings for the dissolution of or the appointment
of a receiver for any such domestic society or branch
thereof shall be entertained by any court in this
state unless the same is made by the attorney-gen-
eral. (1913, c. 89, s. 22; C. S. 6535.)
§ 58-298. Proceedings only by attorney-general.
—No application for injunction against or proceed-
ings for the dissolution of or the appointment of a
receiver for any such domestic society or branch
thereof shall be entertained by any court in this
state unless the same is made by the attorney-gen-
eral. (1913, c. 89, s. 22; C. S. 6535.)
§ 58-299. Examination of foreign societies.—The
commissioner of insurance or any person whom he
may appoint may examine any foreign society
transacting or applying for admission to transact
business in this state. The commissioner may em-
ploy assistants, and he, or any person he may ap-
point, shall have free access to all the books, pa-
pers, and documents that relate to the business
of the society, and may summon and qualify as wit-
ess under oath and examine its officers, agents,
and employees and other persons in relation to the
affairs, transactions, and condition of the society.
He may, in his discretion, accept in lieu of such
examination the examination of the insurance
department of the state, territory, district, prov-
ince, or country where such society is organized.
The actual expenses of examiners making any
such examination shall be paid by the society up-
on statement furnished by the commissioner of
insurance.
If any such society or its officers refuse to sub-
mit to such examination or to comply with the
provisions of the section relative thereto, its au-
thority to write new business in this state shall be
suspended or license refused until satisfactory evi-
dence is furnished the commissioner relating to
its condition and affairs, and during such suspen-
sion the society shall not write new business in
this state. (1913, c. 89, s. 23; C. S. 6536.)
§ 58-300. No adverse publications. — Pending, during, or after an examination or investigation of any such society, either domestic or foreign, the commissioner of insurance shall make public no financial statement, report, or finding, nor shall he knowingly permit to become public any financial statement, report, or finding affecting the status, standing, or rights of any such society, until a copy thereof has been served upon the society, at its home office, nor until the society has been afforded a reasonable opportunity to answer any such financial statement, report, or finding, and to make such showing in connection therewith as it may desire. (1913, c. 89, s. 24; C. S. 6527.)

§ 58-301. Revocation of license.—When the commissioner of insurance on investigation is satisfied that any foreign society transacting business under this article has exceeded its powers, or has failed to comply with any provisions of this article, or is conducting business fraudulently, or is not carrying out its contracts in good faith, he shall notify the society of his findings, and state in writing the grounds of his dissatisfaction, and after reasonable notice require the society, on a date named, to show cause why its license should not be revoked. If on the date named in the notice such objections have not been removed to the satisfaction of the commissioner, or the society does not present good and sufficient reasons why its authority to transact business in this state should not at that time be revoked, he may revoke the authority to continue business in this state. All decisions and findings of the commissioner made under the provisions of this section may be reviewed by proper proceedings in any court of competent jurisdiction, as provided in this article. (1913, c. 89, s. 25; C. S. 6528.)

§ 58-302. Criminal offenses.—Any person, officer, member, or examining physician of any society authorized to do business under this article who shall knowingly or willfully make any false or fraudulent statement or representation in or with reference to any application for membership, or for the purpose of obtaining money from or benefit in any society transacting business under this article, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, or imprisoned in the county jail for not less than thirty days nor more than one year, or both, in the discretion of the court.

Any person who shall solicit membership for, or in any manner assist in procuring membership in any fraternal benefit society not licensed to do business in this state, or who shall solicit membership for, or in any manner assist in procuring membership in any such society not authorized as herein provided, to do business as herein defined in this state, shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than fifty nor more than two hundred dollars.

Any society, or any officer, agent, or employee thereof, neglecting or refusing to comply with, or violating any of the provisions of this article, the penalty for which neglect, refusal, or violation is not specified in this section, shall be fined not exceeding two hundred dollars upon conviction thereof. (1913, c. 89, s. 28; C. S. 6529.)

Cross Reference.—As to penalties for using funds of insurance companies for political purposes, see § 163-206.

§ 58-303. Merger, consolidation, or reinsurance of risks, with other fraternal benefit societies.—No fraternal benefit society organized under the laws of this state to do the business of life, accident, or health insurance, shall consolidate or merge with any other fraternal benefit society, or reinsurance its insurance risks, or any part thereof with any other fraternal benefit society, or assume or reinsurance the whole or any portion of the risks of any other fraternal benefit society, except as herein provided. No fraternal benefit society or subordinate body thereof shall merge, consolidate with, or be reinsured by any company or association not licensed to transact business as a fraternal beneficiary society. (1921, c. 60, s. 1; C. S. 6529(a).)

§ 58-304. Contract approved by governing bodies of parties to same; approval by commissioner of insurance.—When any such fraternal benefit society shall propose to consolidate or merge its business or to enter into any contract of reinsurance, or to assume or reinsure the whole or any portion of the risks of any other fraternal benefit society, the proposed contract in writing setting forth the terms and conditions of such proposed consolidation, merger, or reinsurance shall be submitted to the legislative or governing bodies of each of said parties to said contract after due notice, and if approved such contract as so approved, shall be submitted to the commissioner of insurance of this state for his approval, and the parties to said contract shall at the same time submit a sworn statement showing the financial condition of each of such fraternal benefit societies as of the thirty-first day of December preceding the date of such contract: Provided, that such commissioner of insurance may, within his discretion, require such financial statement to be submitted as of the last day of the month preceding the date of such contract. The commissioner of insurance shall thereupon consider such contract of consolidation, merger, or reinsurance, and if satisfied that the interests of the certificate holders of such fraternal benefit societies are properly protected, and that such contract is just and equitable to the members of each of such societies, and that no reasonable objection exists thereto, shall approve said contract as submitted. In case the parties corporate to such a contract shall have been incorporated in separate states, or territories, such contract shall be submitted as herein provided to the commissioner of insurance of each of such incorporating states, or territories, to be considered and approved separately by each of such commissioners of insurance. When said contract of consolidation, merger, or reinsurance shall have been approved as hereinabove provided, such commissioner of insurance shall issue a certificate to that effect, and thereupon the said contract of consolidation, merger, or reinsurance shall be in full force and effect. In case such contract is not approved, the fact of its submission and its contents shall not be
disclosed by the commissioner of insurance. (1921, c. 60, s. 2; C. S. 6520(b).)

§ 58-305. Expenses; compensation to officers or employees of contracting parties and state employees.—All necessary and actual expenses and compensation incident to the proceedings provided in this law shall be paid as provided by such contract of consolidation, merger, or reinsurance: Provided, however, that no brokerage or commission shall be included in such expenses and compensation or shall be paid to any person by either of the parties to any such contract in connection with the negotiation therefor or execution thereof, nor shall any compensation be paid to any officer or employee of either of the parties to such contract for directly or indirectly aiding in effecting such contract of consolidation, merger, or reinsurance. An itemized statement of all such expenses shall be filed with the commissioner of insurance, subject to approval, and when approved the same shall be binding on the parties thereto. Except as fully expressed in the contract of consolidation, merger or reinsurance, or itemized statement of expenses, as approved by the commissioner of insurance, or commissioners, as the case may be, no compensation shall be paid to any person or persons, and no officer or employee of the state shall receive any compensation, directly or indirectly, for in any manner aiding, promoting, or assisting any such consolidation, merger, or reinsurance. (1921, c. 60, s. 3; C. S. 6529(c).)

§ 58-306. Violation of law a felony.—Any person violating the provisions of §§ 58-303, 58-304, and 58-305 shall be guilty of a felony, and upon conviction shall be liable to a fine of not more than five thousand dollars, or to imprisonment for not more than five years, or to both fine and imprisonment. (1921, c. 60, s. 4; C. S. 6529(d).)

§ 58-307. Appointment of commissioner of insurance as process agent.—Every foreign fraternal benefit society except labor organizations which limit their admission to membership to persons engaged in one or more hazardous occupations in the same or similar lines of business now transacting business in this state shall, within thirty days after the passage of this section, and every such society hereafter applying for admission shall, before being licensed, appoint in writing the commissioner of insurance and his successors in office to be its true and lawful attorney upon whom all legal process in any action or proceeding against it shall be served, and in such writing shall agree that any lawful process against it which is served upon such attorney shall be of the same legal force and validity as if served upon the society, and that the authority shall continue in force so long as any liability remains outstanding in this state. Copies of such appointment, certified by said commissioner of insurance, shall be deemed sufficient evidence thereof and shall be admitted in evidence with the same force and effect as the original thereof might be admitted. Service shall be made in duplicate upon the commissioner of insurance, or in his absence upon the person in charge of his office, and shall be deemed sufficient service upon said society. When legal service against any such society is served upon said commissioner of insurance he shall forthwith forward by registered mail one of the duplicate copies, prepaid and directed to its secretary or corresponding officer. No such service shall be valid or binding against any such society when it is required thereunder to file its answer, pleading or defense in less than thirty days from the date of mailing the copy of such service to such society. Legal process shall not be served upon any such society except in the manner provided therein. As a condition precedent to a valid service of process and to the duty of the commissioner in the premises, the plaintiff shall pay to the commissioner of insurance at the time of service the sum of one ($1.00) dollar, which the plaintiff shall recover as taxable costs if he prevails in his action. (1939, c. 130.)

Cross Reference.—As to other ways in which a foreign insurance company may be served with a copy of process, see §§ 1-97, 55-38.

Art. 29. Whole Family Protection.

§ 58-308. Insurance on children.—Any fraternal order or fraternal benefit society authorized to do business in this State and operating on the lodge plan may provide in its constitution and by-laws, in addition to other benefits provided for therein, for the payment of death or annuity benefits upon the lives of children between the ages of one and sixteen years at next birthday, for whose support and maintenance a member of such society is responsible. The society may at its option organize and operate branches for such children and membership in local lodges, and initiation therein shall not be required of such children, nor shall they have any voice in the management of the society. The total benefits payable as above provided shall in no case exceed the following amounts at ages at next birthday at time of death, respectively, as follows: one year, twenty dollars; two years, fifty dollars; three years, seventy-five dollars; four years, one hundred dollars; five years, one hundred twenty-five dollars; six years, one hundred fifty dollars; seven years, one hundred seventy-five dollars; eight years, one hundred dollars; nine years, one hundred twenty-five dollars; ten years, one hundred fifty dollars; eleven years, one hundred seventy-five dollars; twelve years, one hundred dollars; thirteen years, one hundred twenty-five dollars; fourteen years, one hundred dollars; fifteen years, one hundred twenty-five dollars; sixteen years, one hundred dollars. Provided, any fraternal benefit society which shall accumulate and maintain the reserves required by a table of mortality not lower than the American Experience Table of Mortality, with an interest assumption of not more than four per cent, may accept members at such ages, and children under sixteen years of age, in such manner and upon such showing of eligibility, and issue to its members or children under sixteen years of age, such forms of certificates, payable to such beneficiaries, and for such amounts, as its constitution and laws may provide. Children under sixteen years of age shall have no voice or vote. (1917, c. 239, s. 1; 1931, c. 38; 1937, c. 208; C. S. 6530.)

Editor's Note.—The Act of 1931 repealed the former section and substituted the above in lieu thereof. Formerly
§ 58-309. Medical examination; certificates and contributions.—No benefit certificate as to any child shall take effect until after medical examination or inspection by a licensed medical practitioner, in accordance with the laws of the society, nor shall any such benefit certificate be issued unless the society shall simultaneously put in force at least five hundred such certificates, on each of which at least one assessment has been made. Any new certificate representing by such certificate falls below five hundred. The death benefit contributions to be made upon such certificate shall be based upon the "Standard Mortality Table" or the "English Life Table Number Six," and a rate of interest not greater than four per cent per annum, or upon a higher standard; but contributions may be waived or returns may be made from any surplus held in excess of reserve and other liabilities, as provided in the by-laws; and extra contributions shall be made if the reserves hereafter provided for become impaired. (1917, c. 239, s. 2; C. S. 6531.)

§ 58-310. Reserve fund; exchange of certificates.—Any society entering into such insurance agreements shall maintain on all such contracts the reserve required by the standard of mortality and interest adopted by the society for computing contributions as provided in § 58-309, and the funds representing the benefit contributions and all accretions thereon shall be kept as separate and distinct funds, independent of the other funds of the society, and shall not be liable for or used for the payment of the debts and obligations of the society other than the benefits herein authorized. A society may provide that when a child reaches the minimum age for initiation into membership in such society, any benefit certificate issued hereunder may be surrendered for cancellation and exchanged for any other form of certificate issued by the society: Provided, that such surrender will not reduce the number of lives insured in the branch below five hundred; and upon the issuance of such new certificate any reserve upon the original certificate herein provided for shall be transferred to the credit of the new certificate. Neither the person who originally made application for benefits on account of such child, nor the beneficiary named in such original certificate, nor the person who paid the contributions, shall have any vested right in such new certificate, the free nomination of a beneficiary under the new certificate being left to the child so admitted to benefit membership. (1917, c. 239, s. 3; C. S. 6532.)

§ 58-311. Separation of funds.—An entirely separate financial statement of the business transactions and of assets and liabilities arising therefrom shall be made in its annual report to the commissioner of insurance by any society availing itself of the provisions hereof. The separation of assets, funds, and liabilities required hereby shall not be terminated, rescinded, or modified, nor shall the funds be diverted for any use other than as specified in the preceding section, as long as any certificates issued hereunder remain in force, and this requirement shall be recognized and enforced in liquidation, reinsurance, merger, or other change in the condition or the status of the society. (1917, c. 239, s. 4; C. S. 6533.)

§ 58-312. Payments to expense or general fund.—Any society shall have the right to provide in its laws and the certificate issued hereunder for specified payments on account of the expense or general fund, which payments shall or shall not be mingled with the general fund of the society, as its constitution and by-laws may provide. (1917, c. 239, s. 5; C. S. 6534.)

§ 58-313. Continuation of certificates.—In the event of the termination of membership in the society by the person responsible for the support of any child on whose account a certificate may have been issued as provided herein, the certificate may be continued for the benefit of the estate of the child, provided the contributions are continued, or for the benefit of any other person responsible for the support and maintenance of such child who shall assume the payment of the required contributions. (1917, c. 239, s. 6; C. S. 6535.)


§ 58-314. Appointment of trustees to hold property.—The lodges of Masons, Odd Fellows, Knights of Pythias, camps of Woodmen of the World, councils of the Junior Order of United American Mechanics, orders of the Elks, Young Men's Christian Associations, Young Women's Christian Associations, societies for the care of orphans and indigent children, societies for the rescue of fallen women, and any other benevolent or fraternal orders and societies, may appoint from time to time suitable persons trustees of their bodies or societies, in such manner as they deem proper, which trustees, and their successors, shall have power to receive, purchase, take, and hold property, real and personal, in trust for such society or body. The trustees shall have power, when instructed so to do by resolution adopted by the society or body which they represent, to mortgage or sell and convey in fee simple any real or personal property owned by the society or body; and the conveyances so made by the trustees shall be effective to pass the property in fee simple to the purchaser or to the mortgagee or trustee for the purposes in such conveyance or mortgage expressed. If there shall be no trustee, then any real or personal property which could be held by such trustees shall vest in and be held by such charitable, benevolent, religious, or fraternal orders and societies, respectively, according to such intent. (1907, c. 22; 1915, cc. 149, 186; 1923, c. 257; C. S. 6536.)

Suspension of Members.—Where a local fraternal and benevolent lodge has existed under the constitution and by-laws of the supreme lodge requiring written notice to be given to its members before suspension as a financial member, etc., for nonpayment of dues, etc., and such notice has not been given accordingly: Held, a resolution passed at a meeting of the local lodge authorizing a sale and conveyance of its property by trustees without complying with this requirement, is valid, and at the suit of such wrongfully suspended members, an injunction will lie. Tyler v. Howell, 192 N. C. 433, 135 S. E. 133. [574]
§ 58-315. Unauthorized wearing of badges, etc. — Any person who fraudulently and wilfully wears the badge or button of any secret or fraternal organization or society, either in the identical form or in such near resemblance thereto as to be a colorable imitation thereof, or who fraudulently and wilfully uses the name of any such order or organization, the titles of its officers, or its insignia, ritual, or ceremonies, unless entitled to wear or use the same under the constitution and by-laws, rules and regulations of such secret or fraternal organization or society, shall be deemed guilty of a misdemeanor, and shall, upon conviction, be punished by a fine of fifty dollars or imprisonment for thirty days, in the discretion of the court. (1907, c. 968; 1911, c. 37; 1915, c. 252; C. S. 6537.)


§ 58-316. Cooperative non-profit life benefit association defined.—Any corporation or association, domestic or foreign, issuing benefit certificates or policies of life, health or accident insurance upon the lives or health of its members, having a representative form of government without capital stock and conducting its business without profit and for the sole benefit of its members and their beneficiaries and maintaining the reserves as herein provided and all contracts issued by it, which shall make acceptable written application to become such and shall comply with the provisions of this article is defined as a “Cooperative Non-profit Life Benefit Association.” (1927, c. 30, s. 1.)

§ 58-317. Form of corporate government.—Such association shall have a constitution, laws and/or by-laws providing for a representative form of government for the management of the association; providing for a legislative or governing body composed of its officers and representatives to be elected either by the adult members or by delegates elected directly or indirectly by the adult members, and providing for the manner of selecting representatives of the members for membership in its legislative body. The elected members of the governing body shall have not less than two-thirds of the votes of said body, nor less than the votes required to amend its constitution, laws and by-laws, and the governing body shall meet as often as once in four years (or any time during the fourth year after a meeting). Meetings of its governing body may be held in any state, province or country where such association is authorized to do business. The members of the governing body shall not vote by proxy.

Officers to conduct the business of the association shall be elected by such body, but not for a longer period than four years or/and until the subsequent quadrennial meeting of said body. Such officers, by whatever name known, shall constitute the Board of Directors. (1927, c. 30, s. 2.)

§ 58-318. Basis upon which insurance contracts may be issued.—Any such association maintaining reserves based upon the American Experience Table of Mortality, with an interest assumption of not more than 4% or some higher standard, or upon any minimum standard hereafter allowed by law in this State for legal reserve life insurance companies, may issue contracts of insurance, life, health, accident, annuities and endowments or all of them combined or separately, upon the health and lives of children and adults.

Any association licensed to do business under the provisions of this act, which has theretofore enacted a provision in its constitution, laws and/or by-laws in relation to the rates to be paid by its members, or lien and interest charges in lieu of such rates, or any part thereof, shall maintain the provisions of such constitution, laws and/or by-laws in full force and effect or the equivalent thereof in all particulars as to such members.

Any such association desiring to do business in this State under the provisions of this article, which has all or any portion of its membership upon a rate or premium basis not producing the reserves herein required under the American Experience Table of Mortality with an interest assumption of not more than 4% and which also possesses the power to increase the rates or call extra assessments upon said membership, may be permitted to do business in this State as such association defined in this article if it shall, as to all business hereafter acquired by it, maintain reserves on such business based upon the American Experience Table of Mortality with an interest assumption of not more than four per cent, or upon any minimum standard allowed by law for legal reserve life insurance companies in this State or the state of its domicile; and the contracts of members theretofore admitted to membership shall be forever subject to increased rates or extra assessments and the association shall maintain the reserves on all of its prior business on a basis not less than the National Fraternal Congress Table of Mortality with an interest assumption of not more than four (4) per cent, or upon a table of mortality not less than that derived from its own experience covering a period of not less than twenty years and involving not less than one hundred thousand lives, with an interest assumption of not more than four per cent.; and the officers of such association shall provide for such increased rates or extra assessments as shall be necessary to maintain such reserves. (1927, c. 30, ss. 3, 3(a); 1927, c. 252.)

Editor’s Note.—The 1927 amendment, ch. 252, substituted four per cent for three and one-half per cent.

§ 58-319. Contracts in writing; fees not set out in policy forbidden.—All contracts for insurance or benefits shall be in writing. It shall be unlawful for any such association or any officer or agent to include in the sum charged a member, any fee, compensation, charge or perquisite whatsoever not specified in the policy or certificate except that a local medical examiner's fee may be charged. (1927, c. 30, s. 4.)

§ 58-320. All policies mutual and participating. — All beneficiary certificates or policies issued by such association on said American Experience Table of Mortality with said interest assumption or any higher standard, shall be mutual and participating, and the association may provide for automatic paid up or extended insurance for an amount not to exceed the amount the reserve to the credit of such member will purchase in the event of suspension after said certificate shall have
§ 58-321. Benefit not subject to seizure under process.—No money or other benefit, charity or relief or aid to be paid, provided or rendered by any such association, shall be liable to attachment, garnishment or other process, or be seized, taken, appropriated or applied by any legal or equitable process or operation of law to pay any debt or liability of a member, or his beneficiary, or any other person who may have a right thereunder, either before or after payment. (1927, c. 30, s. 6.)

§ 58-322. Officers and members not personally liable.—Officers and members of the supreme, grand or any subordinate body of such association, by whatever name known, shall not be individually liable for the payment of any disability or death or other benefits provided for in the laws and contracts of such association, but such benefits shall be payable out of the funds of such association and in the manner provided by its laws. (1927, c. 30, s. 7.)

§ 58-323. Authority to make laws.—Every such association shall have the power to make a constitution, laws and/or by-laws for the government of the association, the admission of its members, the management of its affairs and the fixing and readjustment of the rates of contribution of its members from time to time, and it shall have the power to change, add to or amend such constitution, laws or by-laws and shall have such other powers as are necessary to carry into effect the objects and purposes of the association; it may make refunds to its members equitably of any surplus funds of the association. (1927, c. 30, s. 8.)

§ 58-324. Constitution, laws and by-laws must be filed.—Every such association transacting business under this act shall file with the commissioner of insurance of this state, a duly certified copy of its constitution, laws or by-laws and all amendments or additions thereto. Copies of the same, certified to by the secretary or corresponding officer of the association, shall be prima facie evidence of the legal adoption and filing thereof. (1927, c. 30, s. 9.)

§ 58-325. Benefits, loan values and dividends.—Such association may provide for stipulated premiums and death, annuity, endowment and disability benefits, and for cash surrender and loan values to an amount not exceeding the reserve or the equivalent thereof, in paid up or extended term insurance, based upon the mortality standards set forth in this article. (1927, c. 30, s. 10.)

§ 58-326. May maintain hospitals and homes.—Such association may maintain homes for aged members, or children’s homes, hospitals or recreational centers, or any or all of said features, or any other charitable institution, and may provide for the erection of monuments or memorials to deceased members: Provided, any such expenses may not be paid from the mortuary fund or reserves herein required. (1927, c. 30, s. 11.)

§ 58-327. Organization of cooperative non-profit life benefit association.—When ten or more citizens of the United States, a majority of whom are citizens of this State, desire to form an association under the provisions of this article, they shall adopt articles of incorporation and a constitution, laws or by-laws and file the same with the commissioner of insurance of this state who shall grant them temporary permission to solicit members and collect premiums therefrom, but without the right to issue contracts until licensed to do business; and when such incorporators have presented to the commissioner of insurance proof that they have five hundred members or more, and have collected from them assessments or premiums sufficient to pay the maximum amount of any proposed policy to be issued, and upon depositing with the commissioner of insurance ten thousand dollars ($10,000) in securities to be approved by him, then said commissioner of insurance may grant to said association a certificate of authority and permission to do business under this article. (1927, c. 30, s. 12.)

§ 58-328. Corporation now doing business in this State may qualify under this article.—Any association, domestic or foreign, now engaged in transacting business in this State, which can qualify under the provisions of this article as a “Cooperative Non-profit Life Benefit Association,” may, upon making application therefor, be granted a license by the commissioner of insurance to do business as such under this article, provided, it has accumulated reserves on its policies in force in a sum of not less than one hundred thousand dollars ($100,000), properly invested. (1927, c. 30, s. 13.)

§ 58-329. License granted.—Any domestic or foreign association wishing to do business under the provisions of this article, under whatever name it may conduct its business, upon making a written application and submitting proof satisfactory to the commissioner of insurance of this State that its business, as conducted, and its reserves on hand comply with the provisions of this article, upon paying to the commissioner of insurance the sum of two hundred dollars ($200) as license fee and all other fees assessed against such company shall be licensed to do business in this State as such association until the first day of the following April. Any such association, admitted to do business under this article in this State, which shall fail to comply with the provisions of this article, may have its license revoked, and upon failing to maintain its reserves as herein required, may be liquidated by the courts or by the commissioner of insurance as may be provided by law for the liquidation of legal reserve life insurance companies. (1927, c. 30, s. 14.)

§ 58-330. Annual statement and license.—Every such association doing business in this State shall annually file with the commissioner of insurance on or before the first day of March in each year a full and complete sworn statement of its financial condition on the thirty-first day of December in the preceding. Such statement shall plainly exhibit all real and contingent assets and liabilities and a complete account of its income and disbursements during the year. The commis-
sion of insurance is hereby empowered to require such further information as may be reason-
ably necessary to satisfy him that the statements contained in the sworn statement are true, and
he may thereupon grant a renewal of such license to such association to do business in this State
which shall continue in full force and effect until a new license is issued or specifically refused
unless revoked for good cause. For each such license, or annual renewal thereof, the association
shall pay the commissioner of insurance two hundred dollars ($200). Such license or a duplicate
thereof shall be prima facie evidence that such association is a Domestic Non-Profit Life Benefit
Association within the meaning of this article.

When the commissioner of insurance refuses to li-
cense any such association or revokes its authority
to do business in this State, he shall reduce his rul-
ing, order or decision to writing and file the same
in his office and furnish a copy thereof, together
with a statement of his reasons for his ruling to
the officers of the association upon request, and
the action of the commissioner of insurance shall
be reviewable by proper proceedings in any court
of competent jurisdiction within the State. Except
as herein provided, such association shall be
governed by the laws of this State relative to or
affecting life insurance companies. (1927, c. 30,
s. 15.)

§ 58-331. Examination of association. — The
commissioner of insurance or any person he may
appoint shall have the power of visitation and ex-
amination into the affairs of any such association.
He may employ assistants for such purpose and
they shall have free access to all the books, papers and documents that relate to the business
of the association, and may summon and quality
as witnesses under oath and examine its officers,
agents and employees or other persons in relation
to the condition of its business. The expenses of
such examination shall be paid by the associa-
tion examined upon a statement furnished by the
commissioner of insurance. As to all such foreign
associations doing business in this State, the
commissioner of insurance, in his discretion, may
accept in lieu of such examination the report of the
examination of the commissioner of insurance of
the state, territory, district, province or coun-
try where such association is organized or a re-
port of an examination made of such association
by the commissioner of insurance of any state.
(1927, c. 30, s. 16.)

§ 58-332. Investments. — The funds of such as-
sociation shall be invested in the same securities
as provided by law for other domestic com-
panies, and if a foreign association, in such secu-
rities as may be provided by the laws of its domi-
cile. (1927, c. 30, s. 17.)

§ 58-333. Premium tax; reports. — The officers
of such association shall file the reports required
by § 58-67 and shall pay the same premium tax as
is now or shall hereafter be provided for other
life insurance companies. (1927, c. 30, s. 18.)

§ 58-334. Foreign associations may incorporate
under this article. — Any foreign association, now
or hereafter doing business in this state or con-
ducting a business enabling it to qualify to do

business under this article in this state, may be-
come incorporated in this state as such associa-
tion under whatever name it shall select, upon
filing with the commissioner of insurance a resolu-
tion of its board of directors or of a similar body
by whatever name known, or of its legislative body,
requesting to be incorporated as such associa-
tion of this state, and submitting proof of its
financial qualifications under this article: Pro-
vided, the name chosen shall not conflict with
the name of some other organization doing busi-
ness in this state so as to cause confusion. The
officers of such associations shall thereupon retain
their respective offices for the terms for which
they were elected. Such association so reincor-
porated in this state shall maintain a general office
within this state. (1927, c. 30, s. 19.)

§ 58-335. To become a legal reserve life com-
pany. — Any such association filing with the com-
missioner of insurance a resolution of its board of
directors or similar body, by whatever name
known, or of its legislative body, making a request
to become a legal reserve life insurance company,
upon submitting proof satisfactory to the commis-
sioner of insurance that the condition of its busi-
ness qualifies it under the laws of this State, to
be classed as a legal reserve life insurance com-
pany, shall thereupon become a legal reserve life
insurance company under such name and such
plan as may be approved by the commissioner of
insurance. (1927, c. 30, s. 20.)

§ 58-336. Election of corporation to accept ar-
ticle. — This article shall not apply to any cor-
poration, domestic or foreign, now or hereafter
doing business in this State, unless said corpora-
tion, by action of its board of directors or other
properly constituted body, elects to have said
corporation come under the provisions hereof.
(1927, c. 30, s. 21.)

§ 58-337. Suit against association; where in-
stituted. — Suit may be instituted against said as-
sociation in any county in this State in any court
having jurisdiction. (1927, c. 30, s. 22.)

§ 58-338. Service of process on commissioner of
insurance. — Every cooperative non-profit life ben-
efit association, whether domestic or foreign,
before it shall be permitted to transact business in
this State, shall appoint in writing the commis-
sioner of insurance and his successor in office to be
its true and lawful attorney on whom all legal pro-
cess and legal notices in any action or proceeding
against it in this State shall be served, and in such
writing shall agree that any lawful process against
it which is served upon such attorney shall be of
effect with the same force and effect as the
commissioner of insurance, shall be deemed suffi-
cient evidence thereof and shall be admitted in
evidence with the same force and effect as the
original. Service of process in all suits and pro-
ceedings against such association shall be made
only upon such attorney and must be made in
duplicate upon him, or in his absence upon the person in charge of his office, and shall be deemed sufficient service upon such association: Provided, however, that no such service shall be deemed valid or binding against such association when it is required thereunder to file its answer, pleading or defense in less than thirty days from the date of service upon such attorney. When legal process against such association is served upon said commissioner of insurance, he shall forthwith forward by mail one of the duplicate copies, directed to its secretary or corresponding officer at the home office of the association. Legal process shall not be served upon any such association except in the manner herein provided. (1927, c. 30, s. 24.)

§ 58-340. Commissioner of insurance defined.—The term “Commissioner of insurance,” as used in this article, shall include the person, board or department of this State, under whatever name known, supervising the granting of licenses to insurance organizations to do business in this State. (1937, c. 30, s. 25.)

Chapter 59. Partnership.


Art. 1. Limited partnership defined.

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§ 59-1. Limited partnership defined.—A limited partnership is a partnership formed by two or more persons under the provisions of § 59-2, having as members one or more general partners and one or more limited partners. The limited partners as such shall not be bound by the obligations of the partnership. (1941, c. 251, s. 1.)
Editor's Note.—For comment on this enactment, see 19 N. C. Law Rev. 593.

§ 59-2. Formation.—(1) Two or more persons desiring to form a limited partnership shall:
(a) Sign and swear to a certificate, which shall state:
I. The name of the partnership,
II. The character of the business,
III. The location of the principal place of business,
IV. The name and place of residence of each member; general and limited partners being respectively designated,
V. The term for which the partnership is to exist,
VI. The amount of cash and a description of and the agreed value of the other property contributed by each limited partner,
VII. The additional contributions, if any, agreed to be made by each limited partner and the times at which or events on the happening of which they shall be made,
VIII. The time, if agreed upon, when the contribution of each limited partner is to be returned,
IX. The share of the profits or the other compensation by way of income, and the nature of such priority,
X. The right, if given, of the remaining general partner or partners to continue the business on the death, retirement or insanity of a general partner, and
XIV. The right, if given, of a limited partner to demand and receive property other than cash in return for his contribution.
(b) File for record the certificate in the office of the clerk of the superior court.
(2) A limited partnership is formed if there has been substantial compliance in good faith with the requirements of paragraph (1). (1941, c. 251, s. 2.)
§ 59-3. Business which may be carried on.—A limited partnership may carry on any business which a partnership without limited partners may carry on. (1941, c. 251, s. 3.)
§ 59-4. Character of limited partner's contribution.—The contributions of a limited partner may be cash or other property, but not services. (1941, c. 251, s. 4.)
§ 59-5. A name not to contain surname of limited partner; exceptions.—(1) The surname of a limited partner shall not appear in the partnership name, unless:
(a) It is also the surname of a general partner, or
(b) Prior to the time when the limited partner became such the business had been carried on under a name in which his surname appeared.
(2) A limited partner whose name appears in a partnership name contrary to the provisions of paragraph (1) is liable as a general partner to partnership creditors who extend credit to the partnership without actual knowledge that he is not a general partner. (1941, c. 251, s. 5.)
§ 59-6. Liability for false statements in certificate.—If the certificate contains a false statement, one who suffers loss by reliance on such statement may hold liable any party to the certificate who knew the statement to be false:
(a) At the time he signed the certificate, or
(b) Subsequently, but within a sufficient time before the statement was relied upon to enable him to cancel or amend the certificate, or to file a petition for its cancellation or amendment as provided in § 59-25, subsection (3). (1941, c. 251, s. 6.)
§ 59-7. Limited partner not liable to creditors.—A limited partner shall not become liable as a general partner unless, in addition to the exercise of his rights and powers as a limited partner, he takes part in the control of the business. (1941, c. 251, s. 7.)

Cross Reference.—As to nature of liability of a general partner, see § 59-45.

§ 59-8. Admission of additional limited partners.—After the formation of a limited partnership, additional limited partners may be admitted upon filing an amendment to the original certificate in accordance with the requirements of § 59-25. (1941, c. 251, s. 8.)

§ 59-9. Rights, powers and liabilities of a general partner.—A general partner shall have all the rights and powers and be subject to all the restrictions and liabilities of a partner in a partnership without limited partners, except that without the written consent or ratification of the specific act by all the limited partners, a general partner or all of the general partners have no authority to:

(a) Do any act in contravention of the certificate,
(b) Do any act which would make it impossible to carry on the ordinary business of the partnership,
(c) Confess a judgment against the partnership,
(d) Possess partnership property, or assign their rights in specific partnership property, for other than a partnership purpose,
(e) Admit a person as a general partner,
(f) Admit a person as a limited partner, unless the right so to do is given in the certificate,
(g) Continue the business with partnership property on the death, retirement or insanity of a general partner, unless the right so to do is given in the certificate. (1941, c. 251, s. 9.)

§ 59-10. Rights of a limited partner.—(1) A limited partner shall have the same rights as a general partner to:

(a) Have the partnership books kept at the principal place of business of the partnership, and at all times to inspect and copy any of them,
(b) Have on demand true and full information of all things affecting the partnership, and a formal account of partnership affairs whenever circumstances render it just and reasonable, and
(c) Have dissolution and winding up by decree of court.

(2) A limited partner shall have the right to receive a share of the profits or other compensation by way of income, and to the return of his contribution as provided in §§ 59-15 and 59-16. (1941, c. 251, s. 10.)

§ 59-11. Status of person erroneously believing himself a limited partner.—A person who has contributed to the capital of a business conducted by a person or partnership erroneously believing that he has become a limited partner in a limited partnership, is not, by reason of his exercise of the rights of a limited partner, a general partner with the person or in the partnership carrying on the business, or bound by the obligations of such person or partnership; provided that on ascertaining the mistake he promptly renounces his interest in the profits of the business, or other compensation by way of income. (1941, c. 251, s. 11.)

§ 59-12. One person both general and limited partner.—(1) A person may be a general partner and a limited partner in the same partnership at the same time.

(2) A person who is a general, and also at the same time a limited partner, shall have all the rights and powers and be subject to all restrictions of a general partner; except that, in respect to his contribution, he shall have the rights against the other members which he would have had if he were not also a general partner. (1941, c. 251, s. 12.)

§ 59-13. Loans and other business transactions with limited partner.—(1) A limited partner may lend money to and transact other business with the partnership, and, unless he is also a general partner, receive on account of resulting claims against the partnership, with general creditors, a pro rata share of the assets.

No limited partner shall in respect to any such claim:

(a) Receive or hold as collateral security any partnership property, or
(b) Receive from a general partner or the partnership any payment, conveyance, or release from liability, if at the time the assets of the partnership are not sufficient to discharge partnership liabilities to persons not claiming as general or limited partners.

(2) The receiving of collateral security, or a payment, conveyance, or release in violation of the provisions of paragraph (1) is a fraud on the creditors of the partnership. (1941, c. 251, s. 13.)

§ 59-14. Relation of limited partners inter se.—Where there are several limited partners the members may agree that one or more of the limited partners shall have a priority over other limited partners as to the return of their contributions, as to their compensation by way of income, or as to any other matter. If such an agreement is made it shall be stated in the certificate, and in the absence of such a statement all the limited partners shall stand upon equal footing. (1941, c. 251, s. 14.)

§ 59-15. Compensation of limited partner.—A limited partner may receive from the partnership the share of the profits or the compensation by way of income stipulated for in the certificate; provided, that after such payment is made, whether from the property of the partnership or that of a general partner, the partnership assets are in excess of all liabilities of the partnership except liabilities to limited partners on account of their contributions and to general partners. (1941, c. 251, s. 15.)

§ 59-16. Withdrawal or reduction of limited partner’s contribution.—(1) A limited partner shall not receive from a general partner or out of partnership property any part of his contribution until:

(a) All liabilities of the partnership, except liabilities to general partners and to limited partners on account of their contributions, have been paid or there remains property of the partnership sufficient to pay them,

(b) The consent of all members is had, unless the return of the contribution may be rightfully demanded under the provisions of paragraph (2), and

(c) The certificate is cancelled or so amended as to set forth the withdrawal or reduction.

(2) Subject to the provisions of paragraph (1)
§ 59-17. Liability of limited partner to partnership.—(1) A limited partner is liable to the partnership
(a) For the difference between his contribution as actually made and that stated in the certificate as
having been made, and
(b) For any unpaid contribution which he agreed in the certificate to make in the future at the
time and on the condition stated in the certificate.
(2) A limited partner holds as trustee for the partnership
(a) Specific property stated in the certificate as contributed by him, but which was not contributed or
which has been wrongfully returned, and
(b) Money or other property wrongfully paid or conveyed to him on account of his contribution.
(3) The liabilities of a limited partner as set forth in this section can be waived or compromised
only by the consent of all members; but a waiver or compromise shall not affect the right of a creditor
of a partnership for any sum, not in excess of such return asascertained from the certificate.
(4) When a contributor has rightfully received the return in whole or in part of the capital of his
contribution, he is nevertheless liable to the partnership for any sum, not in excess of such return with
interest, necessary to discharge its liabilities to all creditors who extended credit or whose claims arose before such return. (1941, c. 251, s. 17.)

§ 59-18. Nature of limited partner's interest in the partnership.—A limited partner's interest in
the partnership is personal property. (1941, c. 251, s. 18.)

§ 59-19. Assignment of limited partner's interest.—(1) A limited partner's interest is assignable.
(2) A substituted limited partner is a person admitted to all the rights of a limited partner who
has died or has assigned his interest in a partnership.
(3) An assignee, who does not become a substituted limited partner, has no right to require
any information or account of the partnership transactions or to inspect the partnership books;
he is only entitled to receive the share of the profits or other compensation by way of income,
or the return of his contribution, to which his assignor would otherwise be entitled.
(4) An assignee shall have the right to become a substituted limited partner if all the members
(except the assignor) consent thereto or if the assignor, being thereunto empowered by the certificate,
gives the assignee that right.
(5) An assignee becomes a substituted limited partner when the certificate is approximately
amended in accordance with § 59-25.
(6) The substituted limited partner has all the rights and powers, and is subject to all the restric-
tions and liabilities of his assignor, except those liabilities of which he was ignorant at the time he
became a substituted limited partner and which could not be ascertained from the certificate.
(7) The substitution of the assignee as a limited partner does not release the assignor from liability
to the partnership under §§ 59-6 and 59-17. (1941, c. 251, s. 19.)

Cross Reference.—As to assignment of a partner's interest, see § 59-37.

§ 59-20. Effect of retirement, death or insanity of a general partner.—The retirement, death or
insanity of a general partner dissolves the partnership, unless the business is continued by the remaining general partners
(a) Under a right so to do stated in the certificate, or
(b) With the consent of all members. (1941, c. 251, s. 20.)

§ 59-21. Death of limited partner.—(1) On the death of a limited partner his executor or admin-
istrator shall have all the rights of a limited partner for the purpose of settling his estate, and
such power as the deceased had to constitute his assignee a substituted limited partner.
(2) The estate of a deceased limited partner shall be liable for all his liabilities as a limited
partner. (1941, c. 251, s. 21.)

§ 59-22. Rights of creditors of limited partner.—(1) On due application to a court of compe-
tent jurisdiction by any judgment creditor of a limited partner, the court may charge the interest
of the indebted limited partner with payment of the unsatisfied amount of the judgment debt; and
may appoint a receiver, and make all other orders, directions, and inquiries which the circumstances
of the case may require.
(2) The interest may be redeemed with the separate property of any general partner, but may
not be redeemed with partnership property.
(3) The remedies conferred by paragraph (1) shall not be deemed exclusive of others which may
exist.
(4) Nothing in this article shall be held to de-
prive a limited partner of his statutory exemption. (1941, c. 251, s. 22.)

§ 59-23. Distribution of assets.—(1) In sett-
ling accounts after dissolution the liabilities of
the partnership shall be entitled to payment in the following order:
(a) Those to creditors, in the order of priority
as provided by law, except those to limited part-
nners on account of their contributions, and to
general partners,
(b) Those to limited partners in respect to their
share of the profits and other compensation by
way of income on their contributions,
(c) Those to limited partners in respect to the
capital of their contributions,
(d) Those to general partners other than for
capital and profits,
(e) Those to general partners in respect to pro-
fits,
(f) Those to general partners in respect to capi-
tal,
(2) Subject to any statement in the certificate
or to subsequent agreement, limited partners share
in the partnership assets in respect to their claims
for capital, and in respect to their claims for profits
or for compensation by way of income on their
contributions respectively, in proportion to the
respective amounts of such claims. (1941, c. 251,
s. 23.)
§ 59-24. When certificate shall be cancelled
or amended.—(1) The certificate shall be cancelled
when the partnership is dissolved or all limited
partners cease to be such.
(2) A certificate shall be amended when
(a) There is a change in the name of the part-
nership or in the amount or character of the con-
tribution of any limited partner,
(b) A person is substituted as a limited partner,
(c) An additional limited partner is admitted,
(d) A person is admitted as a general partner,
(e) A general partner retires, dies or becomes
insane, and the business is continued under §
59-20,
(f) There is a change in the character of
the business of the partnership,
(g) There is a false or erroneous statement in
the certificate,
(h) There is a change in the time as stated in
the certificate for the dissolution of the partner-
ship or for the return of a contribution,
(i) A time is fixed for the dissolution of the
partnership, or the return of a contribution, no
time having been specified in the certificate, or
(j) The members desire to make a change in
any other statement in the certificate in order that
it shall accurately represent the agreement be-
tween them. (1941, c. 251, s. 24.)
§ 59-25. Requirements for amendment and for
cancellation of certificate.—(1) The writing to
amend a certificate shall
(a) Conform to the requirements of § 59-3,
subsection (1) (a) as far as necessary to set forth
clearly the change in the certificate which it is
desired to make, and
(b) Be signed and sworn to by all members,
and an amendment substituting a limited partner
or adding a limited or general partner shall be
signed also by the member to be substituted or
added, and when a limited partner is to be substi-
tuted, the amendment shall also be signed by the
assigning limited partner.
(2) The writing to cancel a certificate shall be
signed by all members.
(3) A person desiring the cancellation or
amendment of a certificate, if any person desig-
nated in paragraphs (1) and (2) as a person who
must execute the writing refuses to do so, may
petition the superior court to direct a cancellation
or amendment thereof.
(4) If the court finds that the petitioner has a
right to have the writing executed by a person
who refuses to do so, it shall order the clerk of
the superior court in the office where the certificate
is recorded to record the cancellation or amend-
ment of the certificate; and where the certificate
is to be amended, the court shall also cause to be
filed for record in said office a certified copy of
its decree setting forth the amendment.
(5) A certificate is amended or cancelled when
there is filed for record in the office of the clerk
of the superior court where the certificate is re-
corded.
(a) A writing in accordance with the provisions
of paragraph (1), or (2) or
(b) A certified copy of the order of court in
accordance with the provisions of paragraph (4).
(6) After the certificate is duly amended in ac-
cordance with this section, the amended certificate
shall thereafter be for all purposes the certificate
provided for by this article. (1941, c. 251, s. 25.)
§ 59-26. Parties to actions.—A contributor, un-
less he is a general partner, is not a proper
party to proceedings by or against a partnership,
except where the object is to enforce a limited
partner's right against or liability to the partner-
ship. (1941, c. 251, s. 26.)
§ 59-27. Name of article.—This article may be
cited as the Uniform Limited Partnership Act.
(1941, c. 251, s. 27.)
that statutes in derogation of the common law
are to be strictly construed shall have no applica-
tion to this article.
(2) This article shall be so interpreted and con-
strued as to effect its general purpose to make uni-
form the law of those states which enact it.
(3) This article shall not be so construed as to
impair the obligations of any contract existing
when the article goes into effect, nor to affect any
action on proceedings begun or right accrued be-
fore this article takes effect. (1941, c. 251, s. 28.)
§ 59-29. Rules for cases not provided for in
this article.—In any case not provided for in this
article the rules of law and equity, including the
law merchant, shall govern. (1941, c. 251, s. 29.)
§ 59-30. Provisions for existing limited
partnerships.—(1) A limited partnership formed un-
der any statute of this state prior to March 15,
1941, may become a limited partnership under
this article by complying with the provisions of
§ 59-2; provided the certificate sets forth
(a) The amount of the original contribution of
each limited partner, and the time when the con-
tribution was made, and
(b) The property of the partnership ex-
ceeds the amount sufficient to discharge its liabil-
ities to persons not claiming as general or limited
partners by an amount greater than the sum of
the contributions of its limited partners.
(2) A limited partnership formed under any
statute of this state prior to the adoption of this
article, until or unless it becomes a limited partner-
ship under this article, shall continue to be gov-
erned by the provisions of existing law, except that
such partnership shall not be renewed unless so
provided in the original agreement. (1941, c. 251,
s. 30.)
Editor's Note.—Section 31 of the Uniform Limited Par-
nership Act (1941, c. 251, s. 31) repealed §§ 3258-3276 of the Consolidated Statutes, as amended, except in so far as said sections affect limited partnerships existing on March 15, 1941, when the act became effective.

Art. 2. Uniform Partnership Act.


§ 59-31. Name of article.—This article may be cited as Uniform Partnership Act. (1941, c. 374, s. 1.)

Editor's Note.—The Uniform Partnership Act became effective March 15, 1941.

For comment on this enactment, see 19 N. C. Law Rev. 499.

§ 59-32. Definition of terms.—In this article, "court" includes every court and judge having jurisdiction in the case.

"Business" includes every trade, occupation, or profession.

"Person" includes individuals, partnerships, corporations, and other associations.

"Bankrupt" includes bankrupt under the Federal Bankruptcy Act or insolvent under any state insolvent act.

"Conveyance" includes every assignment, lease, mortgage, or encumbrance.

"Real property" includes land and any interest or estate in land. (1941, c. 374, s. 2.)

§ 59-33. Interpretation of knowledge and notice.—(1) A person has "knowledge" of a fact within the meaning of this article not only when he has actual knowledge thereof, but also when he has knowledge of such other facts as in the circumstances show bad faith.

(2) A person has "notice" of a fact within the meaning of this article when the person who claims the benefit of the notice: (A) states the fact to such person, or (B) delivers through the mail, or by other means of communication a written statement of the fact to such person or to a proper person at his place of business or residence. (1941, c. 374, s. 3.)

§ 59-34. Rules of construction.—(1) The rule that statutes in derogation of the common law are to be strictly construed shall have no application to this article.

(2) The law of estoppel shall apply under this article.

(3) The law of agency shall apply under this article.

(4) This article shall be so interpreted and construed as to effect its general purpose to make uniform the law of those states which enact it.

(5) This article shall not be construed so as to impair the obligations of any contract existing when the article goes into effect, nor to affect any action or proceedings begun or right accrued before this article takes effect. (1941, c. 374, s. 4.)

§ 59-35. Rules for cases not provided for in this article.—In any case not provided for in this article the rules of law and equity, including the law merchant, shall govern. (1941, c. 374, s. 5.)


§ 59-36. Partnership defined.—(1) A partnership is an association of two or more persons to carry on as co-owners a business for profit.

(2) But any association formed under any other statute of this state, or any statute adopted by authority, other than the authority of this state, is not a partnership under this article, unless such association would have been a partnership in this state prior to the adoption of this article; but this article shall apply to limited partnerships except in so far as the statutes relating to such partnerships are inconsistent herewith. (1941, c. 374, s. 6.)

Cross Reference.—As to limited partnerships, see §§ 59-1 to 59-30.

§ 59-37. Rules for determining the existence of a partnership.—In determining whether a partnership exists, these rules shall apply:

(1) Except as provided by § 59-46 persons who are not partners as to each other are not partners as to third persons.

(2) Joint tenancy, tenancy in common, tenancy by the entirety, joint property, common property, or part ownership does not of itself establish a partnership, whether such co-owners do or do not share any profits made by the use of the property.

(3) The sharing of gross returns does not of itself establish a partnership, whether or not the persons sharing them have a joint or common right or interest in any property from which such returns are derived.

(4) The receipt by a partner of a share of the profits of a business is prima facie evidence that he is a partner in the business, but no such inference shall be drawn if such profits were received in payment:

(a) as a debt by installments or otherwise.

(b) as wages of an employee or rent to a landlord.

(c) as an annuity to a widow or representative of a deceased partner.

(d) as interest on a loan, though the amount of payment vary with the profits of the business.

(e) as the consideration for the sale of a good-will of a business or other property by installment or otherwise. (1941, c. 374, s. 7.)

Cross Reference.—That a lessor and lessee are not partners, see §§ 74-1 and 42-1.

§ 59-38. Partnership property.—(1) All property originally brought into the partnership stock or subsequently acquired by purchase or otherwise, on account of the partnership, is partnership property.

(2) Unless the contrary intention appears, property acquired with partnership funds is partnership property.

(3) Any estate in real property may be acquired in the partnership name. Title so acquired can be conveyed only in the partnership name.

(4) A conveyance to a partnership in the partnership name, though without words of inheritance, passes the entire estate of the grantor unless a contrary intent appears. (1941, c. 374, s. 8.)

Part 3. Relations of Partners to Persons Dealing with the Partnership.

§ 59-39. Partner agent of partnership as to partnership business.—(1) Every partner is an agent of the partnership for the purpose of its business, and the act of every partner, including the execution in the partnership name of any instrument, for apparently carrying on in the usual way the business of the partnership of which he is a member binds the partnership, unless the part-
ner so acting has in fact no authority to act for the partnership in the particular matter, and the person with whom he is dealing has knowledge of the fact that he has no such authority.

(2) An act of a partner which is not apparently for the carrying on of the business of the partnership in the usual way does not bind the partnership unless authorized by the other partners.

(3) Unless authorized by the other partners or unless they have abandoned the business, one or more but less than all the partners have no authority to:

(a) Assign the partnership property in trust for creditors, or on the assignee's promise to pay the debts of the partnership,
(b) Dispose of the goodwill of the business,
(c) Do any other act which would make it impossible to carry on the ordinary business of a partnership,
(d) Confess a judgment,
(e) Submit a partnership claim or liability to arbitration or reference.

(4) No act of a partner in contravention of a restriction on authority shall bind the partnership to persons having knowledge of the restriction.

(1941, c. 374, s. 9.)

§ 59-40. Conveyance of real property of the partnership.—(1) Where title to real property is in the partnership name, any partner may convey title to such property by a conveyance executed in the partnership name; but the partnership may recover such property unless the partner's act binds the partnership under the provisions of paragraph (1) of § 59-39, or unless such property has been conveyed by the grantee of a person claiming through such grantee to holder for value without knowledge that the partner, in making the conveyance, has exceeded his authority.

(2) Where title to real property is in the name of the partnership, a conveyance executed by a partner, in his own name, passes the equitable interest of the partnership, provided the act is one within the authority of the partner under the provisions of paragraph (1) of § 59-39.

(3) Where title to real property is in the name of one or more, but not all partners, and the record does not disclose the right of the partnership, the partners in whose name the title stands may convey title to such property, but the partnership may recover such property if the partner's act does not bind the partnership under the provisions of paragraph (1) of § 59-39, unless the purchaser or his assignee, is a holder for value, without knowledge.

(4) Where the title to real property is in the name of one or more or all the partners, or in a third person in trust for the partnership, a conveyance executed by a partner in the partnership name, or in his own name, passes the equitable interest of the partnership, provided the act is one within the authority of the partner under the provisions of paragraph (1) of § 59-39.

(5) Where the title to real property is in the names of all the partners a conveyance executed by all the partners passes all their rights in such property. (1941, c. 374, s. 10.)

§ 59-41. Partnership bound by admission of partner.—An admission or representation made by any partner concerning partnership affairs within the scope of his authority as conferred by this article is evidence against the partnership. (1941, c. 374, s. 11.)

Cross Reference.—As to admission after the statute of limitations has run, see § 1-97.

§ 59-42. Partnership charged with knowledge of or notice to partner.—Notice to any partner of any matter relating to partnership affairs, and the knowledge of any partner acting in the particular matter, acquired while a partner or then present to his mind, and the knowledge of any other partner who reasonably could and should have communicated it to the acting partner, operate as notice to or knowledge of the partnership, except in the case of a fraud on the partnership committed by or with the consent of that partner. (1941, c. 374, s. 12.)

§ 59-43. Partnership bound by partner's wrongful act.—Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the partnership or with the authority of his copartners, loss or injury is caused to any person, not being a partner in the partnership, or any penalty is incurred, the partnership is liable therefor to the same extent as the partner so acting or omitting to act. (1941, c. 374, s. 13.)

§ 59-44. Partnership bound by partner's breach of trust.—The partnership is bound to make good the loss:

(a) Where one partner acting within the scope of his apparent authority receives money or property of a third person and misapplies it; and
(b) Where the partnership in the course of its business receives money or property of a third person and the money or property so received is misapplied by any partner while it is in the custody of the partnership. (1941, c. 374, s. 14.)

§ 59-45. Nature of partner's liability.—All partners are liable

(a) Jointly and severally for everything chargeable to the partnership under §§ 59-43 and 59-44.
(b) Jointly for all other debts and obligations of the partnership; but any partner may enter into a separate obligation to perform a partnership contract. (1941, c. 374, s. 15.)

Cross References.—As to liability of a limited partner, see §§ 59-5 and 59-7. As to personal liability of corporate managing a partnership, see § 55-60. As to procedure in an action against a partnership, see §§ 1-113 and 1-72.

§ 59-46. Partner by estoppel.—(1) When a person, by words spoken or written or by conduct, represents himself, or consents to another representing him to any one, as a partner in an existing partnership or with one or more persons not actual partners, he is liable to any such person to whom such representation has been made, who has, on the faith of such representation, given credit to the actual or apparent partnership, and if he has made such representation or consented to its being made in a public manner, he is liable to such person, whether the representation has or has not been made or communicated to such person so giving credit by or with the knowledge of the apparent partner making the representation or consenting to its being made.

(a) When a partnership liability results, he is liable as though he were an actual member of the partnership.

(b) When no partnership liability results, he is liable jointly with the other persons, if any, so
concerned with the partnership business may be done rightfully without the consent of all the partners. (1941, c. 374, s. 18.)

§ 59-47. Liability of incoming partner.—A person admitted as a partner into an existing partnership is liable for all the obligations of the partnership arising before his admission as though he had been a partner when such obligations were incurred, except that this liability shall be satisfied only out of partnership property. (1941, c. 374, s. 17.)

Part 4. Relations of Partners to One Another.

§ 59-48. Rules determining rights and duties of partners.—The rights and duties of the partners in relation to the partnership shall be determined, subject to any agreement between them, by the following rules:

(a) Each partner shall be repaid his contributions, whether by way of capital or advances to the partnership property and share equally in the profits and surplus remaining after all liabilities, including those to partners, are satisfied; and must contribute towards the losses, whether of capital or otherwise, sustained by the partnership according to his share in the profits.

(b) The partnership must indemnify every partner in respect of payments made and personal liabilities reasonably incurred by him in the ordinary and proper conduct of its business, or for the preservation of its business or property.

(c) A partner, who in aid of the partnership makes any payment or advance beyond the amount of capital which he agreed to contribute, shall be paid interest from the date of the payment or advance.

(d) A partner shall receive interest on the capital contributed by him only from the date when repayment should be made.

(e) All partners have equal rights in the management and conduct of the partnership business.

(f) No partner is entitled to remuneration for acting in the partnership business, except that a surviving partner is entitled to reasonable compensation for his services in winding up the partnership affairs.

(g) No person can become a member of a partnership without the consent of all the partners.

(h) Any difference arising as to ordinary matters connected with the partnership business may be decided by a majority of the partners; but no act in contravention of any agreement between the partners may be done rightfully without the consent of all the partners. (1941, c. 374, s. 18.)

Cross Reference.—As to rights and liabilities of limited partners, see §§ 59-10 to 59-17.

§ 59-49. Partnership books.—The partnership books shall be kept, subject to any agreement between the partners, at the principal place of business of the partnership, and every partner shall at all times have access to and may inspect and copy any of them. (1941, c. 374, s. 19.)

§ 59-50. Duty of partners to render information.—Partners shall render on demand true and full information of all things affecting the partnership to any partner or the legal representative of any deceased partner or partner under legal disability. (1941, c. 374, s. 20.)

§ 59-51. Partner accountable as a fiduciary.—

(1) Every partner must account to the partnership for any benefit, and hold as trustee for it any profits derived by him without the consent of the other partners from any transaction connected with the formation, conduct or liquidation of the partnership or from any use by him of its property.

(2) This section applies also to the representatives of a deceased partner engaged in the liquidation of the affairs of the partnership as the personal representatives of the last surviving partner. (1941, c. 374, s. 21.)

Cross Reference.—As to criminal liability for appropriation of partnership funds by a partner, see §§ 14-97 and 14-98.

§ 59-52. Right to an account.—Any partner shall have the right to a formal account as to partnership affairs:

(a) if he is wrongfully excluded from the partnership business or possession of its property by his co-partners,

(b) if the right exists under the terms of any agreement.

(c) as provided by § 59-51,

(d) whenever other circumstances render it just and reasonable. (1941, c. 374, s. 22.)

§ 59-53. Continuation of partnership beyond fixed term.—(1) When a partnership for a fixed term or particular undertaking is continued after the termination of such term or particular undertaking without any express agreement, the rights and duties of the partners remain the same as they were at such termination, so far as is consistent with a partnership at will.

(2) A continuation of the business by the partners or such of them as habitually acted therein during the term, without any settlement or liquidation of the partnership affairs, is prima facie evidence of a continuation of the partnership. (1941, c. 374, s. 23.)

Part 5. Property Rights of a Partner.

§ 59-54. Extent of property rights of a partner.—The property rights of a partner are (1) his rights in specific partnership property, (2) his interest in the partnership, and (3) his right to participate in the management. (1941, c. 374, s. 24.)

§ 59-55. Nature of a partner’s right in specific partnership property.—(1) A partner is co-owner with his partners of specific partnership property holding as a tenant in partnership.

(2) The incidents of this tenancy are such that:

(a) A partner, subject to the provisions of this article and to any agreement between the partners, has an equal right with his partners to possess specific partnership property for partnership purposes; but he has no right to possess such property for any other purpose without the consent of his partners.
§ 59-56. Nature of partner's interest in the partnership.—A partner's interest in the partnership is his share of the profits and surplus, and the same is personal property. (1941, c. 374, s. 26.)

§ 59-57. Assignment of partner's interest.—(1) A conveyance by a partner of his interest in the partnership does not of itself dissolve the partnership, nor, as against the other partners in the absence of agreement, entitle the assignee, during the continuance of the partnership, to interfere in the management or administration of the partnership business or affairs, or to require any information or account of partnership transactions, or to inspect the partnership books; but it merely entitles the assignee to receive in accordance with his contract the profits to which the assigning partner would otherwise be entitled.

(2) In case of a dissolution of the partnership, the assignee is entitled to receive his assignor's interest and may require an account from the date only of the last account agreed to by all the partners. (1941, c. 374, s. 27.)

Cross Reference.—As to assignment of a limited partner's interest, see § 59-19.

§ 59-58. Partner's interest subject to charging order.—(1) On due application to a competent court by any judgment creditor of a partner, the court which entered the judgment, order or decree, or any other court, may charge the interest of the debtor partner with payment of the unsatisfied amount of such judgment debt with interest thereon; and may then or later appoint a receiver of his share of the profits, and of any other money due or to fall due to him in respect of the partnership, and make all other orders, directions, accounts and inquiries which the debtor partner might have made, or which the circumstances of the case may require.

(2) The interest charged may be redeemed at any time before foreclosure, or in case of a sale being directed by the court may be purchased without thereby causing a dissolution:

(a) With separate property, by any one or more of the partners, or
(b) With partnership property, by any one or more of the partners with the consent of all the partners whose interests are not so charged or sold.

(3) Nothing in this article shall be held to deprive a partner of his right, if any, under the exemption laws, as regards his interest in the partnership. (1941, c. 374, s. 28.)

Cross Reference.—As to right of creditors of a limited partner, see § 59-22.


§ 59-59. Dissolution defined.—The dissolution of a partnership is the change in the relation among the partners caused by any partner ceasing to be associated in the carrying on as distinguished from the winding up of the business. (1941, c. 374, s. 29.)

§ 59-60. Partnership not terminated by dissolution.—On dissolution the partnership is not terminated, but continues until the winding up of partnership affairs is completed. (1941, c. 374, s. 30.)

§ 59-61. Causes of dissolution.—Dissolution is caused:

(1) Without violation of the agreement between the partners,

(a) by the termination of the definite term or particular undertaking specified in the agreement,

(b) by the express will of any partner when no definite term or particular undertaking is specified,

(c) by the express will of all partners who have not assigned their interests or suffered them to be charged for their separate debts, either before or after the termination of any specific term or particular undertaking,

(d) by the expulsion of any partner from the business bona fide in accordance with such a power conferred by the agreement between the partners;

(2) in contravention of the agreement between the partners, where the circumstances do not permit a dissolution under any other provision of this section, by the express will of any partner at any time;

(3) by any event which makes it unlawful for the business of the partnership to be carried on or for the members to carry it on in partnership;

(4) by the death of any partner, unless the partnership agreement provides otherwise;

(5) by the bankruptcy of any partner or the partnership;

(6) by decree of court under § 59-62. (1941, c. 374, s. 51; 1943, c. 384.)

Editor's Note.—The 1943 amendment added to subsection (d) the words "unless the partnership agreement provides otherwise."

§ 59-62. Dissolution by decree of court.—(1) On application by or for a partner the court shall decree a dissolution whenever:

(a) A partner has been declared a lunatic in any judicial proceeding or is shown to be of unsound mind,

(b) a partner becomes in any other way incapable of performing his part of the partnership contract,

(c) a partner has been guilty of such conduct as tends to affect prejudicially the carrying on of the business,

(d) a partner wilfully or persistently commits a breach of the partnership agreement, or otherwise
so conducts himself in matters relating to the partnership business that it is not reasonably practicable to carry on the business in partnership with him.

e) the business of the partnership can only be carried on at a loss,

f) other circumstances render a dissolution equitable.

(2) On the application of the purchaser of a partner's interest under §§ 59-57 and 59-58:

(a) After the termination of the specified term or particular undertaking,

(b) At any time if the partnership was a partnership at will when the interest was assigned or when the charging order was issued. (1941, c. 374, s. 32.)

§ 59-63. General effect of dissolution on authority of partner.—Except so far as may be necessary to wind up partnership affairs or to complete transactions begun but not then finished, dissolution terminates all authority of any partner to act for the partnership,

(1) with respect to the partners,

(a) when the dissolution is not by the act, bankruptcy or death of a partner; or

(b) when the dissolution is by such act, bankruptcy or death of a partner, in cases where § 59-64 so requires,

(2) with respect to persons not partners, as declared in § 59-65. (1941, c. 374, s. 33.)

§ 59-64. Right of partner to contribution from copartners after dissolution.—Where the dissolution is caused by the act, death or bankruptcy of a partner, each partner is liable to his copartners for his share of any liability created by any partner acting for the partnership as if the partnership had not been dissolved unless

(a) the dissolution being by act of any partner, the partner acting for the partnership had knowledge or notice of his want of authority, or

(b) the dissolution being by the death or bankruptcy of a partner, the partner acting for the partnership had knowledge or notice of the death or bankruptcy. (1941, c. 374, s. 34.)

§ 59-65. Power of partner to bind partnership to third persons after dissolution.—(1) After dissolution a partner can bind the partnership except as provided in paragraph (3)

(a) by any act appropriate for winding up partnership affairs or completing transactions unfinished at dissolution;

(b) by any transaction which would bind the partnership if dissolution had not taken place, provided the other party to the transaction

(I) had extended credit to the partnership prior to dissolution and had no knowledge or notice of the dissolution; or

(II) though he had not so extended credit, had nevertheless known of the partnership prior to dissolution, and, having no knowledge or notice of dissolution, the fact of dissolution had not been advertised in a newspaper of general circulation in the place (or in each place if more than one) at which the partnership business was regularly carried on.

(2) The liability of a partner under paragraph (1) (b) shall be satisfied out of partnership assets alone when such partner had been prior to dissolution (a) unknown as a partner to the person with whom the contract is made; and

(b) so far unknown and inactive in partnership affairs that the business reputation of the partnership could not be said to have been in any degree due to his connection with it.

(3) The partnership is in no case bound by any act of a partner after dissolution

(a) where the partnership is dissolved because it is unlawful to carry on the business, unless the act is appropriate for winding up partnership affairs; or

(b) where the partner has become bankrupt; or

(c) where the partner has no authority to wind up partnership affairs; except by a transaction with one who

(I) had extended credit to the partnership prior to dissolution and had no knowledge or notice of his want of authority; or

(II) had not extended credit to the partnership prior to dissolution, and, having no knowledge or notice of his want of authority, the fact of his want of authority has not been advertised in the manner provided for advertising the fact of dissolution in paragraph (1) (b) (II).

(4) Nothing in this section shall affect the liability under § 59-48 of any person who after dissolution represents himself or consents to another representing him as a partner in a partnership engaged in carrying on business. (1941, c. 374, s. 35.)

§ 59-66. Effect of dissolution on partner's existing liability.—(1) The dissolution of the partnership does not of itself discharge the existing liability of any partner.

(2) A partner is discharged from any existing liability upon dissolution of the partnership by an agreement to that effect between himself, the partnership creditor and the person or partnership continuing the business; and such agreement may be inferred from the course of dealing between the creditor having knowledge of the dissolution and the person or partnership continuing the business.

(3) Where a person agrees to assume the existing obligations of a dissolved partnership, the partners whose obligations have been assumed shall be discharged from any liability to any creditor of the partnership who, knowing of the agreement, consents to a material alteration in the nature or time of payment of such obligations.

(4) The individual property of a deceased partner shall be liable for all obligations of a dissolved partnership, the partners whose obligations have been assumed shall be discharged from any liability to any creditor of the partnership who, knowing of the agreement, consents to a material alteration in the nature or time of payment of such obligations.

§ 59-67. Right to wind up.—Unless otherwise agreed the partners who have not wrongfully dissolved the partnership or the legal representative of the last surviving partner, not bankrupt, has the right to wind up the partnership affairs; provided, however, that any partner, his legal representative or his assignee, upon cause shown, may obtain winding up by the court. (1941, c. 374, s. 37.)

§ 59-68. Rights of partners to application of partnership property.—(1) When dissolution is caused in any way, except in contravention of the partnership agreement, each partner, as against his copartners and all persons claiming through them in respect of their interest in the partnership, unless otherwise agreed, may have the partnership
property applied to discharge its liabilities, and the surplus applied to pay in cash the net amount owing to the respective partners. But if dissolution is caused by expulsion of a partner, bona fide under the partnership agreement, and if the expelled partner is discharged from all partnership liabilities, either by payment or agreement under § 59-66, subsection (2), he shall receive in cash only the net amount due him from the partnership.

(2) When dissolution is caused in contravention of the partnership agreement the rights of the partners shall be as follows:

(a) Each partner who has not caused dissolution wrongfully shall have

(I) all the rights specified in paragraph (1) of this section, and

(II) the right, as against each partner who has caused the dissolution wrongfully, to damages for breach of the agreement.

(b) The partners who have not caused the dissolution wrongfully, if they all desire to continue the business in the same name, either by themselves or jointly with others, may do so, during the agreed term for the partnership and for that purpose may possess the partnership property, provided they secure the payment by bond approved by the court, or pay to any partner who has caused the dissolution wrongfully, the value of his interest in the partnership at the dissolution, less any damages recoverable under clause (2) (a) (II) of this section, and in like manner indemnify him against all present or future partnership liabilities.

(c) A partner who has caused the dissolution wrongfully shall have:

(I) if the business is not continued under the provisions of paragraph (2) (b) all the rights of a partner under paragraph (1), subject to clause (2) (a) (II) of this section,

(II) if the business is continued under paragraph (2) (b) of this section, the right as against his copartners and all claiming through them in respect of their interests in the partnership, to have the value of his interest in the partnership, less any damages caused to his copartners by the dissolution, ascertained and paid to him in cash, or the payment secured by bond approved by the court, and to be released from all existing liabilities of the partnership; but in ascertaining the value of the partner's interest the value of the surplus of the partnership property after satisfying the partnership liabilities to third persons for any sum of money by him for the purchase of an interest in the partnership and for any capital or advances contributed by him; and

(b) to stand, after all liabilities to third persons have been satisfied, in the place of the creditors of the partnership for any payments made by him in respect of the partnership liabilities; and

(c) to be indemnified by the person guilty of the fraud or making the representation against all debts and liabilities of the partnership. (1941, c. 374, s. 39.)

§ 59-70. Rules for distribution.—In settling accounts between the partners after dissolution, the following rules shall be observed, subject to any agreement to the contrary:

(a) The assets of the partnership are

(I) the partnership property,

(II) the contributions of the partners necessary for the payment of all the liabilities specified in clause (b) of this section.

(b) The liabilities of the partnership shall rank in order of payment, as follows:

(I) Those owing to creditors other than partners,

(II) those owing to partners other than for capital and profits,

(III) those owing to partners in respect of capital,

(IV) those owing to partners in respect of profits.

(c) The assets shall be applied in the order of their declaration in clause (a) of this section to the satisfaction of the liabilities.

(d) The partners shall contribute, as provided by § 59-48, subsection (a) the amount necessary to satisfy the liabilities; but if any, but not all, of the partners are insolvent, or, not being subject to process, refuse to contribute, the other partners shall contribute their share of the liabilities, and, in the relative proportions in which they share the profits, the additional amount necessary to pay the liabilities.

(e) An assignee for the benefit of creditors or any person appointed by the court shall have the right to enforce the contributions specified in clause (d) of this section.

(f) Any partner or his legal representative shall have the right to enforce the contributions specified in clause (d) of this section, to the extent of the amount which he has paid in excess of his share of the liability.

(g) The individual property of a deceased partner shall be liable for the contributions specified in clause (d) of this section.

(h) When partnership property and the individual properties of the partners are in possession of a court for distribution, partnership creditors shall have priority on partnership property and separate creditors on individual property, saving the rights of lien or secured creditors as heretofore.

(i) Where a partner has become bankrupt or his estate is insolvent the claims against the separate property shall rank in the following order:

(I) Those owing to separate creditors,

(II) Those owing to partnership creditors,

(III) Those owing to partners by way of contribution. (1941, c. 374, s. 40.)

Cross Reference.—As to distribution of assets of a limited partnership, see § 59-23.

§ 59-71. Liability of persons continuing the business in certain cases.—(1) When any new partner is admitted into an existing partnership, or when any partner retires and assigns (or the representative of the deceased partner assigns) his rights in partnership property to two or more of the partners, or to one or more of the partners and one or more third persons, if the business is continued without liquidation of the partnership affairs, creditors of the first or dissolved partners.
ship are also creditors of the partnership so continuing the business.

(2) When all but one partner retire and assign (or the representative of a deceased partner assigns) their rights in partnership property to the remaining partner, who continues the business without liquidation of partnership affairs, either alone or with others, creditors of the dissolved partnership are also creditors of the person or partnership so continuing the business.

(3) When any partner retires or dies and the business of the dissolved partnership is continued as set forth in paragraphs (1) and (2) of this section, with the consent of the retired partners or the representative of the deceased partner, but without any assignment of his right in partnership property, rights of creditors of the dissolved partnership and of the creditors of the person or partnership continuing the business shall be as if such assignment had been made.

(4) When all the partners or their representatives assign their rights in partnership property to one or more third persons who promise to pay the debts and who continue the business of the dissolved partnership, creditors of the dissolved partnership are also creditors of the person or partnership continuing the business.

(5) When any partner wrongfully causes a dissolution and the remaining partners continue the business under the provisions of § 59-68, subsection (2)(b), either alone or with others, and without liquidation of the partnership affairs, creditors of the dissolved partnership are also creditors of the person or partnership continuing the business.

(6) When a partner is expelled and the remaining partners continue the business either alone or with others, without liquidation of the partnership affairs, creditors of the dissolved partnership are also creditors of the person or partnership continuing the business.

(7) The liability of a third person becoming a partner in the partnership continuing the business, under this section, to the creditors of the dissolved partnership shall be satisfied out of the partnership property only.

(8) When the business of a partnership after dissolution is continued under any conditions set forth in this section, to the creditors of the dissolved partnership, as against the separate creditors of the retiring or deceased partner or the representative of the deceased partner, have a prior right to any claim of the retired partner or the representative of the deceased partner against the person or partnership continuing the business on account of the retired or deceased partner's interest in the dissolved partnership or on account of any consideration promised for such interest or for his right in partnership property.

(9) Nothing in this section shall be held to modify any right of creditors to set aside any assignment on the ground of fraud.

(10) The use by the person or partnership continuing the business of the partnership name, or the name of a deceased partner as part thereof, shall not of itself make the individual property of the surviving partner liable for any debts contracted by such person or partnership. (1941, c. 374, s. 41.)
COMPETENCY OF WITNESS.—In an action for goods sold to a firm, the testimony of one partner, who admitted his liability by failing to answer, that the goods were furnished by the plaintiff on the order of the firm, is not competent as against the executor, administrator, or surviving partner of the firm. Fertilizer Co. v. Rippy, 124 N. C. 643, 32 S. E. 980; Moore v. Palmer, 132 N. C. 599, 44 S. E. 673.

§ 59-78. Notice to creditors.—Every surviving partner, within thirty days after the death of the deceased partner, shall notify all persons having claims against the partnership which were in existence at the time of the death of the deceased partner, to exhibit the same to the surviving partner. The notice shall be served personally, or mailed to the last known address of the debtor. The notice shall be published once a week for four weeks in a newspaper published in the county where the partnership existed. If there should be no newspaper published in the county, then the newspaper shall be published at the courthouse and disposed of the assets thereof in accordance with law. (Rev. s. 2541; 1901, c. 640, s. 2; C. S. 3280.)

When representative not subject to suit.—The representative of a deceased partner cannot be sued while there is a surviving partner. Burgwin v. Hostler, 1 N. C. 167.

§ 59-77. When personal representative may take inventory; receiver.—If the surviving partner neglect or refuse to have such inventory made, the personal representative of the deceased partner may have the same made in accordance with the provisions of § 59-76. Should any surviving partner fail to take such an inventory or refuse to allow the personal representative of the deceased partner's estate to do so, such personal representative of the deceased partner's estate may forthwith apply to a court of competent jurisdiction for the appointment of a receiver for such partnership, who shall thereupon proceed to wind up the same and dispose of the assets thereof in accordance with law. (Rev. s. 2541; 1901, c. 640, s. 2; C. S. 3280.)

Receivers appointed when assignee holds for indefinite term.—Where an assignee is held by a surviving partner of an insolvent firm, and the assignee was empowered to continue the business for an indefinite term, a receiver might be appointed to administer the partnership fund among the creditors, although the need for such a receiver was not shown. Southern Commission Co. v. Porter, 122 N. C. 692, 30 S. E. 119.

When representative not subject to suit.—The representative of a deceased partner cannot be sued while there is a surviving partner. Burgwin v. Hostler, 1 N. C. 167.
§ 59-79. Debts paid pro rata; liens.—All debts and demands against a copartnership, where one partner has died, shall be paid pro rata, except debts which are a specific lien on property belonging to the partnership. (Rev., s. 2543; 1901, c. 640, s. 4; C. S. 3283.)

When Interest of Firm Demands Creation of Debt.—While a surviving partner cannot enter into contracts, or create liabilities which will bind the estate of his deceased partner, yet he is not bound to sacrifice the interests of the firm, and lose the benefit of a joint business for the interest of the common property, he may pay them out of the common fund. Calvert v. Miller, 94 N. C. 600.

Same.—Creditors Advancing Funds to Market Product.—Where a surviving partner has purchased materials and contracted new debts to complete unfinished products and placed the finished article on the market, the creditors advancing the necessary funds are entitled to pay out of assets set off by a surviving partner. Howel v. Boyd Manufacturing Co., 116 N. C. 806, 22 S. E. 5.

Personal Debt as Set-Off.—In an action brought by a surviving partner for the payment of a debt due him, a debt due to the deceased partner may be pleaded as a set-off. Hogg v. Ashe, 2 N. C. 471.

But a defendant cannot avail herself of a debt due to her by a deceased member of the firm, though the contract between the latter and the defendant was that the debt, being for the board of his partner, should be paid out of the assets of the store in which the plaintiff and the defendant were partners. Carter v. Ny, 1768, 23 N. Y. 182.

Division Not Permitted before Settlemen.—"There can be no division of partnership property," in the language of Ruffin, C. J., in Baird v. Baird, 21 N. C. 534, "until all the accounts of the partnership have been taken and the clear balance of partnership property pro rata, is fraudulent as against creditors." Mendenhall v. Benbow, 84 N. C. 646, 650.

Prior Encumbrance.—The claim of a surviving partner upon the proceeds of sale of the deceased partner’s half of the real estate (here mill property), to reimburse him to the amount of half the expenditures incurred in the conduct of the joint business and improvements put upon the property, constitute a prior encumbrance and must be paid to the postmortem creditors of the deceased partner. Mendenhall v. Benbow, 84 N. C. 646.

When Assignment for Indefinite Term Fraudulent.—An assignment by a surviving partner of an insolvent firm for an indefinite term, the assignee to have the right to employ servants and to replenish the stock, and out of the proceeds pay all debts, and also the individual debts of the survivor pro rata, is fraudulent as against creditors. Southern Commission Co. v. Porter, 122 N. C. 692, 30 S. E. 119.

When Bank May Not Apply Deposits to Debts.—When a bank knew that the plaintiff was the only surviving partner of a firm, and that he was making deposits as such, it had no right to apply them to the payment of a debt created by the partnership before its dissolution, without the consent of the debtor. Hodgins v. National Bank, 125 N. C. 503, 34 S. E. 709, 712.

Accommodation Indorser of Note for Member of Firm.—A note executed by a member of a partnership to a third party who, as surety for the accommodation of the maker, indorses it and receives no benefit from it, cannot be subject to action at law against the indorser by the firm, nor in the case of the death of the maker of the note can the surviving partner maintain an action on the note against the accommodation indorsers unless the firm is insolvent. Patton v. Carr, 117 N. C. 176, 23 S. E. 182.

§ 59-80. Effect of failure to present claim in twelve months.—In an action brought on a claim which was not presented within twelve months from the first publication of the general notice to creditors, the surviving partner shall not be paid in satisfaction of any debts before such action was commenced, nor shall any costs be recovered in such action against the surviving partner. (Rev., s. 2544; 1901, c. 640, s. 5; C. S. 3283.)

§ 59-81. Procedure for purchase by surviving partner.—1. Appraisal of Property.—The surviving partner may, if he so desire, make application to the clerk of the superior court of the county in which the partnership existed, after first giving notice to the executor or administrator of the time of the hearing of such application, for the appointment of three judicious, disinterested appraisers, one of whom may be named by the surviving partner, one by the representative of the deceased partner’s estate, and the third named by the two appraisers selected, whose duty it shall be to make out under oath a full and complete inventory and appraisement of the entire assets of the partnership, including real estate if there be any, together with a schedule of the debts and liabilities thereof, and to deliver the same to the surviving partner; they shall also deliver a copy to the executor or administrator, and file a copy with the clerk of the court.

2. Surviving Partner May Purchase.—The surviving partner may, with the consent of the executor or administrator of the deceased partner and the approval of the clerk of the superior court by whom such executor or administrator was appointed, purchase the interest of such deceased partner in the partnership assets at the appraised value thereof, including the good will of the business, first deducting therefrom the debts and liabilities of the partnership, for cash or upon giving to the executor or administrator his promissory note or notes, with good approved security, and satisfactory to the executor or administrator, for the payment of the interest of such deceased partner in the partnership assets.

3. Surviving Partner to Give Bond.—In case the surviving partner shall assign himself the privilege of purchasing such interest as provided for in this section, he shall give bond to the executor or administrator with surety for the payment of the debts and liabilities of the partnership, and for the performance of all contracts for which the partnership is liable.

4. Sale of Real Estate.—In case of such sale of the real estate belonging to the partnership, the title to the real estate so purchased shall not pass until the said thereof has been reported to and confirmed by the clerk of the superior court of the county in which the partnership was located, in a special proceeding to which the widow and heirs at law or devisees of the deceased partner are duly made parties. (Rev., s. 2545; 1901, c. 640, s. 6; 1911, c. 12; C. S. 3284.)

§ 59-82. Surviving partner to account and settle. In case the surviving partner shall not avail himself of the privilege of purchasing the interest of the deceased partner, he shall, within twelve months from the death of the deceased partner, file with the clerk of the superior court of the county where the partnership was located, an account, under oath, stating his action as surviving partner, and shall come to a settlement with the executor or administrator of the deceased partner: Provided, that the clerk of the superior court shall have power, upon good cause shown, to extend the time within which said final settlement shall be made. The surviving partner for his services in settling the partnership estate shall receive commissions to be allowed by the court, and in no case to exceed five per cent out of the share of the deceased
and administrators, see §§ 28-118 and 28-122, cern to all the goods purchased by either of the parties; and faith in a fiduciary character he is not chargeable with loss. That two and one-half per cent commissions on receipt and evidence to the contrary, each partner is presumed to be equally partner is entitled to reasonable compensation for his serv-
ices, under the circumstances in that case. It appears to have existed between parties for the purchase of partners, and no express agreement be proved adjusting the parties are entitled to share the profits, without regard to
the value of a note due the testator of the plaintiff individually, the account by a partnership, see § 93-4. Loss.—Where the surviving partner has acted in good
faith in a fiduciary character he is not chargeable with loss. Thompson v. Rogers, 69 N. C. 361.

§ 59-83. Accounting compelled.—In case any surviving partner fails to come to a settlement with the executor or administrator of the deceased partner within the time prescribed by law, the clerk of the superior court may, at the instance of such executor, administrator or other person interested in such deceased partnership estate, cite the surviving partners to a final settlement as provided for by law in the case of executors and administrators. (Rev., s. 2547; 1901, c. 640, s. 8; C. S. 3286.)

Cross Reference.—As to compelling account by executors and administrators, see §§ 28-118 and 28-122.

§ 59-84. Settlement otherwise provided for.—When the original articles of partnership in force at the death of any partner or the will of a deceased partner make provision for the settlement of the deceased partner's interest in the partnership, and for a disposition thereof different from that required by either of the preceding sections of this chapter, the interest of such deceased partner in the partnership shall be settled and disposed of in accordance with provisions of such articles of partnership or of such will. (Rev., s. 2545; 1901, c. 640, s. 6; C. S. 3287.)

Art. 4. Business Under Assumed Name Regulated.

§ 59-85. Certificate filed; contents.—No person shall hereafter carry on, conduct or transact business in this state under assumed name, or under any designation, name or style other than the real name of the individual owning, conducting or transacting such business, unless such person file with the clerk of the superior court of the county in which such person owns, conducts or transacts, or intends to own, conduct or transact such business, or maintain an office or place of business, a certificate setting forth the name under which such business owned is or is to be conducted or transacted, and the true or real full name of the person owning, conducting or transacting the same, with the home and post-office address of such person. The certificate shall be executed and duly acknowledged by the person so owning, conducting or intending to conduct such business: Provided, that the selling of goods by sample or through traveling agents or traveling salesman, or by means of orders forwarded by the purchaser through the mails, shall not be construed for the purpose of this section as conducting or transacting business so as to require the filing of such certificates. (1913, c. 77, s. 1; C. S. 3288.)

Cross Reference.—As to use of title of certified public accountant by a partnership, see § 93-4.

Highly Penal.—The section is of a highly penal character, and its meaning will not be extended by interpretation to include cases of fraud or imposition. Jennette v. Coppersmith, 176 N. C. 82, 97 S. E. 54.

Purpose and Operation.—This statute manifestly is for the protection of the persons who have done business with the firm as conducting or transacting business so as to render them liable for the consequences of a violation of the statute are prescribed by sec. 59-88. They seem to be limited to punishment as a misdemeanor, for it is expressly provided that failure to comply with this section, shall not prevent a recovery in a civil action by the person who shall violate the statute. Farmers' Bank, etc., Co. v. Murphy, 189 N. C. 479, 127 S. E. 527, 533. A section is inserted to protect the public from fraud and imposition, and a person violating the same may not enforce a contract in our courts made in the course of such business, though the statute does not expressly invalidate such transactions. Courtney v. Parker, 173 N. C. 479, 92 S. E. 324. The rule laid down in this case is now changed by legislative enactment.

Public Laws of 1913, c. 77, s. 1. This section requires all persons and the following sections of this article, requiring that a partnership under an assumed name shall file a certificate in the office of the clerk of the superior court setting forth the name under which the business is conducted, with the full names and addresses of the persons owning and conducting it, etc., was to prevent fraud or imposition upon those dealing therewith, and to afford them means for knowing the name of the business and the person or persons with whom they dealt. Price v. Edwards, 178 N. C. 493, 101 S. E. 33.

When Not Applicable.—It does not apply between partners who are presumed to know each other's business, and a surviving partner may maintain his action against the heirs of the deceased one to recover his share in the assets of a partnership in a legitimate business, notwithstanding the business had been conducted under the unregistered name of such deceased partner, and the requirements of the statute had not been complied with. Price v. Edwards, 178 N. C. 493, 101 S. E. 33.

Same.—Surname of Proprietors. Where a partnership business is being conducted under the surname of the proprietor in such manner as to afford a reasonable and suf-
ficient guide and notice to the public that the firm was actually conducting the firm, chapter 77, Laws 1913, forbidding the carrying on or transacting business under an "assumed name," etc., does not apply. Belafar v. Spell, 176 N. C. 193, 96 S. E. 399.

Same.—A Silent Partner. Where a partnership in a legitimate business has been conducted in the name of one of the partners alone, as between themselves, chapter 77, Public Laws 1913, now this article does not apply, and an action of
§ 59-86. Index of certificates kept by clerk.—The several clerks of the superior court of this state shall keep an alphabetical index of all persons filing certificates provided for herein, and for the indexing and filing of such certificates they shall receive a fee of twenty-five cents. A copy of such certificates duly certified to by the clerk in whose office the same shall be filed shall be presumptive evidence in all courts of law in this state of the facts therein contained. (1913, c. 77, s. 2; C. S. 3289.)

§ 59-87. Corporations and limited partnerships not affected.—This article shall in no way affect or apply to any corporation created and organized under the laws of any other state and doing business in this state, nor shall it in any manner affect the right of any persons to form limited partnerships as provided by the laws of this state. (1913, c. 77, s. 3; C. S. 3290.)

§ 59-88. Violation of article misdemeanor.—Any person owning, carrying on or conducting or transacting business as aforesaid, who shall fail to comply with the provisions of this article, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than fifty dollars or imprisonment in the county jail for a term of not exceeding thirty days: Provided, however, that the failure of any person or persons owning, carrying on, or conducting or transacting business as aforesaid, to comply with the provisions of this article shall not prevent a recovery by said person or persons in any civil action brought in any of the courts of this state. (1913, c. 77, s. 4; 1919, c. 2; C. S. 3291.)

Nature of Section.—As stated in Courtney v. Parker, infra and infra v. & Co., a violation of this statute is "a police regulation to protect the general public, as heretofore stated, from fraud and imposition," Security Finance Co. v. Hendry, 189 N. C. 549, 127 S. E. 629, 631.

Application.—In Courtney v. Parker, 173 N. C. 479, 92 S. E. 234, it was held that the statute was enacted as a police regulation to protect the general public from fraud and imposition, and a person violating the same may not enforce a contract made in the course of such business, though the statute does not expressly invalidate such transactions. See note infra.

This statute was further considered by the court in Jennette v. Coppersmith, 176 N. C. 82, 97 S. E. 54. In that case, Courtney v. Parker, supra, was distinguished, and the plaintiffs alleged to recover without filing the certificate required by sec. 59-85, because the title of the plaintiffs' firm, Jennette Bros., afforded a reasonable and sufficient guide to correct knowledge of the individuals composing the firm, and therefore did not come clearly within the doctrine of "assumed" names. Security Finance Co. v. Hendry, 189 N. C. 549, 127 S. E. 629, 630. See note following immediately hereafter.

When Courts Will Not Lend Aid.—The courts will not lend their aid to extend a highly penal statute, although it is within the police power, unless the certificate is in every material particular presented within the letter of the law, and also within its meaning and palpable design. It is just as clearly the policy of the law that it will not lend its aid in enforcing a claim founded on its own violation. Security Finance Co. v. Hendry, 189 N. C. 549, 127 S. E. 629, 631.

In Jennette v. Coppersmith, supra, the court, reviewing Courtney v. Parker, after referring to the highly penal character of this statute, says: "It should not be extended or held to include cases that do not come clearly within its provision." Security Finance Co. v. Hendry, 189 N. C. 549, 127 S. E. 629, 631.

Same—Act not forbidden by statute.—In Hines v. Norscott, 176 N. C. 123, 130, 96 S. E. 899, the court held that this statute did not apply, because the action did not arise out of the doing of an act forbidden by the statute. Security Finance Co. v. Hendry, 189 N. C. 549, 127 S. E. 629, 630.

Same—When transaction illegal.—In Fineman v. Faulkner, 174 N. C. 13, 16, 93 S. E. 384, L. R. A. 1916F 337, the plaintiff had not violated any statute, but was suing the Administrator of Mamie Faulkner who was engaged in an illegal business, and the court says: "In all the cases in which recovery has been denied, it will be found that either the consideration or the transaction was illegal or the vendor participated in the illegal purposes of the purchaser." Security Finance Co. v. Hendry, 189 N. C. 549, 127 S. E. 629, 630. See notes supra.

Same—Courtney v. Parker overruled by 1919 Amendment.—The foregoing were decided by the court prior to the enactment of chapter 2, Public Laws 1919. This enactment added the proviso now appearing in this section, and this proviso had the effect to change the decision in Courtney v. Parker, supra, as to violations of section 59-85. The legislative intent is clear, not only in the act itself, but the title: "An act to amend chapter 77 of the Public Laws of 1913, relating to assumed names and the acquirement of the right to permit recovery in actions brought by a partnership which has failed to register." Security Finance Co. v. Hendry, 189 N. C. 549, 127 S. E. 629, 631.

In Real Estate Co. v. Sasser, 179 N. C. 497, 498, 103 S. E. 73, the court considers this statute (Public Laws 1913, ch. 77) together with chapter 2, Public Laws 1919, now contained in sections 59-85 to 59-88, inclusive, and allows the plaintiff to recover, although he was carrying on a real estate business, and he admitted direct violation of this statute. The court says that this amendment (chapter 2, Public Laws 1919) applied to pending actions and to transactions prior to its enactment, in the absence of a saving clause (36 Cyc. 1164). And, since it is a mere police regulation, it may be abolished at any time and no vested rights are acquired under it. Security Finance Co. v. Hendry, 189 N. C. 549, 127 S. E. 629, 631.

Same—Contracts Not Void.—It is clear by express enactment, that the Legislature intended by adding the proviso that the provision should be confined to the police or prison, set out in this section, but that contracts made by persons carrying on or conducting or transacting business in violation of this statute, and under license as an auctioneer, broker, or commission merchant, or held to include cases that do not come clearly within its proviso, are not affected.—This article shall in no way affect or apply to any corporation created and organized under the laws of any other state and doing business in this state, nor shall it in any manner affect the right of any persons to form limited partnerships as provided by the laws of this state. (1913, c. 77, s. 3; C. S. 3290.)

§ 59-89. Person trading as "company" or "agent" to disclose real parties.—If any person shall transact business as trader or merchant, with the addition of the words "factor," "agent," "& Company" or "& Co.," or shall conduct such business under any name or style other than his own, except in case of a corporation, and fail to disclose the name of his principal or partner by a sign placed conspicuously at the place wherein such business is conducted, then all the property, stock of goods and merchandise, and choses in action purchased, used and contracted in the course of such business shall, as to creditors, be liable for the debts contracted in the course of such business by the person in charge of same. Provided, this section shall not apply to any person carrying on a real estate business, under license as an auctioneer, broker, or commission merchant; and in all actions under this section it is incumbent on such trader or merchant to prove compliance with the same. (Rev., s. 2118; 1905, c. 443; C. S. 3292.)

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§ 60-1. Application to existing railroads; special charters.—All existing railroad corporations within this state shall respectively have and possess all the powers and privileges contained in this chapter; and they shall be subject to all the duties, liabilities and provisions of this chapter not inconsistent with their charters. This chapter shall govern and control, anything in any special act of assembly creating a railroad corporation to the contrary notwithstanding, unless in the act of the general assembly creating the corporation the section or sections of this chapter intended to be repealed shall be specially referred to by number and, as such, specially repealed. (Rev., s. 2566; Code, ss. 701, 1982; 1871-2, c. 138, s. 45; C. S. 3412.)

Editor's Note.—Railroad companies are common carriers, receiving from the state a delegation of a portion of its sovereignty powers, duties and liabilities of the same character and nature as those of the state, and in the place and stead of the government, exercising public duties, they are therefore, subject to legislative as well as judicial control. The sections comprising this chapter are the result of the exercise of this power by the legislature of North Carolina.

To What Charters Applicable.—This section governs and controls all charters granted after its enactment. Durham, etc., R. Co. v. Richmond, etc., R. Co., 106 N. C. 15, 27, 10 S. E. 1914.

Does Not Affect Subsequent Legislation.—The section is like any other act of the legislature and is subject to any subsequent legislation, and is only useful in construing the meaning of subsequent legislation when it is doubtful. It cannot have the effect to prevent antagonistic legislation at a subsequent date. Watsaugs, etc., R. Co. v. Ferguson, 169 N. C. 26, 71 S. E. 145.

Repeal by Implication Not Favor.—“This provision very plainly shows that it was the intention of the legislature that the general railroad act should apply, and that any inconsistent provision should not be repealed, either by implication or by hasty legislation. It is but an affirmation of the principle that the repeal by implication of a general law by a private statute is not favored. But the statute goes a step further, and prescribes a rule of construction under which the private act, even if it be inconsistent with the provisions of the general law, shall not repeal them unless they are specially referred to by number, and, as such, specially repealed.” Durham, etc., R. Co. v. Richmond, etc., R. Co., 106 N. C. 16, 27, 10 S. E. 1914.

Consequently a provision of a charter that the railroad shall have the power to condemn land under the “same rules and regulations as are prescribed for the North Carolina Railroad Company,” is invalid. Durham, etc., R. Co. v. Richmond, etc., R. Co., 106 N. C. 16, 10 S. E. 1914, cited as conclusive in Livermon v. Roanoke, etc., R. R. Co., 109 N. C. 46, 62 S. E. 1913; Rumbough v. Southern Improvement Co., 162 N. C. 183, 62 S. E. 125; C. S. 3414.

Sec. 60-144. Right of eminent domain.

Violations of the provisions of the general law, shall not repeal them “unless in the act of the general assembly creating the corporation the section or sections of this chapter intended to be repealed shall be specially referred to by number and, as such, specially repealed.” Durham, etc., R. Co. v. Richmond, etc., R. Co., 106 N. C. 16, 27, 10 S. E. 1914.

Cross Reference.—As to badge of railroad police, see § 60-85.

§ 60-2. Roads not to be established unless authorized by law.—If any person or corporation, not being expressly authorized thereto, shall make or establish any canal, turnpike, tramroad, railroad or plankroad, with the intent that the same shall be used to transport passengers other than such persons, or the members of such corporation, or to transport any productions, fabrics or manufactures other than their own, the person or corporation so offending, and using the same for any such purpose, shall forfeit and pay

fifty dollars for every person and article of produce so transported.

This section shall not apply to any narrow-gauge railroad, tramroad or toll road made and established and maintained solely by the owner of the lands upon which said road may be, the principal business of which is the transportation of logs, lumber and articles for the owners of such railroad or tramroad. Provided, that the utilities commission shall have power to authorize lumber companies, having logging roads, to transport all kinds of commodities other than their own and passengers and to charge therefor reasonable rates to be approved by said commission. (Rev., s. 2598; Code, s. 1717; R. C., c. 61, s. 37; 1874-5, c. 83; 1901, c. 282; 1907, c. 531; 1911, c. 160; 1915, c. 6; 1933, c. 134, s. 8; 1941, c. 97, s. 5; C. S. 3413.)

Violation by Company Can Not Be Set Up as Defense.—A lumber company cannot avail itself of the defense, in an action for damages, that it was prohibited by this section, from building a standard-gauge railroad, in consideration of which it had obtained the plaintiff’s timber at a less price than its actual value; for if the stipulation to construct the railroad is invalid, the plaintiffs, though they should be parties to such contracts, are not in pari delicto. Herring v. Cumberland Lumber Co., 159 N. C. 382, 383, 74 S. E. 1911.

§ 60-3. Conductor and certain other employees to wear badges.—Every conductor, baggage-master, engineer, brakeman or other servant of any railroad corporation employed on a passenger train, or at stations for passengers, shall wear upon his hat or cap a badge which shall indicate his office and the initial letters of the title of the corporation by which he is employed. No conductor or collector without such badge shall be entitled to demand or receive from any passenger any fare or ticket, or to exercise any of the powers of his office; and no officer or servant without such badge shall have authority to meddle or interfere with any passenger, his baggage or property. (Rev., s. 2640; Code, s. 1958; 1871-2, c. 138, s. 30; C. S. 3414.)

Cross Reference.—As to badge of railroad police, see § 60-85.

§ 60-4. Actions for penalties to be in name of state.—All penalties imposed by this chapter may, unless otherwise provided, be sued for in the name of the state. (Rev., s. 2647; Code, s. 1976; 1885, c. 224; C. S. 3415.)

Cross Reference.—As to venue of actions against railroads, see § 1-81.

The penalty prescribed by section 60-112 for failure to transport within a reasonable time is given directly to the party aggrieved, and an action therefor is not required to be brought in the name of the state. Robertson v. Atlantic, etc., R. Co., 148 N. C. 323, 62 S. E. 413.

§ 60-5. Discrimination in charges misdemeanor.—If any common carrier shall directly or indirectly by special rate, rebate, drawback, or other device, charge, demand, collect or receive from any person a greater or less compensation for any service rendered or to be rendered in the transportation of passengers or property subject to the provisions of law than it charges,
demands or collects or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions; or shall make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or any particular description of traffic in any respect whatsoever; or shall subject any particular person, company, firm, corporation or locality or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever, such person or corporation shall, if convicted, be fined not less than one thousand nor more than five thousand dollars for each and every offense.

(Rev., s. 3749; 1899, c. 164, s. 13; C. S. 3416.)

Cross References.—As to failure to receive and forward freight, see §§ 60-111 and 60-112. As to rules of the utilities commission to prevent discrimination, see § 62-56. As to discrimination between connecting lines, see § 62-143.

Editor's Note.—At common law it was an indictable offense for any carrier to give or receive a preference or advantage to members of the public; and by constitutional and statutory provisions in a number of states, including North Carolina by this section, unlawful discrimination makes the carriers subject to prosecution.

The sine qua non for a prosecution under this section is that the variance in charge constituting the discrimination must be for "a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions." This is substantially the same form in all of the state laws. For example the Kentucky statute is held not to apply to a discrimination in charges for the transportation of freight unless the shipments are of the same class from and to the same point and upon the same condition. See Louisville, etc., R. Co. v. Com., 105 Ky. 179, 20 Ky. I. Rep. 1099, 48 S. W. 416, 43 L. R. A. 550.

Section Is Remedial.—"The statutes enacted for the enforcement of the duties of common carriers, imposing penalties, are not intended to simply penalize railroads, but to secure prompt, efficient service to all and not a favored few." Garrison v. Southern R. Co., 150 N. C. 575, 585, 64 S. E. 615.

It will be observed, as said by Clark, C. J., in Lumber Co. v. Atlantic, etc., R. Co., 136 N. C. 479, 487, 48 S. E. 813, that this section is substantially like that portion of the English "Traffic Act" known as the "Equality Clause" and the "Equalization Clause." The fundamental purpose which it was enacted to be patterned after the Act of Congress of 1887, c. 104, section 2, U. S. Comp. Stat., 1901, p. 3155, which regulates the same subject in interstate commerce, and is found in substantially the same language in all of the state laws. The principle of the Kentucky statute is held not to apply to a discrimination in charges for the transportation of freight unless the shipments are of the same class from and to the same point and upon the same condition. See Louisville, etc., R. Co. v. Conn., 105 Ky. 179, 20 Ky. L. Rep. 1099, 48 S. W. 416, 43 L. R. A. 550.

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Section Is Remedial.—"The statutes enacted for the enforcement of the duties of common carriers, imposing penalties, are not intended to simply penalize railroads, but to secure prompt, efficient service to all and not a favored few." Garrison v. Southern R. Co., 150 N. C. 575, 585, 64 S. E. 615.
§ 60-8. Discrimination against the Atlantic and North Carolina railroad misdemeanor; venue;—If any railroad in North Carolina shall discriminate against the freights received from the Atlantic and North Carolina railroad, or shall make rates by which, either directly or indirectly, by rebates or otherwise, freights may be delivered at less rates when received from other points than from points along the Atlantic and North Carolina railroad in proportion to distance hauled, it shall be guilty of a misdemeanor, and shall be punished by a fine of not less than one hundred dollars for each and every violation thereof. An indictment for the misdemeanor may be found and tried in the courts where the goods were either shipped or delivered, but the court in which the indictment for the offense is first found shall have exclusive jurisdiction. (Rev., s. 3750; 1889, c. 358; C. S. 3419.)

Art. 2. Incorporation, Officers, and Stock of Railroad.

§ 60-9. Articles of association; contents; signature; filing;—Any number of persons, not less than six, at least one of whom shall be a citizen and resident of this state, may form a company for the purpose of constructing, maintaining and operating a railroad for public use in the conveyance of persons and property, or for the purpose of maintaining and operating any unincorporated railroad already constructed for the like public use; and for that purpose may make and sign articles of association, in which shall be stated the name of the company, the number of years the same is to continue, the places from and to which the road is to be constructed or maintained and operated, the length of such road as near as may be, and the name of each county in this state through or into which it is made or intended to be made, the amount of the capital stock of the company, which shall not be less than five thousand dollars for every mile of road constructed or proposed to be constructed, and the number of shares of which the capital stock shall consist, and the names and places of residence of six directors of the company, at least one of whom shall be a citizen and resident of this state, upon whom legal process may be served, who shall manage its affairs for the first year, or until others are chosen in their places. Each subscriber to such articles of association shall subscribe thereto his name, place of residence, and the number of shares of stock he agrees to take in the company. On compliance with the provisions of § 60-10, such articles of association may be filed in the office of the secretary of state, who shall indorse thereon the day they are filed, and record the same in a book to be provided by him for that purpose; and thereupon the persons who have so subscribed such articles of association, and all persons who shall become stockholders in such company, shall be a corporation by the name specified in such articles of association, and shall possess the powers and privileges granted to railroad corporations by this chapter. The Articles of association of any company formed under the provisions of this chapter, or the charter of any railroad company formed under a special act, may be amended as provided in §§ 55-30 and 55-31 and said §§ 55-30 and 55-31 are hereby made to apply to railroad companies: Provided, no amendment may be made changing the nature of the company, the name of the railroad, extending the franchise or authorizing any powers other than those authorized by this chapter. Provided further, that the capital stock provision or provisions of this section shall not apply to any railroad corporation chartered for the purpose of leasing a railroad already in existence and in operation, and such railroad company so chartered shall have a paid-in capital stock of not less than five thousand dollars ($5,000.00). (Rev., s. 2548; Code, s. 1932; 1871-2, c. 138; 1905, c. 187; 1907, c. 472; ss. 1, 2; 1921, c. 117; 1939, c. 60; C. S. 3420.)

Cross References.—As to requirement of certificate of convenience and necessity for construction and operation of utilities, see § 99-29. As to amendments of charter of railroad, see also § 60-11.

Editor's Note.—The last sentence of this section with the proviso thereto relative to amendments of articles of associations and carriers, was added by the Public Laws of 1921.

The 1939 amendment added the second proviso.

Section Provides Exclusive Method of Creating.—The legislature has in this and the two following sections manifested a clear and positive intention that railroad corporations shall not be created by the action of associated persons otherwise than as provided in such sections. Bradley v. Ohio River & C. Ry. Co., 119 N. C. Appx., 918, 927.

Not Applicable to Continuing Existence.—This section refers only to the mode and manner of creating railroad corporations, and not to the methods of continuing the existence and operation of railroad franchises in the hands of purchasers at judicial sales. Bradley v. Ohio River & C. Ry. Co., 119 N. C. Appx., 918, 927.

Effect of Noncompliance.—The filing and recording by the secretary of state of articles of association of a proposed railroad company, if not such as required by law, is a nullity. Kinston, etc., R. Co. v. Strood, 132 N. C. 413, 45 S. E. 913.

May Be Declared Void by Court.—Where the articles of incorporation of a railroad company are upon their face void, though not subject to collateral attack, the trial court will so declare in refusing to condemn land by right of eminent domain claimed thereunder. Kinston, etc., R. Co. v. Strood, 132 N. C. 413, 45 S. E. 913.

§ 60-10. Prerequisites of filing; stock subscription; affidavit of directors; payment of fees.—Such articles of association shall not be filed and recorded in the office in the secretary of the state until at least one thousand dollars of stock for every mile of railroad proposed to be made is subscribed thereto, and five per cent paid thereon in good faith, and in cash, to the directors named in the articles of association; nor until there is indorsed thereon or annexed thereto an affidavit made by at least three of the directors named in such articles, that the amount of stock required by this section has been in good faith subscribed and five per cent paid in cash thereon as aforesaid, and that it is intended in good faith to construct or to maintain and operate the road mentioned in such articles of association, which affidavit shall be recorded with the articles of association, as aforesaid; nor until said directors shall pay the taxes and fees provided for under the chapter Corporations, Article 14, entitled Taxes and Fees. (Rev., s. 2549; Code, s. 1933; 1871-2, c. 138, s. 2; 1905, c. 168; C. S. 3421.)

§ 60-11. Amendment of charter by railroad; changing value of and issuing stock without par value.—Any railroad company heretofore or here-
after organized under the laws of this State, whether under a special act, or otherwise, may, in the manner provided by § 55-31, as heretofore amended, amend its certificate of incorporation, articles of association or charter, for the purpose of increasing or decreasing its capital stock, changing its name, changing the par value of the shares of its capital stock, creating one or more classes of common or preferred stock, creating shares of stock with or without nominal or par value, or for any purpose authorized by statutes now in force relating to the amendment of certificates of incorporation, articles of association or charters of corporations: Provided, however, that in case of a consolidated railroad company, heretofore or hereafter organized under a special act or general laws of this State and of any other state or states, a new class or classes of stock may be created upon authorization by vote of such amount of the outstanding capital stock, in no case less than a majority thereof, as may be prescribed by the provisions of the agreement of consolidation in pursuance of which such consolidated company was formed. (1989, c. 261.)

Cross Reference.—As to exchange by a corporation of par value shares of stock for no par value shares, see § 55-80.

§ 60-12. Copy of articles evidence of incorporation.—A copy of any articles of association filed and recorded in pursuance of this article and of the record thereof, with a copy of the affidavit aforesaid indorsed thereon or annexed thereto, and certified to be a copy by the secretary of state, shall be presumptive evidence of the incorporation of such company, and of the facts therein stated. (Rev., s. 2550; Code, s. 1934; 1871-2, c. 138, s. 3; C. S. 3422.)

§ 60-13. Opening of subscription books.—When such articles of association and affidavit are filed and recorded in the office of the secretary of state, the directors named in such articles of association may, in case the whole of the capital stock is not before subscribed, open books of subscription to fill up the capital stock of the company in such places and after giving such notice as they may deem expedient, and may continue to receive subscriptions until the whole of the capital stock is subscribed. (Rev., s. 2551; Code, s. 1935; 1871-2, c. 138, s. 4; C. S. 3423.)

§ 60-14. How stock paid for; forfeiture for nonpayment.—The directors may require the subscribers to the capital stock of the company to pay the amounts by them respectively subscribed in such manner and in such installments as they may deem proper. If any stockholder shall neglect to pay any installment as required by a resolution of the board of directors, the said board shall be authorized to declare his stock and all previous payments thereon forfeited for the use of the company, but they shall not declare it so forfeited until they shall have caused a notice in writing to be served on him personally, or the same to be deposited in the postoffice, properly directed to him at the post office nearest his usual place of residence, stating that he is required to make such payment at the time and place specified in such notice, and that if he fails to make the same, his stock and all previous payments thereon will be forfeited for the use of the company, which notice shall be served as aforesaid at least sixty days previous to the day on which payment is required to be made. (Rev., s. 2554; Code, s. 1938; 1871-2, c. 138, s. 7; C. S. 3424.)

Cross Reference.—As to construction companies taking stock in railroad as payment, see § 55-64.

§ 60-15: Repealed by Session Laws 1913, c. 543.

§ 60-16. Stockholders’ liability for unpaid stock and to laborers; notice.—Each stockholder of any such company shall be individually liable to the creditors of such company to an amount equal to the amount unpaid on the stock held by him, for all the debts and liabilities of such company until the whole amount of the capital stock so held by him shall have been paid to the company, and all the stockholders of any such company shall be jointly and severally liable for the debts due or owing to any of its laborers and servants, other than contractors, for personal services for thirty days service performed for such company, but shall not be liable to an action therefor before an execution shall be returned unsatisfied in whole or in part against the corporation, and the amount due on such execution shall be the amount recoverable with costs against such stockholder. Before such laborer or servant shall charge such stockholders for such thirty days service he shall give them notice in writing within twenty days after the performance of such service that he intends to hold them liable, and shall commence such action therefor within thirty days after the return of such execution unsatisfied as above mentioned; and every such stockholder, against whom any such recovery by such laborer or servant shall have been had, shall have a right to recover the same of the other stockholders in such corporation in ratable proportion to the amount of the stock they shall respectively hold with himself. (Rev., s. 2556; Code, s. 1940; 1871-2, c. 138, s. 10; C. S. 3426.)

§ 60-17. Liability of trustees and other fiduciaries holding stock.—No person holding stock in any such company as executor, administrator, guardian or trustee, and no person holding such stock as collateral security, shall be personally subject to any liability as stockholder of such company. The estates in the hands of such executor, administrator, guardian or trustee shall be liable in like manner and to the same extent as the testator or intestate or the ward or person interested in such trust fund would have been if he had been living and competent to act and hold the same stock in his own name, and a person pledging such stock shall be considered as holding the same, and shall be liable as a stockholder accordingly. (Rev., s. 2557; Code, s. 1941; 1871-2, c. 138, s. 11; C. S. 3427.)

§ 60-18. Directors and presidents.—There shall be a board of six directors, one of whom shall be elected president, of every corporation formed under this article, to manage its affairs. The directors shall be chosen annually by a majority of the votes of the stockholders voting at such election, in such manner as may be prescribed in the by-laws of the corporation, and they may and shall continue in office until others are elected in their places. In the election of directors each stockholder shall be entitled to one vote person—
ally or by proxy on every share held by him thirty days previous to any such election, and vacancies in the board of directors shall be filled in such manner as shall be prescribed by the directors of the corporation. The inspectors of the first election of directors shall be appointed by the board of directors named in the articles of association. No person shall be a director or president unless he shall be a stockholder owning stock absolutely in his own right and qualified to vote for directors at the election at which he shall be chosen; and at every election of directors the books and papers of such company shall be exhibited to the meeting, if a majority of the stockholders present shall require it. (Rev., s. 2552; Code, s. 1936; 1871-2, c. 138, s. 3; C. S. 3428.)

§ 60-19. Appointment of officers and agents.—
The president and directors shall appoint a treasurer and secretary and such other officers and agents as shall be prescribed by the by-laws. (Rev., s. 2553; Code, s. 1937; 1871-5, c. 138, s. 6; C. S. 3429.)

§ 60-20. Officials to account to successors.—
The president and directors shall appoint a trustee and secretary and such other officers and agents as shall be prescribed by the by-laws. (Rev., s. 2553; Code, s. 1937; 1871-5, c. 138, s. 6; C. S. 3429.)

The decisions of the Federal Courts were made statutory by this section referred to all railroads or only those partially used by the counties. See § 14-253. As to embezzlement by officers of a railroad, see §§ 14-94 and 14-95.

Art. 3. County Subscriptions in Aid of Railroads.

§ 60-21. Counties may subscribe stock.—The boards of commissioners of the several counties shall have power to subscribe stock to any railroad company when necessary to aid in the construction of any railroad in which the citizens of the county may have an interest. (Rev., s. 2558; Code, s. 1996; 1868-9, c. 171, s. 1; C. S. 3431.)

Cross Reference.—As to an incorporated town encouraging the building of railroads, see § 158-1.

Editor's Note.—As this section appeared in the Code of 1883 it permitted subscription when necessary to aid in the completion of any railroad. This phraseology was the cause of some litigation as it was doubtful whether the section was applicable only to those railroads which were partially completed or whether it extended to all such companies. The Supreme Court of North Carolina adhered consistently to the former view, while the Federal Courts adopted the latter. The decisions of the Federal Courts were made statutory by the substitution in the Revisal of 1905, of the word “construction” for the word “completion.” For the North Carolina cases prior to this substitution see Com'rs v. Smuggs, 121 N. C. 394, 28 S. E. 539; Com'rs v. Payne, 123 N. C. 432, 31 S. E. 711; Graves v. Commissioners, 135 N. C. 49, 47 S. E. 134. For the controlling federal cases see Com'rs v. Color, 112 Fed. 705; Wilkes County v. Color, 190 U. S. 107, 47 L. Ed. 971, 23 S. Ct. 718; Stanly County v. Coler, 190 U. S. 437, 47 L. Ed. 1125, 23 S. Ct. 815.

Editor's Note.—County Subscriptions.—The same state and federal cases which were in conflict upon the question of whether this section referred to all railroads or only those partially completed (see Editor's Note above) were also at variance upon the sufficiency of interest requisite to authorize the subscription. The state cases maintained the position that the interest must be direct and in and of the county subscribing, while the federal cases were in conflict upon the question of whether a public interest would suffice. The best statement of this rule is found in Coler v. Commissioners, 89 Fed. 257 where it is said: "The section does not require the citizens to have a direct pecuniary interest in the road, but a public interest, such as is created by the building of a railroad into the county, and the necessity of bonds and levying of taxes to carry out the same." Burden of Proving Validity.—Where the recitals in railroad bonds are that they were issued under a particular act of the legislature, the burden of validating them, as made under this section, is on the party alleging their validity. Graves v. Commissioners, 135 N. C. 49, 47 S. E. 134.

§ 60-22. Election on question of county aid.—
The board of commissioners of any county proposing to take stock in any railroad company shall meet and agree upon the amount to be subscribed, and if a majority of the board shall vote for the proposition, this shall be entered of record, which record shall show the amount proposed to be subscribed, to what company, and whether in bonds, money or other property, and thereupon the board shall order an election, to be held on a notice of not less than thirty days, for the purpose of voting for or against the proposition to subscribe to the amount agreed upon by the board of county commissioners. If a majority of the qualified voters of the county shall vote in favor of the proposition, the board of county commissioners, through their chairman, shall have power to subscribe the amount of stock proposed by them and submitted to the people, subject to all the rules, regulations and restrictions of other stockholders in such company: Provided, that the counties, in the manner aforesaid, shall subscribe from time to time such amounts, either in bonds or money, as they may think proper. (Rev., s. 2559; Code, s. 1997; 1868-9, c. 171, s. 2; C. S. 3432.)

Editor's Note.—Section 160-62 and Article VII, section 7 of the Constitution require a popular vote for the contrac- tion of debts by cities and towns except in the case of neces-sary expenses. Vote on Two Subscriptions.—Where the question of subscription to two different railroad corporations is to be submitted to a vote, it is improper and irregular to submit them as a single proposition, at the same election and on the same ballot. Goforth v. Rutherford Ry. Constr. Co., 96 N. C. 535; § 8 E. 361.

§ 60-23. Conduct of election.—All elections ordered under § 60-22 shall be held by the sheriff under the laws and regulations provided for the election of members of the general assembly. The votes shall be compared by the boards of county commissioners, who shall make a record of the same. (Rev., s. 2560; Code, s. 1998; 1868-9, c. 171, s. 3; C. S. 3433.)

§ 60-24. Interest on bonds.—In case the county shall subscribe the amount proposed in bonds, the board of commissioners shall have power to fix the rate of interest, not to exceed the rate of six per cent, and upon the payment of interest on the bonds the county shall be liable for and shall pay the same at the rates from time to time fixed by the county. (Rev., s. 2561; Code, s. 1999; 1868-9, c. 171, s. 4; C. S. 3434.)

No Estoppel by Payment of Interest.—The payment of interest from year to year on the bonds is not an estoppel, but does not validate them. Commissioners v. Payne, 123 N. C. 432, 31 S. E. 711.

§ 60-25. Collection and disposition of taxes authorized.—The taxes authorized by this article to
be raised for the payment of interest or principal shall be collected by the sheriff or tax collector in like manner as ad valorem taxes, and be paid into the hands of the county treasurer, to be used by the chairman of the board of county commissioners as directed by this article. (Rev., s. 2562; Code, s. 2000; 1868-9, c. 171, s. 5; 1943, c. 543; C. S. 3435.)

Cross Reference.—As to the collection of taxes generally, see § 105-372 et seq.

Editor's Note.— The 1943 amendment inserted the words “or tax collector” that substituted the words “ad valorem” for the words “other state.”

Art. 4. Township Subscriptions in Aid of Railroads.

§ 60-26. Townships may subscribe stock.—The board of commissioners of the several counties of the state shall have power to subscribe stock for the use and benefit of any township in their several counties, when necessary to aid in the construction of any railroad, which is now or may hereafter be incorporated under the laws of this state, in which the citizens of such county may have an interest. (1917, c. 64, s. 1; C. S. 3436.)

Editor's Note. — In Graves v. Com‘rs, 135 N. C. 49, 47 S. E. 134, it was held that section 60-21 did not apply to other state.

Editor’s Note.— The 1943 amendment inserted the words “or tax collector” that substituted the words “ad valorem” for the words “other state.”

§ 60-27. Election on question of township aid.—The board of commissioners of any county proposing to take stock, for the use and benefit of any township, shall meet and agree upon the amount to be subscribed for such township, as mentioned in § 60-26, shall meet and agree upon the amount to be subscribed for such township, and if a majority of the board shall vote for the proposition, this shall be entered of record, which record shall show the amount proposed to be subscribed, and for what township, to what company, and whether in bonds, money or other property; and thereupon the board shall order an election, to be held upon a notice of not less than thirty days, in each and every township for whose use and benefit such subscription is proposed to be made. If a majority of the qualified voters of the township for whose use and benefit such subscription is proposed to be made shall vote in favor of the proposition, the board of county commissioners through their chairman shall have power to subscribe the amount of stock proposed by them, and submitted to the voters, for the use and benefit of such township, subject to all the rules, regulations, and restrictions of other stockholders in such railroad company: Provided, that the township, in the manner aforesaid, shall subscribe from time to time such amounts, either in bonds or money, as it may think proper. (1917, c. 64, s. 2; C. S. 3437.)

§ 60-28. Conduct of election; canvass of votes.—All elections ordered under § 60-27 shall be held by the sheriff of the county in which such township is located, under such laws and regulations as are now or may hereafter be provided for the election of members of the general assembly. The votes of each township for whose use and benefit subscription under this article is proposed to be made shall be compared and the results of such election determined by the board of commissioners of the county in which such township is located, who shall make a record of the same. (1917, c. 64, s. 3; C. S. 3438.)

§ 60-29. Bond issue; special tax.—In case the township shall authorize, at the election herein provided for, a subscription of the amount proposed in bonds, the board of commissioners shall have power to fix the rate of interest, not to exceed the rate of six per cent, when the principal of such bonds shall be payable, and at what place, and shall also fix the time and place for paying interest, and shall also determine the mode and manner of paying the same. The board of commissioners shall, in order to provide for the payment of the bonds and interest authorized to be issued by this article, compute and levy each year at the time of levying the county taxes a sufficient tax upon the property in any township authorizing the issuance of bonds under this article to pay the interest on the bonds issued on account of and for the use and benefit of such township, and shall also levy a sufficient tax to create a sinking fund to provide for the payment of such bonds at maturity. Such taxes shall be levied and collected annually and under the same laws and regulations as shall be in force for levying and collecting other county taxes. (1917, c. 64, s. 4; 1943, c. 543; C. S. 3459.)

Editor's Note.—The 1943 amendment struck out the words “and state” formerly appearing after the word “county” in the fourteenth line.

§ 60-30. Levy, collection, and disposition of tax.—The tax authorized by this article to be raised for the payment of interest and principal shall be levied by the board of commissioners of the county in which such township is located, at such times as is now or hereafter may be fixed for levying ad valorem county taxes, against the taxable property located in such township, in addition to the regular ad valorem county taxes assessable against such property. The tax shall be levied and collected annually and under the same laws and regulations as shall be in force for levying and collecting other county taxes. (1917, c. 64, s. 6; 1943, c. 543; C. S. 3440.)

Cross Reference.—As to the collection of taxes generally, see §§ 105-372 et seq.

Editor's Note.—The 1943 amendment substituted the words “ad valorem” for former references to state and other taxes.

§ 60-31. Tax to be kept separate.—The taxes levied and collected under the provisions of this article shall be kept separate and apart from all other ad valorem taxes levied and collected in the county in which such township shall be located. (1917, c. 64, s. 6; 1943, c. 543; C. S. 3441.)

Editor’s Note.—The 1943 amendment substituted in the fourth line the words “ad valorem” for the words “state and county.”
§ 60-32. Townships may subscribe to purchase of railroad corporations. — The board of commissioners of the several counties of the state shall have power to make subscriptions, for the use and benefit of any township in their several counties, for the purpose of aiding in the purchase of any railroad corporation now or hereafter incorporated under the laws of this state which shall be dissolved or whose property and franchises are proposed to be sold privately or under execution, judicial decree, deed in trust, mortgage, or other conveyance, and all the provisions of this article shall apply as fully and as well to such subscriptions as they do to subscriptions to stock to aid in the construction of railroads. (1917, c. 64, s. 1; 1919, c. 130, s. 1; C. S. 3442.)

§ 60-33. Election on question of purchase; proxies to represent stock. — The county commissioners shall, upon the petition of one-fourth of the qualified voters of any township mentioned in § 60-32, order an election and submit the question of such subscription according to the terms of the petition. At such election five persons shall be chosen as proxies to represent such stock, if the vote shall be in favor of the subscription, in all respects as fully as if private promoters, corporators or holders of such stock. They shall be eligible to the position of director or other office in the corporation. They shall hold office until the first Monday in December following the next general election and until their successors chosen at such general election shall qualify. Such proxies shall be chosen at the general election every two years as township officers are. They shall have authority, alone, if sole purchasers, and with the proxies from other townships and others participating in the purchase, if not acting alone, to purchase such railroad property and franchise, and shall constitute a new corporation upon compliance with law as in other cases of a dissolution and sale of railroad property and franchise. (1917, c. 64, s. 2; 1919, c. 130, s. 2; C. S. 3443.)

§ 60-34. Increase of interest; procedure. — Whenever the board of county commissioners of any county has subscribed for the use and benefit of any township to any interest in any railroad or railroad corporation, as provided in this article, and the majority of the proxies chosen to represent the stock or interest of the township in such railroad shall certify to the board of commissioners that in their opinion the interest of the township in said railroad or railroad corporation should be increased, the board of county commissioners shall order an election to be held in such township, upon the petition of one-fourth of the qualified voters of such township, in the same manner as provided in this article, and if the majority of the qualified voters of such township shall vote in favor of the proposition contained in the petition the county commissioners shall execute and deliver the bonds authorized, levy and collect in the township and dispose of the tax, as authorized in this article. (Ex. Sess. 1924, c. 117, s. 1.)

§ 60-35. Execution and sale of bonds for increase of interest. — Said bonds shall be executed by the chairman of the board of county commissioners of such county, attested by the clerk of said board, who shall affix the seal of the board, and deliver the same to the board of proxies representing said township. The board of proxies shall advertise said bonds as provided by law, and faithfully apply the same to the purposes set forth in the petition for the election. (Ex. Sess. 1924, c. 117, ss. 2, 3.)

§ 60-36. Organization of proxies; report; vacancies. — The proxies chosen at each general election shall qualify and organize on the first Monday in December, elect a chairman, vice-chairman and secretary, and they shall annually in each year file with the board of county commissioners a copy of the report required by law to be made to the Interstate Commerce Commission.

Any vacancy occurring in the board of proxies shall be filled by the board of proxies until the next general election. (Ex. Sess. 1924, c. 117, ss. 4, 5.)

Art. 5. Powers and Liabilities.

§ 60-37. Powers of railroad corporations enumerated. — Every railroad corporation shall have power:

1. To Survey and Enter on Land. — To cause such examination and surveys for its proposed railroad to be made as may be necessary to the selection of the most advantageous route; and for such purpose, by its officers or agents and servants, to enter upon the lands or waters of any person, but subject to responsibility for all damages which shall be done thereto.

Cross Reference. — As to right of entry on land, see § 40-3.

Conflicting Locations. — As between two railroad companies the first location belongs to that company which first defines and marks its route and adopts the same for its permanent location by authoritative corporate action. Fayetteville Street Ry. v. Aberdeen & R. R. Co., 142 N. C. 423, 55 S. E. 345.

2. To Condemn Land under Eminent Domain. — To appropriate land and rights therein by condemnation, as provided in the chapter Eminent Domain.

Cross Reference. — As to condemnation by right of eminent domain, see § 40-2 et seq. As to amount of land which may be condemned, see § 40-29.

Editor's Note. — Since railroads are quasi-public corporations they are given by the state the power to take, by proper proceedings the necessary lands upon which to build their roads. Nor will the courts enjoin a railroad corporation from condemning land for a public purpose on the ground that the corporation was irregularly organized. In Powers v. Hazelton, etc., R. Co., 33 Ohio St. 429, it was held that a land-owner could not be permitted to prove, as a defense to condemnation proceedings instituted by a regularly organized railroad corporation, that the company was incorporated not for a public use, but for the private purposes of the corporators only, and that there was no public necessity for the road. See, also, Wellington, etc., R. Co. v. Cashie, etc., R. Co., 114 N. C. 690, 19 S. E. 646.

Land May Be Taken from Another Railroad. — Land acquired by one railroad company under a legislative grant of the right of eminent domain, and not necessary for the exercise of its franchise or the discharge of its duties, is liable to be taken under the law of eminent domain for the use of another railroad company. North Carolina, etc., R. Co. v. Carolina, etc., R. Co., 83 N. C. 489.

3. To Take Property by Grant. — To take and hold such voluntary grants of real estate and other property as shall be made to it to aid in the construction, maintenance and accommodation of its railroad; but the real estate received by volum-
tary grant shall be held and used for the purposes of such grant only. Railroad companies can acquire real estate only by statutory authority. After the authority is granted, either by general legislation, charter or implied power, property may be acquired by purchase, grant, dedication, adverse possession or by condemnation under the power of eminent domain.

In 1 Elliott on Ry., sec. 390, the general principle is stated as follows: "It is well established that a railroad corporation cannot acquire and hold lands for any purposes except as authorized by statute. The authority must be conferred by legislation or it does not exist; it is, however, not necessary that the authority should be expressly conferred. It may be implied." See Wallace v. Moore, 178 N. C. 114, 115, 100 S. E. 239.

4. To Purchase and Hold Property.—To purchase and hold and use all such real estate and other property as may be necessary for the construction and maintenance of its railroad and the stations and other accommodations necessary to accomplish the object of its incorporation.

Cross Reference.—As to adverse possession of property owned by a railroad, see § 1-44.

5. To Grade and Construct Road.—To lay out its road, not exceeding one hundred feet in width, and to construct the same; to take, for the purpose of cuttings and embankments, as much more land as may be necessary for the proper construction and security of the road; and to cut down any standing trees that may be in danger of falling on the road, making compensation therefor as provided in the chapter Eminent Domain.

Cross Reference.—See also § 40-29.

Change of Grade.—A railroad company has a right to change the grade of its road-bed or to remove it to any point on its right of way. Binkley v. Sou. R., Co., 135 N. C. 654, 47 S. E. 791.

6. To Intersect with Highways and Waterways.—To construct its road across, along or upon any stream of water, water-course, street, highway, plankroad, turnpike, railroad or canal which the route of its road shall intersect or touch; but the company shall restore the stream or water-course, street, highway, plankroad or turnpike road, thus intersected or touched, to its former state or to such state as not unnecessarily to have impaired its usefulness. Nothing in this chapter contained shall be construed to authorize the erection of any bridge or any other obstruction across, in or over any stream or lake navigated by steam or sail boats, at the place where the same is proposed to be placed, nor to authorize the construction of any railroad not already located in, upon or across any streets in any city without the assent of the corporation of such city.

Cross References.—As to the power of the utilities commission to regulate crossings, see § 62-50. As to the duty of railroads to construct and maintain bridges which it has necessitated building, see §§ 136-75 and 136-78; as to their duty to provide cattle guards, see § 60-48.

Editor's Note.—The right of railroad companies to cross highways is limited to the necessities of the crossing and no greater right than that reasonably necessary to accomplish the purpose of the crossing. It is the duty of a railroad company constructing its line across a public highway to do so in such a manner as to interfere with the right of the public to the use of the highway as little as possible and to restore the highway to as safe a condition for travel as before the crossing was made so far as it can be done, and prevent any company that has constructed its line across a highway may lay such additional parallel tracks as are reasonably necessary for the transaction of its business.

Duty to Public.—While railroad companies are given the right and power to construct their roads across streets, highways, etc., they must maintain a safe and convenient crossing thereon, so as far as possible to accommodate the public to the public as it would have been had the railroad not been built. Raper v. Wilmington, etc., R., Co., 126 N. C. 567, 56 S. E. 155.

Whole Street Cannot Be Appropriated.—In Seaboard Air Line R. Co. v. Raleigh, 219 Fed. 573, 581, in construing this section it is said: "It is doubtful whether the language of the section can be construed to authorize the exclusive appropriation of the street. The sidewalk is a portion of a street appropriated to the use of pedestrians. To construe the grant of the right to construct its road 'across, along, or upon' a street or a road, always of much greater width than a railroad track and the cross-ties, as a grant of the right to occupy the entire street or sidewalk, is not permissible in the light of the recognized rule of construction of such grants of power. How is it possible to restore the street to its former state' if the track occupies its entire width? Statutes must be given a reasonable construction.

Assent of the Corporation.—Essential to the use of the street by a railroad company is often a most essential power, necessary to be used for the benefit of the people of the city. Griffin v. Southern R. Co., 190 N. C. 312, 314, 64 S. E. 16.

Court Cannot Review Grant.—The action of the board of aldermen in authorizing a railroad company to use a certain street for legitimate railroad purposes, the laying and use of tracks, etc., when the statutory power is given, is not reviewable by the courts at the instance of an owner of land on the street, claiming that some other street should have been so used. Griffin v. Southern R. Co., 190 N. C. 312, 64 S. E. 16.

Cited in Raper v. Wilmington, etc., R., Co., 126 N. C. 567, 56 S. E. 115.

7. To Intersect with Other Railroads.—To cross, intersect, join and unite its railroad with any other railroad before constructed, at any point where any railroad, and also with another company, with the necessary turnouts, sidings and switches and other conveniences in furtherance of the object of its connections. Every company whose railroad is or shall be hereafter intersected by any new railroad shall unite with the owners of such new railroad in forming such intersections and connections and grant the facilities aforesaid, and if the two corporations cannot agree upon the amount of compensation to be made therefor, or the points and manner of such crossings and connections, the same shall be ascertained and determined by commissioners to be appointed by the court as is provided in the chapter Eminent Domain.

Cross Reference.—As to appointment of the commissioners, see § 61-9.

Editor's Note.—In Elliott on Railroads, p. 1687, the author says, "This provision (that the companies shall unite in agreement) has the effect of a condition precedent to the right to invoke the aid of the statute, and a complaint or instrument to condemn a crossing hereunder must show that the companies were unable to agree. If there is a waiver of an agreement or of an effort to agree, that fact should be alleged. Negotiations had with officers of the road sought to be crossed, who assume to act in its behalf, although not authorized to do so, have the effect of authorizing the company to constitute an effort to agree, unless the person with whom such officers act has knowledge of their lack of authority. The burden of proof is upon the petitioner to show that negotiations were in good faith and not a method of delay. It may be made to appear before a crossing will be granted when so required by the statute authorizing the condemnation, that the crossing was necessary and proper."

Railroad Decides Necessity of Intersection. — Where a railroad company has a right to condemn a way across the track of another company to manufacturing plants for a
spur track to which the other company also has its siding, in competition for freight, the question whether it is necessary for the plaintiff company to build its spur is one in its discretion; and controversies as to whether the defendant could and would shift the plaintiff to its own track advantageously to the plaintiff, and for a reasonable charge, are immaterial. Virginia, etc., R. Co. v. Seaboard Air Line R. Co., 161 N. C. 531, 78 S. E. 68.

No Restriction of Right Except Voluntary.—A railroad company having the power of condemnation across the road of another company should exercise this right with regard to the convenience of both parties and with as little interference with the use of the other party of its own track as can be obtained without a great increase in its cost and inconvenience. But the courts cannot restrict this right to be exercised in the cases in which the owner may approve its reasonableness or expediency. Virginia, etc., R. Co. v. Seaboard Air Line R. Co., 165 N. C. 425, 81 S. E. 617.

Agreement or Condemnation Necessary for Entry. — Under this section one road cannot enter on the right-of-way of another for the purpose of connecting therewith without previous agreement, or condemnation proceedings. Richmond, etc., R. Co. v. Durham, etc., Ry., 194 N. C. 368, 10 S. E. 659.

Parol Agreement Ineffectual.—A parol agreement to allow one railroad company to extend its track on the right-of-way of another, for the purpose of connecting therewith, is a mere license, revocable at the will of the licensor, and will not operate as an estoppel although the licensee has entered one railroad to cases in which the owner may approve its reasonableness or expediency. Richmond, etc., R. Co. v. Durham, etc., Ry., 194 N. C. 368, 10 S. E. 659.

8. To Transport Persons and Property.—To take and convey persons and property on its railroad by the power or force of steam, electricity or animals, or by any mechanical power, and to receive compensation therefor.

Cross References.—As to the railroad's duty to transport, see § 60-75. As to power of utilities commission to prevent discrimination in service, see § 62-56. As to discrimination in service, see § 60-75. As to power of utilities commission to prevent discrimination in charges, see §§ 60-5, 60-6, and 62-56.

Charter May Confer Right to Lease.—The charter of a railroad company conferring the right to transport passengers and freight, and giving the power to "farm out" the right of transportation, authorizes the company to execute a valid lease of its property and franchises to another railroad company. Hill v. Atlantic, etc., R. Co., 143 N. C. 539, 55 S. E. 534.

9. To Erect Stations and Other Buildings.—To erect and maintain all necessary and convenient buildings, stations, fixtures and machinery for the accommodation and use of its passengers, freight and bondholders.

Cross References.—As to power of utilities commission to regulate the establishment of stations, see § 62-41 et seq. As to power of railroad companies to condemn land for union depots, see § 49-4. As to abandonment or relocation of a station by a railroad, see § 62-53.

10. To Borrow Money, Issue Bonds and Execute Mortgages.—From time to time to borrow such sums of money as may be necessary for completing and finishing or operating its railroad and to issue and dispose of its bonds for any amount so borrowed, and to mortgage its corporate property and franchises and to secure the payment of any debt contracted by the company for the purposes aforesaid, and the directors of the company may confer on any holder of any bond issued for money borrowed, as aforesaid, the right to convert the principal due or owing thereon into stock of such company at any time under such regulations as the directors may see fit to adopt.

Cross References.—As to control of the utilities commission over pledge of assets, issuing securities, etc., see § 69-52.

Corporation Has Power to Issue Bonds.—A railroad corporation has power to contract debts, and every corporation possessing such power must also have power to acknowledge its indebtedness under its corporate seal, i. e., to make and issue its bonds. Commissioners v. Atlantic, etc., R. Co., 77 N. C. 269.

11. To Lease Rails.—To lease iron rails to any person or corporation for such time and upon such terms as may be agreed on by the contracting parties, and upon the termination of the lease by expiration, forfeiture or surrender, to take possession of and remove the rails so leased as if they had never been laid.

12. To Establish Hotels and Eating Houses.—To purchase, lease, hold, operate or maintain eating-houses, hotels and restaurants for the accommodation of the traveling public along the line of its road. (Rev., ss. 2567, 2575; Code, s. 1957; 1887, c. 341; 1889, c. 518; 1871-2, c. 138, s. 29; C. S. 3444.)

§ 60-38. Engaging in unauthorized business.—It shall be unlawful for any railroad company incorporated under the laws of this State, or any railroad company incorporated under the laws of any other state and operating one or more railroads in this State, to engage in any business other than the business authorized by its or their charter.

Any railroad company violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined in the discretion of the court. (Ex. Sess. 1924, c. 60.)

§ 60-39. Power to aid in construction of connecting and branch lines.—Any railroad or other transportation company shall have the right to aid in the construction of any railroad or branch railroad in this or an adjoining state connected with it directly or indirectly, if the construction of such railroad or branch railroad is authorized by law. (Rev., s. 2567, subsec. 12; 1885, c. 108, s. 1; C. S. 3445.)

§ 60-40. Power to seize fuel.—If any railroad or other transportation company finds it necessary, in order to prevent delays in the transportation of freight or passengers, to take possession of, use and convert it to its own property and convert it to its own use without an agreement with the owner thereof, it shall notify such owner within three days of such taking that his property has been appropriated, giving the date thereof, and shall, within a period of thirty days, pay for such coal, wood or other fuel at the invoice price at place of shipment, plus twenty-five per cent. Should the transportation company fail to notify the consignee or owner within such three days or pay for the coal, wood or other fuel at the invoice price at place of shipment, plus twenty-five per cent as above provided, within thirty days after converting the same to its own use, it shall in addition forfeit to the party aggrieved the sum of twenty-five dollars for the first day of failure to notify such consignee of the appropriation of the fuel, or its failure to pay for the same, and five dollars for each day thereafter in which it shall fail to notify such consignee or pay for the same. (Rev., s. 5617; 1903, c. 590, s. 4; 1907, c. 467; C. S. 3446.)

§ 60-41. Agreements for through freight and traffic.—The directors representing the stock held in the various railroad corporations are hereby authorized and empowered to enter into such agreements and terms with each other as to secure

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through freight and travel without the expense of transfer of freight, or breaking the bulk thereof, at different points along the lines, and for this purpose may use the road or roads and the rolling stock of such corporations or companies on such terms as may be agreed upon by them. (Rev., s. 2640; Code, s. 1995; 1866-7, c. 105; C. S. 3447.)

§ 60-42. Intersection with highways. — Whenever the track of a railroad shall cross a highway, turnpike or plankroad, such highway, turnpike or plankroad may be carried under or over the track, as may be found most expedient; and in cases where an embankment or cutting shall make a change in the line of such highway, turnpike or plankroad desirable, then such corporation may take such additional lands for the construction of the road, highway, turnpike or plankroad on such new line as may be deemed requisite by the directors. Unless the land so taken shall be purchased for the purposes aforesaid, compensation therefor shall be ascertained in the manner prescribed in the chapter Eminent Domain, and when the land is purchased for the purposes aforesaid, compensation for land taken, see § 40-11 et seq.

Cross References.—See also § 60-37, paragraph 6, and § 60-43. As to the power of the utilities commission to regulate railroad crossings, see § 62-50. As to duty of railroad company when by the operation of the railroads they become dangerous or inconvenient to the public traveling along their highways or private ways.

§ 60-43. Service of notice of defective crossings; failure to repair after notice, misdeemeanor. — Whenever, in the construction, the works of any railroad corporation shall cross established roads or ways, the corporation shall so construct its works as not to impede the passage or transportation of persons or property along the same. If any railroad corporation shall so construct its crossings with public streets, thoroughfares or highways, or keep, allow or permit the same at any time to remain in such condition as to impede, obstruct or endanger the passage or transportation of persons or property along, over or across the same, the governing body of the county, city or town, or other public road authority having charge, control or oversight of such roads, streets or thoroughfares may give to such railroad notice, in writing, directing it to place any such crossing in good condition, so that persons may cross and property be safely transported across the same. If the railroad corporation shall fail to put such crossing in a safe condition for the passage of persons and property within thirty days from and after the service of the notice, it shall be guilty of a misdemeanor and shall be punished in the discretion of the court. Each calendar month which shall elapse after the giving of the notice and before the placing of such crossing in repair shall be a separate offense. This section shall in no wise be construed to abrogate, repeal or otherwise affect any existing law now applicable to railroad corporations with respect to highway and street crossings; but the duty imposed and the remedy given by this section shall be in addition to other duties and remedies now prescribed by law. (Rev., s. 2569; Code, s. 1710; R. C., c. 61, s. 30; 1874-5, c. 83; 1915, c. 250, ss. 1, 2; C. S. 3449.)

Cross References.—As to the power of the utilities commission to regulate crossings, see § 62-50. As to duty of railroad to maintain bridges it makes necessary, see § 136-75. As to duty of railroad to provide drawbridge, see § 136-76. As to venue in an action against a railroad, see § 1-81.

Editor's Note.—Section 62-50 confers authority upon the utilities commissioner to abolish grade crossings by a railroad company when by the operation of the railroads they become dangerous or inconvenient to the public traveling along their highways or private ways.

§ 60-44. Service of notice on grade crossings.—The right and power to construct their roads across streets, highways, etc., they must maintain a safe and convenient crossing there, making it, as far as they can, as safe and convenient as it would have been had the railroad not been built. Raper v. Wilmington, etc., R. Co., 126 N. C. 563, 36 S. E. 115.

A Not Restricted to Public Highway.—This section does not restrict the defendant's duty to crossings of "public highways," but uses the broader and generic term "highways," which might include any road used by the public as a mill road, church road and in going to town, as was this road. Goforth v. Southern R. Co., 144 N. C. 569, 570, 57 S. E. 229.

Same— Applies to Private Crossings. —An "established road or way" which a railroad company may not obstruct in crossing it in good condition extends to those which were of a private nature, and not necessarily those dedicated to a public use, and in such instances, where the rights of a railroad and the rights of the public to the use of their roads or ways conflicted, the former must give way to the latter. Tate v. Seaboard Air Line R. Co., 168 N. C. 533, 84 S. E. 898.

"Negligent Construction" Defined.—By "negligent construction" is meant such an improper construction of the crossing, whether arising from negligence, indifference, or motives of economy, as unnecessarily increases the danger of using the public highway. Raper v. Wilmington, etc., R. Co., 126 N. C. 563, 36 S. E. 115. But the mere fact that a crossing is dangerous does not necessarily impute negligence to the railroad company. Edwards v. Atlantic Coast Line R. Co., 115 N. C. 740, 1879 N. C. 253.

Presumption That Crossing Is Safe.—One has the right to assume that a railroad company has discharged its duty to the public by keeping the crossing in safe condition. Tankers v. Roanoke R., etc., Co., 109 N. C. 860, 13 S. E. 719.

Indictment.—An indictment charging a railroad company with obstructing a public road by the use of plank at a crossing, is fatally defective if it does not charge the manner of the use of the plank. State v. Roanoke R., etc., Co., 109 N. C. 860, 13 S. E. 719.

When Injury Might Have Been Caused by Defective Crossing.—Under this section it is error for the trial court to sustain a motion for nonsuit on competent evidence from which the jury could have found that, if defendant's crossing over the public road was negligently left in a dangerous condition, plaintiff would not have been injured by the slipping and falling thereon of the mule upon which he was riding. Goforth v. Southern R. Co., 144 N. C. 569, 57 S. E. 229.

§ 60-45. Change in location of highways.—In order to prevent the frequent crossing of such road or ways, or in cases where it may be necessary to occupy the same, the corporation may change the roads and ways so as to avoid such crossing and occupation, and to such points as may be deemed expedient. (Rev., s. 2570; Code, s. 1711; R. C., c. 61, s. 31; 1874-5, c. 83; C. S. 3451.)

May Change County Road.—A railroad company may make a change in a county road that does not necessarily impair its usefulness. Brinkley v. Sou. R. Co., 135 N. C. 624, 47 S. E. 791.

§ 60-46. Damages due to change in location.—For any injury done to the lands of persons by taking them under § 60-45, the value thereof shall be assessed in like manner as is provided for assessing damages to real estate for taking lands under the chapter Eminent Domain. (Rev., s. 2571; Code, s. 1712; R. C., c. 61, s. 32; 1874-5, c. 83; C. S. 3452.)

Cross Reference.—As to manner of assessing damages when the parties cannot agree, see § 40-11 et seq.

§ 60-47. Old road not to be impeded until new road is made.—Before any part of an established road or way shall be impeded by any railroad corporation, the new road or way shall be prepared and made equally good with the original road or way, and shall be kept up and repaired as before the change. (Rev., s. 2572; Code, s. 1713; R. C., c. 61, s. 33; 1874-5, c. 83; C. S. 3453.)

§ 60-48. Cattle-guards and private crossings; failure to erect and maintain misdemeanor.—Every incorporated company owning, operating or constructing, or which shall hereafter own, operate or construct any railroad passing through and to have complied with the conditions of this section in installing a good and sufficient cattle-guard: Provided, that any railroad company operating in this state may make application to the commission to adopt for its road any particular brand or make of cattle-guard, and if the commission shall approve and authorized the use of such guard, it shall, if kept and maintained in good and sufficient condition at all times by such railroad company, be deemed and held in all actions, suits or proceedings in any court of this state a good and sufficient cattle-guard. (Rev., ss. 2601, 3753; Code, s. 1915, c. 127; 1933, c. 134, s. 8; 1941, c. 97, s. 5; C. S. 3454.)

Applies to Town Lot.—This section which requires railroads to construct cattle guards at the point of entrance upon and exit from enclosed lands, applies to a town lot as well as in the county. Shepard v. Suffolk & C. R. Co., 140 N. C. 391, 53 S. E. 137.

Adoption of Stock Law.—The adoption of the stock law does not abrogate this section in a locality. Shepard v. Suffolk & C. R. Co., 140 N. C. 391, 53 S. E. 137.

Joinder of Actions.—Where plaintiff's complaint contained two causes of action, one to recover damages alleged to have been caused by defendant's ponding water on plaintiff's land; the other to recover damages for a breach of duty on the part of defendant in not putting up sufficient cattle-guards as required by this section, this was an improper joinder of causes of action because of the jury's being for injury to property, a tort, while the second arose "upon contract" for the breach of an implied contract to perform a statutory duty. Hodges v. Wilmington, etc., R. Co., 105 N. C. 176, 10 S. E. 297.

Cited in Allen v. Wilmington, etc., R. Co., 102 N. C. 389, 9 S. E. 4. Concurring opinion of Avery, J., in Allen v. Wilmington, etc., R. Co., 106 N. C. 515, 522, 11 S. E. 175, 1915, c. 127; 1933, c. 394, ss. 1, 2; 1915, c. 127; 1933, c. 134, s. 8; 1941, c. 97, s. 5; C. S. 3454.)

§ 60-49. Change of route of railroad.—The directors of any railroad corporation may by a vote of two-thirds of their whole number at any time alter or change the route, or any part of the route, of their road, if it shall appear to them that the line can be improved thereby, and they shall have the same right and power to acquire title to any lands required for the purposes of the company in such altered or changed route, as if the road had been located there in the first instance; but no such alteration shall be made in any city or town after the road shall have been constructed, unless the same is sanctioned by a vote of two-thirds of the corporate authorities of such city or town. In case of any alteration made in the route of any railroad after the company has commenced grading, compensation shall be made to all persons for injury so done to any lands that may have been donated to the company. When any route or line is abandoned in the exercise of the power herein granted, full compensation shall be made by the company for all money, labor, bonds or material contributed to the construction of the road-bed or its superstructure by those so interested by their contributions in the abandoned route or line. All the provisions of this chapter relative to the first location and to acquiring title to land shall apply to every such new or altered portion of the route. (Rev., s. 2575; Code, s. 1915, c. 127; 1933, c. 394, ss. 1, 2; 1915, c. 127; 1933, c. 134, s. 8; 1941, c. 97, s. 5; C. S. 3455.)

Cross Reference.—As to the duty of the utilities commission to require railroads to enter towns, see § 62-52.

Authority Necessary to Change Route.—While a railroad company has no power to change its route without legislative authority, it is not necessary that this power should
be given in the charter or a direct amendment thereto, but it may be given by charter or by special enactment or by the general retained laws of the State. Dewey v. Atlantic Coast Line R. Co., 142 N. C. 392, 55 S. E. 292.

Original Rights May Be Retained.—Variations in a route over which a railroad may run do not affect the identity of the corporation itself, or its right to build it, where subsequent acts are amending or the original charter and give permission for a deflection from the line first projected; and the right to exemption of property from tax granted in the original charter is retained unimpaired. Cheraw, etc., R. Co. v. Commissioners, 88 N. C. 519.

When Corporation Commission Orders Change.—This section requires that a contemplated change in the route of a railroad of its own volition, and for its own convenience, construction of its road and extending the same within the two separate periods therein prescribed. Brummitt v. Snow Hill Ry. Co., 197 N. C. 381, 148 S. E. 444.

Right to Change Grade.—A railroad company has a right to change the grade of its roadbed or to remove it to any point on its right of way. Brinkley v. Sou. R. Co., 135 N. C. 489, 494.

§ 60-50. Forfeiture for failure to begin or complete railroad.—If any railroad corporation shall not within three years after its articles of association are filed and recorded in the office of the secretary of state, or the passage of its charter, begin the construction of its road and extend theron ten per cent of the amount of its capital, or shall not finish the road and put it in operation in ten years from the time of filing its articles of association or passage of its charter as aforesaid, its corporate existence and powers shall cease. (Rev., s. 2564; Code, s. 1980; 1871-2, c. 138, s. 43; Ex. Sess. 1903, c. 142; C. S. 5456.)

State Must Institute Forfeiture Proceedings.—The failure of a railroad company to organize under an act of incorporation within the two years prescribed, does not prevent a valid organization thereafter, unless forfeiture has been declared in proceedings instituted by the state. Railroad v. Olive, 142 N. C. 257, 55 S. E. 263.

The State alone, acting through the Attorney-General, may institute a proceeding against a railroad company to forfeit its charter under the provisions of this section for failure to begin or complete the construction of the railroad within the same within the two separate periods therein prescribed. Brummitt v. Snow Hill Ry. Co., 197 N. C. 381, 148 S. E. 444.

Suspension of Forfeiture.—If the legislature knowing the ground of forfeiture deals with the corporation as if it were lawfully existing it thereby waives its right of forfeiture. Attorney-General v. Petersburg, etc., R. Co., 28 N. C. 456.

Where a railroad company has not commenced the construction of its road within three years after its charter has been granted as required by this section, and thereafter by statute the Legislature declares that certain bonds issued by a township to aid in the construction of the railroad shall be valid, and the county has acted in recognition of the existence of the corporation, the State by its acquiescence in the delay and by its recognizing the railroad company as an existing corporation has waived its right of forfeiture. Brummitt v. Snow Hill Ry. Co., 197 N. C. 381, 148 S. E. 444.

Same.—Attorney-General Cannot Bring Action.—The attorney-general cannot of his own motion bring an action to begin railroad in certain cases—In all cases where railroad companies have been chartered by the act of the general assembly or the charters of any railroad company has been amended by act of the general assembly, during or subsequent to the session of one thousand nine hundred and eleven, but where construction work has not been begun in accordance with the provisions of § 60-50 or having been begun such construction work has not been completed, the secretary of state may in the exercise of his sound discretion, upon application of any such railroad company and the payment to the state of the same fees as provided in § 55-158, extend from time to time for periods of two years the time within which to begin and renew construction work is required by § 60-50; and the fact of extending the time by the secretary of state, as herein provided, shall, for the period of such extension, fully and to all intents and purposes, renew corporate existence and corporate powers as the same are conferred in the original charter. (1919, c. 181; 1923, c. 214; C. S. 3457.)

Editor's Note.—In 1921, by Public Laws 1921, ch. 184, this section was amended so as to include railroads whose charters had been amended since 1911. At the same time the provision requiring construction work begun but not completed was added. By Public Laws 1923, ch. 245, the legislature made the granting of any extension of time for beginning, renewing or completing, work on railroads within the state discretionary with the secretary of state, in stead of obligatory as heretofore.

§ 60-52. Forfeiture for preferences to shippers.—In the event of any contract having been entered into by any railroad company in this state with any person or company conferring upon that company any preferential or exclusive rights of transportation, either in priority or in arrangements, are given to such person or company, the attorney-general is hereby instructed to institute proceedings against such railroad company for a forfeiture of its charter. (Rev., s. 2563; Code, s. 1969; 1865-6, resolution ratified December 14, 1865; C. S. 3458.)

§ 60-53. Obtaining temporary track across railroad.—Wherever any railroad line track and right of way shall lie between any body of merchantable timber or quarry or other kind or class of heavy property required for the construction of any body of navigable water over which such property could be floated or shipped, and the owner of such timber or property shall desire to transport such property to water for purposes of floating or shipping, such property owner shall have the right to file petition before the utilities commission for a right to cross such railroad with any other railroad track or tramway. The procedure for the hearing of the petition shall be same as other proceedings of the commission. The commission shall hear the facts and if it be found reasonably necessary that the railroad track and right of way shall be crossed by a temporary railroad track the commission shall so order and
§ 60-54. Shelter at railroad division points required; failure to provide, a misdemeanor.—It shall be the duty of every person, firm, or corporation that may now or hereafter own, control, or operate any line of railroad in the state of North Carolina, to erect and maintain at every division point where cars are regularly taken out of trains for repairs or construction work, or where other railroad equipment is regularly made, repaired, or constructed, a building or shed with a suitable and sufficient roof over the repair and construction track or tracks so as to provide that all men or employees permanently employed in the construction and repair of cars, trucks, or other railroad equipment of whatever description shall be under shelter and protected during snows, rains, sleets, hot sunshine, and other inclement weather: Provided, the utilities commission shall have the power to direct the points at which sheds shall be erected, and the character of the sheds: Provided further, that such failure shall constitute a separate offense. Any person, firm, or corporation failing to comply with the requirements of this section shall be guilty of a misdemeanor, and for each offense shall be fined not less than one hundred dollars nor more than five hundred dollars. Each day of such failure shall constitute a separate offense.

§ 60-56. Maximum continuous service.—It shall be the duty of every common carrier, its officers or agents, subject to this article, to require or permit any employee, subject to this article, to be or remain on duty for a longer period than sixteen consecutive hours, and whenever any such employee of such common carrier shall have been continuously on duty for sixteen hours in the aggregate in any twenty-four-hour period shall be required or permitted to continue or again go on duty without having had at least eight consecutive hours off duty: Provided, that no operator, train dispatcher, or other employee who by the use of the telegraph or telephone dispatches, reports, transmits, receives, or delivers orders pertaining to or affecting train movements shall be required or permitted to be or remain on duty for a period longer than nine hours in any twenty-four-hour period in all towers, offices, places, and stations continuously operated night and day, nor for a longer period than thirteen hours in all towers, offices, places, and stations operated only during the daytime, except in case of emergency, when the employees named in this proviso may be permitted to be and remain on duty for four additional hours in a twenty-four-hour period on not exceeding three days in any week: Provided further, the utilities commission may, after a full hearing in a particular case and for good cause shown, extend the period within which a common carrier shall comply with the provisions of this proviso as to such case. (1911, c. 112, s. 2; 1938, c. 134; 1941, c. 97; C. S. 6556.)

§ 60-57. Penalty for violation.—Any such common carrier, or any officer or agent thereof, requiring or permitting any employee to go, be or remain on duty in violation of this article shall be liable to a penalty of not to exceed five hundred dollars for each and every violation, to be recovered in suit or suits to be brought in the name of the state of North Carolina on relation of the utilities commission in the superior court of Wake county or of the county in which the violation of this article occurred; and it shall be the duty of the said utilities commission to bring such suits upon satisfactory information lodged with it; but no such suit shall be brought after the expiration of one year from date of such violation; and it shall be the duty of said utilities commission to lodge with the proper solicitors information of any such violations as may come to its knowledge. In all prosecutions under this article the common carrier shall be deemed to have had knowledge of all acts of all its officers and agents: Provided, that the provisions of this article shall not apply to any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employee at the time the said employee left a terminal, and which could not have been foreseen: Provided further, that the provisions of this article shall not apply to the crews of wrecking or relief trains: Provided further, this article shall not be construed to impose a penalty upon any common carrier for any act done in violation of the act of congress, ratified March the fourth, one thousand nine hundred and seven, and entitled "An act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," or any acts amendatory thereof. (1911, c. 112, s. 3; C. S. 6556.)
§ 60-58. Utilities commission to enforce article.

—It shall be the duty of the utilities commission to execute and enforce the provisions of this article, and all powers granted to the utilities commission by this act are hereby extended to it in the execution thereof. (1911, c. 112, s. 4; 1935, c. 134, ss. 7, 8; 1941, c. 6567.)

Art. 7. Lease, Sale, and Reorganization.

§ 60-59. Lessee of noncompeting railroad may acquire its stock; merger of lessor.—Any railroad corporation or its successors, being the lessee of the road of any other noncompeting railroad corporation, may take a surrender or transfer of the capital stock of the stockholders, or any of them, in the corporation whose road is held under lease, and issue in exchange therefor the like additional amount of its own capital stock at par, or on such other terms and conditions as may be agreed upon between the two corporations, and whenever the greater part of the capital stock of any such corporation shall have been so surrendered or transferred, the directors of the corporation taking such surrender or transfer shall thereafter, on a resolution electing so to do, to be entered on their minutes, become ex officio the directors of the corporation whose road is so held under lease, and shall manage and conduct the affairs thereof as provided by law; and whenever the whole of such capital stock shall have been so surrendered or transferred, and a certificate thereof filed in the office of the secretary of state under the common seal of the corporation to whom such surrender or transfer shall have been made, the estate, property, rights, privileges, and franchises of the corporation whose stock shall have been so surrendered or transferred shall thereupon vest in and be held and enjoyed by the corporation to whom such surrender or transfer shall have been made, and as fully and entirely, without charge or diminution, as the same were before held and enjoyed, and be managed and controlled by the board of directors of the corporation to whom the surrender or transfer of such stock shall have been made in the corporate name of such corporation.

But the property, rights, franchises and profits of every corporation so surrendered, transferred or leased shall hereafter always be liable to taxation, and shall never be exempt therefrom. The rights of any stockholder not so surrendering or transferring his stock shall not be in any way affected thereby, nor shall existing liabilities or the rights of creditors of the corporation where stock shall have been so surrendered or transferred be in any way affected or impaired by this section. (Rev., s. 2567, subsec. 13; 1885, c. 108, s. 2; 1908, c. 119, ss. 1, 3; C. S. 3461.)

Cross References.—As to conditional sales or leases of railroad property, see § 47-24. As to taxation of leased railroad, see § 105-367.

Editor's Note.—The stockholders of the old corporation cannot be compelled to become stockholders of the new corporation without their consent and do not become such until they have actually participated in the transfer by executing the old stock for the new.

A railroad corporation has no power to consolidate with another railroad company so as to form a single corporation unless this be done by legislative act. Under this section no consolidation can take place until one corporation holds all of the capital stock of another.

The sentence reserving the right of taxation is a saving clause to prevent the operation of Tennessee v. Whitworth, 117 U. S. 139, 6 S. Ct. 649, 29 L. Ed. 833, which held that all special privileges, including exemption from taxation, of the old corporation were inherited by the new.

When New Corporation Formed.—When a new corporation is formed out of two existing corporations, these latter ceasing thereafter to exist, the law forming the new corporation governs and controls its corporate functions and rights. Cheraw & Salisbury E. Co. v. Commissioners, 88 N. C. 519.

Legislative Act Authorizing Consolidation.—An act authorizing the consolidation of certain railroad corporations upon a vote of a majority of the stockholders and allowing a stockholder actual value for his stock in lieu of taking stock in the consolidated company, is valid. Spencer v. Railroad Air Line R. Co., 137 N. C. 107, 49 S. E. 96.

§ 60-60. Lease or merger of competing carrier declared a misdemeanor.—No railroad or other transportation company or its officers, now or hereafter doing business in this state, shall purchase, lease, absorb, take over, buy stock in, merge with or in any way secure an interest in a competing line of railroad or other transportation company, nor shall any railroad or other transportation company or its officers enter into any contract, agreement or understanding with a competing line of railroad or other transportation company calculated to defeat or which may defeat or lessen competition in this state. All such contracts, purchases or sales shall be void. Any violation of this section shall make the corporation or person so offending guilty of a misdemeanor, and on conviction the offender shall be fined in the discretion of the court. This section shall not prevent railroads independently owned and operated in this state, and not exceeding one hundred miles in length, from selling their roads and property. (Ex. Sess. 1908, c. 119, ss. 2, 3; C. S. 3460.)

§ 60-61. Acquisition of interest in or lease of noncompeting branch or connecting lines.—Any railroad or other transportation company may acquire and hold or guarantee, or endorse the bonds or stocks of, or may lease any railroad or branch railroad, or other transportation line in this or adjoining state connecting with it directly or indirectly. But no railroad or other transportation company or its officers shall acquire, hold or guarantee the bonds or stock of, or lease or be leased to, or purchase or buy or consolidate with or be merged into, any parallel or competing railroad or other transportation company, nor shall any railroad or other transportation company or its officers sell any of its stock or bonds to any holding or voting company or its officers, whereby such consolidation or merger may be effected, and any such purchase, contract, merger or sale shall be void. This provision shall not prevent railroads independently owned and operated in this state, and not exceeding one hundred miles in length, from selling their roads and property. (Rev., s. 2567, subsec. 13; 1885, c. 108, s. 2; 1908, c. 119, ss. 1, 3; C. S. 3461.)

Lease Beyond Time Granted for Corporate Existence.—Where the term of a lease of property of a railroad company extends beyond the time fixed by its charter for the corporate existence of the lessor, such a lease is valid for the period of the corporate life of the lessor, and will extend beyond that period if the charter is extended, and the lessor's corporate existence is thereby extended, and in this process it may endure for the full term. Hill v. Atlantic, etc., R. Co., 143 N. C. 539, 55 S. E. 854.

Lessee Responsible for Torts.—The lessee of a railroad is responsible for the torts committed by the lessee in the operation of the leased road, and in the exercise of its franchises. Mitchell v. Sou. R. Co., 176 N. C. 645, 97 S. E. 628; Hill v. Director-General, 178 N. C. 607, 610, 101 S. E. 376.
§ 60-62. Purchaser at mortgage or execution sale of railroads may incorporate.—Whenever the purchaser of the real estate, track and fixtures of any railroad corporation which has heretofore been and subject to all of the provisions of this chapter, with all the powers, privileges and franchises his associates shall thereupon be a new corporation, prerequisites for filing, etc., see § 60-9 et seq.

§ 60-63. On dissolution or sale of railroads purchaser becomes a corporation.—When any railroad corporation shall be dissolved, or its property sold and conveyed under any execution, deed of trust, mortgage or other conveyance, the owner or purchaser shall constitute a new corporation upon compliance with law. (Rev., s. 2552; Code, s. 1936; 1871-2, c. 138, s. 5; C. S. 3402.)

Cross Reference.—As to contents of articles of association, prerequisites for filing, etc., see § 60-9 et seq.

Railroad May Be Sold.—A railroad is the subject of private property, and in that character is liable to be sold, unless the sale be forbidden by the Legislature; not the franchise, but the land constituting the road. State v. Rives, 27 N. C. 297.

Corporation Not Dissolved by Sale.—A railroad corporation is not dissolved by the sale of its road. State v. Rives, 27 N. C. 297.

Purchaser Takes Rights of Old Company.—On the foreclosure of a mortgage given by a railroad company, the purchaser takes the rights that the company had acquired in relation to its right of way under its charter. Barker v. Sou. R. Co., 137 N. C. 214, 49 S. E. 115.

Cited in Saluda v. Polk County, 207 N. C. 180, 184, 176 S. E. 236.

§ 60-64. Common carrier defined.—The term “common carrier,” as used in this article, shall include the receiver or receivers, or other persons holding the corporate franchises. Bradley v. Ohio, etc., Ry. Co., 78 Fed. 387, 393.

Sale under Second Mortgage.—The effect of the sale of a railroad company’s franchises and property under a second mortgage, subject to a first mortgage which was assumed by the purchaser, is to place the purchaser in the place of the mortgagor in its relation to the trustee of the first mortgage. This court may be called to operate the road as agent of the mortgagor, but the old corporation was not extinguished, but is still in existence and liable for damages caused by the mal-administration of its corporate franchises. Bradley v. Ohio, etc., Ry. Co., 78 Fed. 387, 393.

§ 60-65. Fellow-servant rule abrogated; defective machinery.—Any servant or employee of any railroad company operating in this state who shall suffer injury to his person, or the personal representative of any such servant or employee who shall have suffered death in the course of his services or employment with such company, by the negligence, carelessness or incompetence of any other servant, employee or agent of the company, or by any defect in the machinery, ways or appliances of the company, shall be entitled to maintain an action against such company. Any contract or agreement, expressed or implied, made by any employee of such company to waive the benefit of this section shall be null and void. (Rev., s. 2646; 1897 (Pr.), c. 56; 1915, c. 256; C. S. 3465.)

Editor’s Note.—This article, regulating the liability of railroads for injuries to employees, was enacted prior to the adoption of the Workmen’s Compensation Act, §§ 97-1 to 97-122. Section 97-13 expressly provides that the Workmen’s Compensation Act is not applicable to railroads or railroad employees and that this article is not repealed. According to that section, however, the exemption as to railroads does not apply to electric street railways and their employees.

§ 60-66. Fellow-servant rule abrogated; defective machinery.—As to action for death by wrongful act generally, see § 28-173.

I. EDITOR’S NOTE.

In Hobbs v. Atlantic, etc., R. Co., 107 N. C. 1, 12 S. E. 124, it was held that a railroad company was not liable for injury to its servants, resulting from the negligence of a fellow servant. In that case the attention of the legislature was called to the fact that many of the states had enacted similar statutes. By legislative enactment abrogated the fellow servant rule in far as it applied to railroad employees. Thereupon there ensued a general discussion for and against the passage of a similar statute in North Carolina. In 1897 such a statute was passed and its constitutionality sustained in Hancock v. Norfolk, etc., Railway, 124 N. C. 222, 32 S. E. 679. By several decisions of the United States Court similar statutes in other states have been held not to be in violation of the Fourteenth Amendment to the Federal Constitution.

In Mott v. Southern R. Co., 131 N. C. 234, 237, 42 S. E. 601, it was sought to have this court and restrict this section so that it should apply only to employees engaged in operating trains, but the court held the contrary and said: "The language of the statute is both comprehensive and explicit. It embraces injuries sustained by any servant or employee of any railroad company . . . in the course of his services or employment with said company." The plaintiff
was an employee and was injured in the course of his employment.”

However, to come within the provisions of this section a railroad company must be engaged in the business of constructing a railroad. The succeeding section was passed after Congress had passed a similar statute applicable to employees engaged in interstate commerce. It is not as broad as this section for it applies only to common carriers.

Injury by Falling Tree.—This section applies where an employee is injured while employed in building a railroad, or in the extension of a railroad, at a point some distance from the section of the railroad on which he was employed. Gurganous v. Camp Mfg. Co., 304 N. C. 525, 168 S. E. 333.

II. FELLOW-SERVANT RULE.

Abrogation of Fellow-Servant Rule.—This section is an unconditional abrogation of the fellow-servant rule as contained in § 60-64.

Injury When Duty Delegated to Another.—Where a railroad company delegates to another to perform a service for which the former is responsible, the latter is not liable for injuries to employees of the former. Coley v. North Carolina R. Co., 129 N. C. 407, 54 S. E. 420. But see § 97-13 and Editor’s Note § 60-65.

Abrogation Only as to Railroads.—The law relating to the doctrine of fellow-servants has been only modified in regard to its application to those employed by railroad companies operating in this state. Robinson v. Ivey & Co., 193 N. C. 635, 136 S. E. 233.

Applies to Any Department of Railroad.—The provisions of this section apply to an injury negligently inflicted by a fellow-servant in any department of a railroad being operated by a railroad company making a shipment, if the employee passes a similar statute applicable to employees engaged.

Applies to Street Railways.—This section applies to street railways which are operated in the city of Wilmington, Clay v. 669, 56 S. E. 213; Hemphill v. Buck Creek Lumber Co., 141 N. C. 407, 54 S. E. 420. But see § 97-13 and Editor’s Note § 60-65.

Applicable to Logging Roads.—This section has been held to apply to logging roads. Moore v. Rawls, 196 N. C. 125, 144 S. E. 552.

Applies to Manufacturing Company Operating Spur Track.—If the owner of a manufacturing corporation which owns and operates a spur track on its grounds as incidental to its main business, with respect to servants employed in such service, United States Leather Co. v. Henson, 121 N. C. 576, 48 S. E. 144, United States Leather Co., 143 N. C. 512, 55 S. E. 847.

Does Not Apply to Railroad under Construction.—This section does not apply to an employee engaged in building a trestle for the extension of a railroad, at a point some miles from the track on which trains are being operated. Nicholson v. Railroad, 138 N. C. 516, 51 S. E. 40; Bailey v. Meadow Co., 152 N. C. 603, 68 S. E. 11.

Kind of Employment.—The provisions of this section applying to railroads do not require that the servant, at the time he is engaged in the work, be employed on a railroad, or in the operation or performance of a service, but applies to any other kind of service, whether more or less dangerous. Mincey v. Atlantic Coastaline Ry Co.; 161 N. C. 467; 77 S. E. 673.

Under the construction of this section assumption of risk is not available. Moore v. Rawls, 195 N. C. 125, 147 S. E. 399.

Duty to Furnish Safe Tools.—It is the master's duty to furnish the servant such tools as are reasonably safe and suitable for the work in which he is engaged, and in general the cases reported by the courts hold that the employer 's negligence in furnishing a tool which is obviously defective will not prevent a person from a recovery for an injury resulting therefrom, unless the apparent danger is so great that its assumption would amount to a conscious indifference to a known defect, and this section has no application. Mathis v. Atlantic R. Co., 144 N. C. 162, 56 S. E. 864.

Same—Acquiescence in Use.—The duty of the master to furnish an appliance for some purpose other than that for which it was intended is discharged by the same position as if the appliance had been originally furnished for that purpose. Wallace v. Railroad, 141 N. C. 646, 54 S. E. 399.

Obviously Defective Machinery.—The use of machinery obviously defective will not prevent a person from a recovery for an injury resulting therefrom, unless the apparent danger is so great that its assumption would amount to a conscious indifference to a known defect, and this section has no application. Mathis v. Atlantic R. Co., 144 N. C. 162, 56 S. E. 864.

When Plaintiff Causes Own Injury.—When under instructions from his superior officer the plaintiff, in repairing a piece of machinery with knowledge of its defects, negligently caused an injury to himself in such manner as it was his duty in repairing to prevent, he cannot recover, and the evidence is not even sufficient to apply the rule of Wallace v. Atlantic Coast Line R. Co., 144 N. C. 162, 56 S. E. 864.

Liability Not Affected by Act of Shipper.—The duty of the railroad company to have a crosspiece used to keep step ladders in place is not a security for the personal safety of the employee, inasmuch as the manner for the use to which its servants customarily put it is not affected by the fact that the shipper puts it on in loading the car. Wallace v. Railroad, 141 N. C. 646, 54 S. E. 399.

Question for Jury.—Where the employee of a railroad company, in intrastate commerce, was ruptured while handling heavy baggage at the station by the unaided use of his personal strength, when the company had promised to furnish the servant such tools as are reasonably safe and suitable for the work in which he is engaged, and in general the cases reported by the courts hold that the employer's negligence in furnishing a tool which is obviously defective will not prevent a person from a recovery for an injury resulting therefrom, unless the apparent danger is so great that its assumption would amount to a conscious indifference to a known defect, and this section has no application. Mathis v. Atlantic R. Co., 144 N. C. 162, 56 S. E. 864.

Failure to Equip Car with Automatic Couplers.—Where the jury found that the plaintiff was injured by the negligence of the defendant in failing to have its cars equipped with automatic couplers, the only defense open to the defendant is the evidence that its negligence was such as will apply under the latter statute may be enforced in the state courts as well as the federal courts.

There is a distinction between the state and federal statute as to the basis of the damage assessed. Under the state statute the damages are based upon the present worth of the net pecuniary value of the life of the deceased. Ward v. North Carolina R. Co., 161 N. C. 179, 186, 176 S. E. 717. Under the United States statute the damages are based upon the present worth of the future pecuniary benefit which the personal representative would have sustained from a defective or insufficiency, due to its negligence, in its cars, engine, appliances, machinery, track, road-bed, works, boats, wharves, or other equipment.

Cross References.—As to action for death by wrongful act generally, see § 28-173. As to venue of an action against a railroad, see § 1-81.

Defective Coupler.—In an action for an injury alleged to have been sustained from a defective coupler, the use of a defective coupler was a violation of a positive duty, and, in connection with an express order of the superintendent to make the coupling, was continuing negligence, and the cause of the injury. Liles v. Foxburg Lumber Co., 142 N. C. 39, 54 S. E. 792; Sears v. Atlantic, etc., R. Co., 169 N. C. 446, 86 S. E. 176.

Motor without Handhold Along Pilot Beam.—Where the evidence shows that he was at the time of the injury at the usual position provided for the purpose on the engine without handhold along the pilot beam and that he was not thrown and injured because the engine did not have the usual handhold along the pilot beam and that he did not know the handhold was missing, the jury was not warranted in finding his act of carelessness, his right of action is established. Biles v. Seaboard Air Line R. Co., 143 N. C. 78, 55 S. E. 512.

Power Drill.—A power drill furnished by the master to the servant for boring holes in iron plates, leaving an exposed set-screw therein dangerous in operating the drill and which are usually covered or countersunk, is not a proper tool for the purpose and the employer is liable in damages proximately caused by the defect. Eplee v. Southern R. Co., 153 N. C. 293, 116 S. E. 325.

Improper Ladder.—Where it is the custom of a railroad company to leave an exposed set-screw thereon dangerous in operating the drill and which are usually covered or countersunk, it was held that such improper ladder was not a proper tool for the purpose and the employer is liable in damages proximately caused by the defect. Eplee v. Southern R. Co., 153 N. C. 293, 116 S. E. 325.

“Common Carrier” Defined.—A common carrier is one who, by virtue of his calling, undertakes for compensation to transport persons or property from one place to another for all persons as choose to employ him. Williams v. Kinston Mfg. Co., 175 N. C. 226, 227, 95 S. E. 366.

Statute Applicable.—The federal and state courts have concurrently held that the statute will apply only to common carriers engaged in interstate commerce. West v. Atlantic, etc., R. Co., 174 N. C. 125, 93 S. E. 479; Renn v. Seaboard Air

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Contributory negligence no bar, but mitigates damages. — In all actions hereafter brought against any common carrier by railroad to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: Provided, however, that no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee. (1913, c. 6, s. 2; C. S. 3467.)

Editor's Note.—The provisions of this section apply only to employees engaged exclusively in interstate commerce. There is a similar federal statute which applies to employees engaged in interstate commerce. See 45 U.S.C. § 53.

Effect of Nonsuit in Action under Federal Act.—A judgment as of nonsuit upon the merits of an action brought by an employee against a railroad company under the Federal Employers' Liability Act will not operate as a bar to the same cause brought under the Federal Act. See v. Atlantic Coast Line, 197 N. C. 590, 148 S. E. 436. See also Capps v. Atlantic, etc., R. Co., 185 N. C. 72, 116 S. E. 175. In Hines v. Atlantic Coast Line R. Co., 197 N. C. 128, 148 S. E. 334, it was held that the question of contributory negligence is a matter to be passed upon by the jury who are to say whether the employee voluntarily assumed the risk; it is no longer a bar to an action by an employee against the defendant railroad company to recover damages or as a partial defense. Moore v. Chicago Bridge, etc., R. Co., 204 N. C. 525, 168 S. E. 833. See also Capps v. Atlantic, etc., R. Co., 195 N. C. 141, 138 S. E. 532.

When Jury Fails to Allow for Contributory Negligence.—Where the plaintiff's complaint demands damages in a certain amount and in his action involving the issues of negligence and contributory negligence, and the applicability of the rule of comparative negligence under the provisions of this section the fact that the jury has rendered a verdict for damages to the full amount demanded in the complaint under a proper instruction does not alone show that the jury had failed to follow the rule of damages prescribed in such instances, and the verdict will not on that ground be disturbed. Brooks v. Suncrest Lumber Co., 194 N. C. 141, 138 S. E. 532.

Evidence Raising Issue for Jury.—In an action for a deceased employee's negligent death, the fact that it was caused by the operation of an improper coupler on a train made up and run by the defendant railroad company's trestle, in broad daylight, with another of its cars, is evidence that the defendant's negligence proximately caused the employee's death, and of the determination of the jury that the intestate might have been guilty of contributory negligence. Hinnant v. Tidewater Power Co., 187 N. C. 286, 121 S. E. 540.

Contributory negligence only a bar in actions brought against a railroad company to furnish an employee engaged in duties connected with or incidental to the operation of railroads, logging roads or tramroads. Gurganous v. Camp Mig. Co., 204 N. C. 525, 168 S. E. 334.

Negligence in Obtaining Improper Ladder.—The failure of a railroad company to furnish an employee engaged in the scope of his employment in painting a station house, a water tank, a locomotive, or in any other work which comes within the provisions of this section, and the contributory negligence of the plaintiff is not a complete bar to his recovery, but only to be considered by the jury in diminution of the damages. Jones v. Atlantic Coast Line R. Co., 194 N. C. 277, 139 S. E. 242.

Motion to Nonsuit.—Where plaintiff, while performing his duty coupled a car attached to defendant's locomotive, while in motion, and the injury was caused by the sudden movement of the locomotive by the engineer, without a signal from the plaintiff, contrary to practice, though there was evidence of contributory negligence, its establishment would not be a complete defense, under this section, and upon a motion to nonsuit, evidence that the engineer properly acted on the signal of another employee will not be considered. Vann v. Atlantic, etc., R. Co., 183 N. C. 74, 119 S. E. 659.

Federal Statute.—The rule under the federal statute is substantially the same as that prescribed by this section. Contributory negligence is not a complete bar to the recovery of damages by an employee of a railroad company caused by the latter in interstate commerce, in an action brought under the Federal Employers' Liability Act, the admixture of the negligence of the latter to which the injury was caused by the sudden movement of the locomotive by the engineer, without a signal from the plaintiff, contrary to practice, though there was evidence of contributory negligence, its establishment would not be a complete defense, under this section, and upon a motion to nonsuit, evidence that the engineer properly acted on the signal of another employee will not be considered. Vann v. Atlantic, etc., R. Co., 183 N. C. 74, 119 S. E. 659.

Contributory Negligence Question for Jury.—Under this section, the plaintiff is entitled to have his cause submitted to the jury, for, as herein provided, contributory negligence is no longer a bar to an action by an employee against the railroad for injuries sustained during his employment, and the question of assumption of risk was for the jury, the burden of proof devolving on the plaintiff. See v. Atlantic, etc., R. Co., 185 N. C. 72, 116 S. E. 175.


In General.—The doctrine of comparative negligence is only recognized by our courts in instances coming within the meaning of the Federal Employers' Liability Act, as defined in this section, and then only for the purpose of mitigating the damages or as a partial defense. See v. Chicago Bridge, etc., R. Co., 193 N. C. 113, 138 S. E. 532.
death of, any of its employees, such employee shall not be held to have assumed the risk of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee, or the death or injury caused by negligence. (1913, c. 6, s. 3; C. S. 3468.)

Editor’s Note.—Section 60-65 is an earlier section similar in its import. It applies to all railroads in North Carolina while this section applies only to common carriers.


§ 60-68. Contracts and rules exempting from liability void; set-off.—Any contract, rule, regulation or device whatsoever, the purpose and intent of which shall be to enable any common carrier by railroad to exempt itself from any liability created by this article, shall to that extent be void: Provided, that in any action brought against such common carrier, under and by virtue of any of the provisions of this article, such common carrier may set off therein any sum it has contributed or paid to any insurance or relief benefit, or indemnity that may have been paid to the injured employee, or the person entitled thereto, on account of the injury or death for which such action was brought. (1913, c. 6, s. 4; C. S. 3469.)

Accepting Benefit from Relief Department.—A relief department of a railroad for providing hospitals for employees contributed to by the employees and the company under the contract and in consideration of the contributions made by the employees and the company to such relief department; and a stipulation in the contract with its employee that in the case of an accident he must accept the benefit of the contract and release the company from liability, is prohibited by the provisions of this section. Barden v. Atlantic Coast Line R. Co., 152 N. C. 318, 67 S. E. 971; Herring v. Atlantic, etc., R. Co., 168 N. C. 555, 84 S. E. 863.


§ 60-70. Provisions of this article applicable to logging roads and tramroads.—The provisions in this article relating to liability for damages shall also apply to logging roads and tramroads. (1919, c. 275; C. S. 3470.)

Editor’s Note.—Before the enactment of this section provisions of section 60-65 were held, by judicial construction, to apply to logging roads and tramroads. See Roberson v. Greenleaf-Johnson Lumber Co., 154 N. C. 328, 70 S. E. 639; Buckner v. Madison County R. Co., 164 N. C. 201, 80 S. E. 225.

However, in Williams v. Kirston Mfg. Co., 175 N. C. 225, 95 S. E. 366. (decided in 1918) it was held that a logging road was not a common carrier within the meaning of section 60-67 and that the doctrine of comparative negligence was not applicable to actions for injuries sustained by employees of such roads. This decision seems to have enlarged the legislative enactment embraced by this section which was passed in 1919.

In a recent decision, Lilley v. Interstate Cooperage Co., 194 N. C. 250, 139 S. E. 369, the rule of the section, as to tram roads, applied, and it is held that section 60-67 is applicable as to such roads.

The provisions of §§ 60-67, 60-65, are applicable to tram or logging roads under the provisions of this section. Sampson v. Jackson Bros. Co., 203 N. C. 413, 166 S. E. 181. The doctrine of contributory negligence is to be applied in duties connected with or incidental to the operation of such roads. Garagnus v. Camp Mfg. Co., 204 N. C. 525, 168 S. E. 833.

Comparative Negligence Rule Applies.—Under this section contributory negligence is no longer a bar to a jury in injuries received in the operation of a logging road, but such negligence mitigates damages. In other words, comparative negligence is now, under the law, applicable to logging roads. Moore v. Rawls, 196 N. C. 125, 129, 144 S. E. 552, citing McKinsh v. Lumber Co., 191 N. C. 836, 131 S. E. 163.

Narrow-Gauge Logging Road.—A narrow-gauge road running through the woods and used for the purpose only of transporting logs to the defendant's sawmill, with the cars loaded with logs pulled up by a grade by means of a steam skidder, the wire cables operating along a narrow roadway from the log skidder, is a logging road within the intent and meaning of this section and an employee negligently injured by such company is not barred of his right to recover damages when caused by a fellow-servant; and contributory negligence is only considered in determination of the amount of damages the injured employee has sustained. Stewart v. Blackwood Lumber Co., 193 N. C. 138, 136 S. E. 985; Brooks v. Suncrest Lumber Co., 194 N. C. 141, 138 S. E. 532.


Art. 9. Construction and Operation of Railroads.

§ 60-71. Map of route to be served with summons for condemnation.—Whenever it shall become necessary to condemn any land for the purposes of a railroad, at the time that the summons for condemnation is served there shall also be served by the railroad company or map showing how the line of the road is located on the land sought to be condemned, and a profile showing the depth of the cuts and the height of the embankments on the land so sought to be condemned, and at what points on such land such cuts and embankments are located. This section shall not apply to street railways. (Rev., s. 2599; Code, s. 1952; 1893, c. 396, s. 2; 1901, c. 6, s. 3; 1871-2, c. 138, s. 24; C. S. 3471.)

Section Mandatory.—These conditions must be complied with before any company can construct any part of its road. Durham, etc., R. Co. v. Richmond, etc., R. Co., 166 N. C. 16; 10 S. E. 1041.

Same—Defect May Be Cured by Amendment.—The failure to serve a map and profile with the summons in condemnation proceedings as required by the section may be cured by amendment. State v. Wells, 142 N. C. 590, 55 S. E. 210.


§ 60-72. Map of railroad to be made and filed.—Every railroad corporation shall, within a reasonable time after its road shall be constructed, cause to be made a map and profile thereof and of the land taken or obtained for the use thereof, and shall file the same in the office of the utilities commission. Every such map shall be drawn on a scale and on paper to be designated by the utilities commission, and shall be certified and signed by the president or engineer of such corporation. (Rev., s. 2600; Code, s. 1977; 1871-2, c. 138, s. 41; 1933, c. 134, s. 8; 1941, c. 97, s. 5; C. S. 3473.)

Purpose of Section.—By this section railroad corporations are required, within a reasonable time after their road is constructed, to file a map and profile of their route and of land condemned for its use with the Corporation Commission. But this is for the information of that body and is not required as a part of a correct and completed location. Fayetteville Street Railway v. Railroad, 142 N. C. 423, 55 S. E. 345.

Survey Unnecessary When Old Road-Bed Adopted.—Where the line of a railroad is clearly defined by the existence of a road already in existence which is entered on and staked out by the agents of the company, and the route so marked is approved and adopted by the directors as its permanent location, in such case a survey by engineers is not essential. Fayetteville Street Railway v. Railroad, 142 N. C. 423, 55 S. E. 345.

Profile Must Show Fills and Cuts.—The profile required
§ 60-73. Joint construction by railroads having same location.—Whenever two railroad companies shall, for a portion of their respective lines, embrace the same location of line; they may by agreement provide for the construction of so much of said line as is common to both of them, by one of the companies, and for the manner and terms upon which the business thereon shall be performed. Upon the making of such an agreement, the company that is not to construct the part of the line which is common to both may terminate its line at the point of intersection, and may reduce its capital to a sum of not less than five thousand dollars for each mile of the road proposed to be constructed. (Rev., s. 2602; Code, s. 1983; 1871-2, c. 138, s. 46; C. S. 3473.)

§ 60-74. Construction of part of line in another state.—Whenever after due examination it shall be ascertained by the directors of any railroad company that a part of the line of railroad proposed to be made between any two points in this state ought to be located and constructed in an adjoining state, it may be so located and constructed by a vote of two-thirds of all the directors. The sections of such railroad within this state shall be considered a connected line, and the directors may reduce the capital specified to such amount as may be deemed proper, but not less than the amount required by law for the number of miles of railroad to be actually constructed in this state. (Rev., s. 2603; Code, s. 1884; 1871-2, c. 138, s. 47; C. S. 3474.)

Cross Reference.—As to amount of capital required by law, see § 60-9.

§ 60-75. Carriage must be according to public schedule.—Every railroad corporation shall start and run its cars for the transportation of passengers and property at regular times to be fixed by public notice, and shall furnish sufficient accommodation for the transportation of all such passengers and property as shall, within a reasonable time previous thereto, be offered for transportation at the place of starting and the junction of other railroads and at usual stopping places established for receiving and discharging way passengers and freights for that train, and shall take, transport and discharge such passengers and property at, from and to such places, on the due payment of the freight or fare legally authorized therefor, and shall be liable to the party aggrieved, in an action for damages, for any neglect or refusal in the premises. (Rev., s. 2611; Code, s. 1963; 1871-2, c. 138, s. 33; C. S. 3475.)

Cross References.—As to the powers of the utilities commission to prevent discrimination in transportation facilities, see § 62-56. As to rate regulation, see § 62-122 et seq.

Editor's Note.—Railroads are great public service corporations and are public agents in the sense that they are created for the purpose of transporting goods and passengers. In accepting the grant of rights and franchises from the state the railroad corporation impliedly assumes the duties of a common carrier. Because their functions are public they have no right to choose their passengers and customers but must under substantially similar conditions treat all alike. This is a common law duty and is only reaffirmed in this section. It applies alike to individuals, receivers and trustees.

The carrier is not bound to accept every person as a passenger, as was shown above, but a railroad company is bound to accept a person by showing that because of his condition or conduct, or even because of his character he is not a fit person to enter the train with others. See Elliott on Railroads, vol. 1, § 571.

Similarly, a railroad company is not bound to accept all freight that is offered it for transportation. It is only a common carrier of all goods which are legally found to be ascertained by the directors of any railroad company, and such goods may be carried by a common carrier only to the extent and upon the terms and conditions prescribed by law. See Kinston, etc., R. Co. v. Stroud, 132 N.C. 413, 45 S.E. 913.

Railroad Completed before Section Passed. — Where the railroad was completed through the locus in quo prior to the passage of the section, it is not necessary to the validity of the location that a map of the route should be filed. Purifoy v. Richmond, etc., R. Co., 108 N. C. 412, 12 S. E. 741.

Duty to Provide Transportation.—It is the duty of a common carrier to provide sufficient means of transportation for all freight which is essentially for the public use and which naturally brings to it, and an unusual occasion by which a greater demand upon it is temporarily made will not relieve it of the obligation if, by the use of reasonable foresight, it could have provided for. Purifoy v. Richmond, etc., R. Co., 108 N. C. 414, 12 S. E. 954, 956.

When Contract of Carriage Begins. — The contract of carriage by a common carrier begins when a passenger comes upon the carrier's premises or conveyance with the purpose of buying a ticket, within a reasonable time or after having purchased a ticket; and the relation, once constituted, continues until the journey contracted for is concluded and the passenger has left or has had reasonable time to leave such premises. Hansley v. Jamesville, etc., R. Co., 115 N. C. 35, 19 S.E. 527.

Trains Need Not Stop at All Stations.—It is a reasonable regulation of the defendant that certain trains shall not stop at all stations, provided there are enough to serve the purposes of local travel. Hutchinson v. Railroad, 140 N. C. 123, 52 S. E. 263.

Schedule Is Offer.—Under this section, the printed schedule of trains is an offer, which is accepted by a person when he asks for a ticket, and he has the right to be transported by the first train stopping at his destination. Coleman v. Southern R. Co., 138 N. C. 351, 50 S. E. 690.

Passenger on Baggage Car. — A person who gets on a baggage car, though having a ticket, but not having told the conductor that he had it, and the conductor not having seen it, is not entitled to recover as a passenger for injuries received while being pulled off the train by the conductor. McGraw v. Southern R. Co., 135 N. C. 264, 47 S. E. 758.

Ticket Not Good on Particular Train. — It is the duty of the defendant to have an agent at the gate to examine the tickets and allow no one to get upon a train which does not stop at his destination. Not having done this, but having received the plaintiff into the train, without objection, with a ticket calling for a regular station, as her destination, and nothing on its face to show it was not good on that train, and she not knowing that that train did not stop there, it was the duty of the defendant to stop the train at that point for her. Hutchinson v. Railroad, 140 N. C. 121, 52 S. E. 263.

Where Conductor Fails to Return Ticket.—Where plaintiff purchased transportation to a destination to which it was necessary to change, and the conductor on the first train neglected to return passenger's ticket, he having no money, and, when the conductor of the second train asked for his fare, vainly attempted to borrow from men who had been on the first train with him, it was negligence on the conductor's part to not to have specified beforehand by indication to such men whether plaintiff had been on the train with them prior to reaching the changing point, before ejecting plaintiff. Sawyer v. Norfolk, etc., R. Co., 171 N. C. 598, 86 S. E. 101.

Injury Caused by Misdirection of Agent. — The plaintiff, who missed his train by misdirection of the defendant's agent and his refusal to sell him a ticket, could recover for the injury sustained on being carried out of the station into the cold weather while waiting for the next train. Coleman v. Southern R. Co., 138 N. C. 351, 50 S. E. 690.

Rejected Passenger Has Right of Action.—Under this sec-
tion a passenger, ejected from train of defendant road for failure to pay again fare which he had paid once upon purchase of his ticket, as right of action. Sawyer v. Norfolk, etc., R. Co., 171 N. C. 174, 115 S. E. 24.

Same—Passenger Need Not Pay Additional Fare to Prevent Ejection. — Under this section where a passenger is absolutely ignorant of the requirement of paying the full fare, having paid his fare thereon, but being unable to produce his ticket, it is not incumbent on him, by paying money which the conductor has no right to exact, to avoid ejection from the train, and the railroad company is liable for injuries incurred by one who, by reason of the negligence of the railroad company, was carried without proper charge on a main train on the way to his destination. Sawyer v. Norfolk, etc., R. Co., 171 N. C. 13, 66 S. E. 166.

30. Ch. 60. Failure to Transport Passenger. — Where the plaintiff purchased a ticket from defendant's agent at a regular station before the time advertised for the arrival and departure of its trains, or to look after the safety of persons who attempt to enter them, when they have been stopped long enough to allow passengers to embark and disembark; but it may be liable for injuries incurred by one who, by reason of the negligence of the railroad company, was carried without proper charge on a main train, he stepped off believing he was at a safe place to stop, but seeing a "go ahead" signal from the rear, did not stop at the station to which he had paid his fare, it being a regular station on the line. Cable v. Southern R. Co., 122 N. C. 892, 29 S. E. 377.

31. Ch. 60. Passenger Carry Baggage. — It is only when the railway engineer actually sees the signal of an intended passenger at a flag station and willfully passes him by that punitive damages will be allowed in an action for damages. It is not incumbent on the railroad to protect the safety of plaintiff's rights is upon the latter. Thomas v. Southern R. Co., 122 N. C. 1065, 30 S. E. 343.

32. Ch. 60. Passenger Carry Baggage. — Under this section when a passenger is carried by his station, he is entitled to damages, and this, though there is no bodily harm, or actual damage. If it is done recklessly or willfully he is entitled to damages. Underwood, 144 N. C. 315, 52 S. E. 263, overruling Smith v. Wilmington, etc., R. Co., 130 N. C. 304, 41 S. E. 481.

33. Ch. 60. Same—May Demand Prepayment of Freight. — A common carrier has a right to demand the prepayment of charges from passengers before receiving any freight for shipment to one individual, although it may have an established custom to accept shipments to its other patrons without such prepayment. Allen v. Cape Fear, etc., R. Co., 100 N. C. 397, 6 S. E. 105.

34. Ch. 60. Same—May Demand It of Particular Shipper. — A common carrier may demand prepayment of freight charges before shipment to any station, and from one shipper, though not required of others. It should appear, however, that a plaintiff had notice of such regulation. Randall v. Richmond, etc., R. Co., 108 N. C. 612, 13 S. E. 137.

35. Ch. 60. Arrangement of cars in passenger trains. — In forming a passenger train, baggage, freight, merchandise or lumber cars shall not be placed in rear of the passenger cars, except in case of accident, or when the cars are provided with automatic couplers or brakes. If any officer or agent of a railroad company, in forming a passenger train, shall direct or knowingly suffer an arrangement of the cars different from the one herein provided for, he shall be guilty of a misdemeanor: Provided, The criminal liability hereby imposed shall not apply to officers and agents of the Wilmington sea-coast railroad company. (Rev., ss. 2613, 3747; Code, s. 1787-2, c. 138; 1893, c. 381; 1895, c. 212; C. S. 3476.)

36. Ch. 60. Unauthorized manufacture or sale of switch-lock keys misdemeanor. — It shall be unlawful for any person to make, manufacture, sell or give away to any other person any duplicate key or any lock used by any railroad company in such switches or switch tracks, except upon the written order or under the supervision of such railroad company whose duty it is to distribute and issue switch-lock keys to the employees of such railroad company. Any person violating the provisions of this section shall be guilty of a misdemeanor and shall be fined and imprisoned, or both, in the discretion of the court. (1900, c. 795; C. S. 3477.)

37. Ch. 60. Willful injury to railroad property misdemeanor. — If any person shall willfully do or cause to be done any act or acts whatever whereby any building, construction or work of any railroad corporation, or any engine, machine or structure or any matter or thing pertaining to a safe place, and was injured, the evidence of the defendant's negligence was sufficient to be submitted to the jury. Cable v. Southern R. Co., 122 N. C. 892, 29 S. E. 377.
ing to the same shall be stopped, obstructed, impaired, weakened, injured or destroyed, he shall be guilty of a misdemeanor. (Rev, s. 3756; Code, s. 1974; 1871-5, c. 138, s. 39; C. S. 3478.)

Cross Reference.—As to injury to property of railroad, see also §§ 14-278 and 14-279.

§ 60-79. Headlights on locomotives on main lines.—Every company, corporation, lessee, manager or receiver owning or operating a railroad in this state is hereby required to equip and maintain and use upon every locomotive in operation in railroad service on main lines in this state an electric or power headlight of at least one thousand five hundred candlepower, measured without the aid of a reflector. This section shall not apply to locomotive engines regularly used in switching cars or trains, to locomotive engines used exclusively between summit and sundown, and to locomotive engines going to and returning from repair shops when ordered in for repairs; neither shall this section apply to independently owned and operated railroad companies in this state whose mileage of road in this state is one hundred and twenty-five miles or less, nor to railroad companies having only lines extending into this state, no one of which is one hundred miles in length in this state. The utilities commission may relieve from the operation of this section such locomotives and roads, or parts or sections or branches of roads, upon which the said utilities commission may deem electric or power headlights not advisable. Should an engine start on a trip with the headlight in good working condition, and from some unavoidable cause such headlight becomes disabled and cannot be repaired on the line of the road on which such run is being made, there shall be nothing in this section to prevent such engine from continuing on its trip, and the railroad company shall not be liable for prosecution on account of such failure to repair. Any company, corporation, lessee, manager or receiver violating the provisions of this section shall be guilty of a misdemeanor. (1909, c. 446; 1935, c. 134, s. 8; 1941, c. 97, s. 5; C. S. 3479.)

Proximate Cause of Death.—Evidence failing to show how deceased was killed, whether walking along railroad tracks or at platform, and showing that he was intoxicated at the time, does not show that the violation of this section was the proximate cause of death. Owens v. Southern Ry. Co., 33 F. (2d) 870.

Burden of Proof.—It is negligence for a railroad company not to equip its locomotives with electric headlights, with the burden on the company to plead and prove that it had in one instance at the time complained of or that its use was excepted by the statute, when relevant to the inquiry. Barnes v. Atlantic, etc., Co., 166 N. C. 512, 94 S. E. 801, citing Powers v. Norfolk Southern R. Co., 166 N. C. 599, 82 S. E. 972. But see McNell v. Atlantic, etc., Co., 167 N. C. 390, 83 S. E. 704.

§ 60-80: Repealed by Session Laws 1945, c. 543.

§ 60-81. Negligence presumed from killing livestock.—When any cattle or other livestock shall be killed or injured by the engine or cars running on any railroad, it shall be prima facie evidence of negligence on the part of the railroad company in any action for damages against such company: Provided, that no person shall be allowed the benefit of this section unless he shall bring his action within six months after his cause of action shall have accrued. (Rev., s. 2645; Code, s. 2326; 1856-7, c. 7; C. S. 3482.)

Cross Reference.—As to venue of an action against a railroad, see § 1-81.

Editor's Note.—Several of the earlier cases notably Doggett v. Richmond, etc., R. Co., 81 N. C. 293, and Durham v. Wilmington, etc., R. Co., 82 N. C. 352, where the facts are known and show there was no negligence on the part of the railroad, the presumption created by this statute does not apply. But it is the established rule of this Court in these cases is calculated to produce an erroneous impression and it would have been much more accurate to have said that the prima facie case here created is rebutted only by negative evidence that the violation of the statute was the proximate cause of death. A statute is an inquiry into the facts, the facts are known and show there was no negligence on the part of the defendant, than to say the statute did not apply to such a case. There is no exception in the statute. It is not excepted cases generally and applies broadly to cases of killing stock by a railroad. The rule is thus stated in the later cases. See Hardison v. Atlantic, etc., Co., 120 N. C. 492, 494, 26 S. E. 600.

§ 60-82. When some of the livestock killed or injured by the railroad were known to have been infected with certain diseases, it was said that when livestock were injured by the engine or cars of a railroad company and an action thereon was brought within six months, this section raised a presumption of negligence and cast upon the defendant the burden of rebutting such presumption. Bethea v. Raleigh, etc., Co., 106 N. C. 279, 10 S. E. 1045; Carlton v. Wilmington, etc., Co., 104 N. C. 279, 10 S. E. 1045, said it was settled by the later and prevailing cases, that “prima facie evidence of negligence” means no more than evidence sufficient to carry the case to the jury, and to justify, but not compel, a verdict as for a negligent wrong.§ 60-81

Section Applies When Facts Known.—The presumption of negligence raised by the statute applies whether a horse, the subject of the action, was killed by the railroad, or by another, or by both. Section applies when the action is brought within six months, applies where the facts were known. Hanford v. Southern R. Co., 167 N. C. 277, 279, 83 S. E. 470.

Appplies When Stock under Control of Person.—When the action is brought within six months, this section raised a presumption of negligence and cast upon the defendant the burden of rebutting such presumption. Bethea v. Raleigh, etc., Co., 106 N. C. 279, 10 S. E. 1045; Carlton v. Wilmington, etc., Co., 104 N. C. 279, 10 S. E. 1045, said it was settled by the later and prevailing cases, that “prima facie evidence of negligence” means no more than evidence sufficient to carry the case to the jury, and to justify, but not compel, a verdict as for a negligent wrong. § 60-81

Same.—When Horse Hitched to Buggy.—The statutory presumption of negligence of a railroad company in killing live stock, when the action is brought within six months, applies whether a horse, the subject of the action, was hitched to a buggy at the time or running at large. Hanford v. Southern R. Co., 167 N. C. 277, 279, 83 S. E. 470.

Does Not Apply to Fowls.—No presumption of negligence against a railroad company is raised by the mere fact of killing fowls, etc., upon its track in the operation of its trains. This section makes it prima facie evidence of negligence in respect only to "cattle and other live stock," which does not include "geese or other fowls within its terms. James v. Atlantic, etc., Co., 166 N. C. 579, 82 S. E. 1005.

Same.—When Horses Run into Trestle.—In an action against a railroad company for damages for injuries to horses, where the evidence showed that the horses were injured by running into a trestle, and that the train was 100 yards from the trestle when they were injured, and the train 100 yards from the trestle when it ran into the trestle, Rambottom v. Atlantic Coast Line R. Co., 138 N. C. 38, 50 S. E. 448.

How Presumption Rebutted.—In an action against a railroad company for injuries to livestock, where negligence is established by force of this section, it can only be rebutted by showing that by the exercise of due diligence the stock could not have been seen in time to save them. J. P. Penny v. Wilmington, etc., R. Co., 75 N. C. 54.

This rule can only be rebutted by showing that the
agents of such railroad company used all proper precautions to guard against damage. It is not sufficient to prove that there was probably no negligence. Battle v. W. & W. Railroad, 66 N. C. 343.

Same.—Negligence Not Repelled.—Where plaintiff's horse was injured on a railroad by the running of a train against it, and it was doubtful from defendant's testimony whether the brakes had been applied to the wheels of the train, the presumption is not rebutted by such prima facie case of negligence made by this section was not repelled. Clark v. Western North Carolina Railroad, 60 N. C. 109.

Same—Instructions. Where the killing of stock by a railroad is admitted or proven, the trial judge may instruct the jury that a certain state of facts, if believed by them, would raise a presumption of negligence, and that they are not evidence, though uncontradicted, would do so. Baker v. Roanoke, etc., R. Co., 133 N. C. 31, 45 S. E. 347.

When Owner Permits Cattle to Stray Off.—If the owner of cattle permit them to stray off and get upon the track of a railroad and they are killed or hurt, the railroad company is not liable unless the train was in motion whether the brakes had been applied to the wheels of the train, the prima facie case of negligence made by this section was not repelled. Clark v. Western North Carolina Railroad, 60 N. C. 109.

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When Owner Permits Cattle to Stray Off.—If the owner of cattle permit them to stray off and get upon the track of a railroad and they are killed or hurt, the railroad company is not liable unless the train was in motion whether the brakes had been applied to the wheels of the train, the prima facie case of negligence made by this section was not repelled. Clark v. Western North Carolina Railroad, 60 N. C. 109.

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§ 60-85. Company police to wear badges. — Such railroad police shall, when on duty, severally wear a metallic shield with the words “Railway Police” and the name of the corporation for which appointed inscribed thereon, and this shield shall always be worn in plain view except when such police are employed as detectives. (Rev. s. 2608; Code, s. 1991; 1871-2, c. 138, s. 54; C. S. 3486.)

Cross Reference. — As to badges of conductors and certain other railroad employees, see § 60-3.

§ 60-86. Compensation of company police. — The compensation of such police shall be paid by the companies for which the policemen are respectively appointed, as may be agreed on between them. (Rev. s. 2609; Code, s. 1992; 1871-2, c. 138, s. 65; C. S. 3487.)

§ 60-87. Police powers cease on company's filing notice. — Whenever any company shall no longer require the services of any policeman so appointed as aforesaid, it may file a notice to that effect in the office of the governor and the office of the utilities commission and thereupon the power of such officer shall cease and determine. (Rev. s. 2610; Code, s. 1993; 1871-2, c. 138, s. 66; 1943, c. 676, s. 3; C. S. 3488.)

Editor's Note. — The 1943 amendment substituted the words “office of the governor and the office of the utilities commission” for the words “several offices in which notice of such appointment was originally filed.”

Art. 11. Joint Rates.

§ 60-88. Carriers permitted to establish joint rates. — Any operating railroad company is authorized and directed to enter into arrangements for the establishment of joint rates and through routes with common carriers by water and with other such railroad companies for the transportation of persons and/or property transported wholly within the State of North Carolina by such carrier by water and such railroad company. (1931, c. 195.)


§ 60-89. Railroad passenger rates established. —No railroad company doing business as a common carrier of passengers in the state of North Carolina shall, except as herein provided, charge, demand or receive for transporting any passenger his or her baggage, not exceeding in weight two hundred pounds, from any station on its railroad in North Carolina to any other station in this state is one hundred miles or less may be applied to railroads hereafter built less than fifty miles in length. For transporting children under twelve years and over five years old, one-half of the rate above prescribed may be charged. For transporting children under five years old, accompanied by any person paying fare, no charge whatever shall be made. Where the amount of the ticket at the prescribed rate would amount to any figure between two multiples of five, the price of the ticket shall be the multiple of five which is nearest the price of the ticket at the rate above mentioned; or, in the event that the amount is equidistant between the multiples of five, the price charged for the ticket shall be on the basis of the higher of those two multiples of five. No charge less than ten cents shall be required. A charge of fifteen cents may be added to the fare of any passenger when the same is paid on the train. A ticket that has been procured within a reasonable time before the commencement of the train. (Ex. Sess. 1908, c. 144, s. 1; Ex. Sess. 1920, c. 51, s. 1; C. S. 3489.)

Cross Reference. — As to free carriage, see § 62-134. As to rate regulation in general, see § 62-122 et seq. As to railroad companies operating as common carriers, see § 60-109. As to duty of the railroad companies to file rates with the utilities commission, see § 60-110.

Editor's Note. — Formerly the maximum charge allowed by this section was two and one-half cents per mile. This section was amended by Public Laws 1923, Ex. Sess., ch. 51, sec. 1, and the maximum rate allowed by this section temporarily raised to twenty-five cents per mile. At the same time the proviso allowing a twenty per cent higher rate for railroads less than one hundred miles in length was added.

Federal Control of Rates. — The provisions of this section apply only to fixed rates for intrastate carriers, and cannot be applied to interstate carriers, as control of the rates charged by the latter is vested in the Interstate Commerce Commission. The Interstate Commerce Commission in fixing rates cannot by its order fix rates between points that are remotely internal and from which no prejudice to interstate commerce can arise. But it can fix rates on intrastate carriers where such rate as fixed by the State is a discrimination against interstate or foreign commerce. (Rev., s. 2609; Code, s. 1992; 1871-2, c. 138, s. 65; C. S. 3485.)

Cross Reference. — As to the oath required, see § 11-11.

§ 60-90. Rates on leased or controlled lines. — In the case that any railroad company operating as a common carrier of passengers in the state of North Carolina is owned, controlled or operated by lease or other agreement by any other railroad company doing business in the state, the rate for carrying passengers thereon shall be determined by such railroad company, and the rate thus determined shall be regulated by § 60-89 for the railroad company which owns, controls or operates the same. (Ex. Sess. 1908, c. 144, s. 2; C. S. 3490.)

§ 60-91. Violations of passenger rates misdemeanors. — Any railroad company violating any of the provisions of §§ 60-89 and 60-90, or counseling, ordering or directing any employee, agent or servant to violate any of such provisions, by charging, demanding or receiving any rate greater than that fixed by such sections, shall be guilty of a misdemeanor, and on conviction shall be fined not less than five hundred dollars nor more than five thousand dollars; and any agent, servant or employee of any railroad company who shall violate either § 60-89 or § 60-90 shall be
§ 60-92. Accepting or giving free transportation illegally misdemeanor.—Any persons, except those permitted by law, who accept free transportation shall be guilty of a misdemeanor, and on conviction shall be fined or imprisoned, or both, in the discretion of the court. (Ex. Sess. 1908, c. 144, s. 3; C. S. 3491.)

Cross References.—As to charging unreasonable freight rates, see § 60-115. As to free carriage, see § 62-134.

§ 60-93. Powers of utilities commission over rates limited.—The utilities commission shall have no power to change, alter, modify or in any way affect the enforcement or operation of any of the provisions of the preceding sections of this article, except as the same shall be therein specifically authorized, or the enforcement of any penalties for violating the provisions thereof. (Ex. Sess. 1908, c. 144, s. 7; 1923, c. 134, s. 8; 1941, c. 97, s. 5; C. S. 3493.)

Cross References.—As to rates limited—The utilities commission shall have no power to change, alter, modify or in any way affect the enforcement or operation of any of the provisions of the preceding sections of this article, except as the same shall be therein specifically authorized, or the enforcement of any penalties for violating the provisions thereof. (Ex. Sess. 1908, c. 144, s. 4; C. S. 3492.)

§ 60-94. Separate accommodations for different races.—All railroad and steamboat companies engaged as common carriers in the transportation of passengers for hire, other than street railways, shall provide separate but equal accommodations for the white and colored races at passenger stations, waiting-rooms, and also on all trains and steamboats carrying passengers. Such accommodations may be furnished by railroad companies either by separate passenger cars or by compartments in passenger cars, which shall be provided by the railroads under the supervision and direction of the utilities commission: Provided, that this shall not apply to relief trains in cases of accident, to Pullman or sleeping cars, or through express trains that do not stop at all stations and are not used ordinarily for traveling from station to station, to negro servants in attendance on their employers, to officers or guards transporting prisoners, nor to prisoners so transported. (Rev., s. 2619; 1899, c. 384, s. 2; 1901, c. 213; 1933, c. 134, s. 8; 1941, c. 97, s. 5; C. S. 3495.)

Cross References.—As to regulation of rates by the utilities commission, see § 62-122 et seq.

§ 60-95. Certain carriers may be exempted from requirement.—The utilities commission is hereby authorized to exempt from the provisions of § 60-94 steamboats, branch lines and narrow-gauge railroads and mixed trains carrying both freight and passengers, if in its judgment the enforcement of the same be unnecessary to secure the comfort of passengers by reason of the light volume of passenger traffic, or the small number of passengers contained on such steamboats, narrow-gauge railroads, branch lines or mixed trains. (Rev., s. 2630; 1899, c. 384, s. 2; 1901, c. 213; 1933, c. 134, s. 8; 1941, c. 97, s. 5; C. S. 3496.)

§ 60-96. Use of same coach in emergencies.—When any coach or compartment car for either race shall be completely filled at a station where no extra coach or car can be had, and the increased number of passengers could not be foreseen, the conductor in charge of such train may assign and set apart a portion of a car or compartment assigned for passengers of one race to passengers of the other race. (Rev., s. 2621; 1899, c. 384, s. 3; C. S. 3496.)

§ 60-97. Penalty for failing to provide separate coaches.—Any railroad or steamboat company failing to comply in good faith with the provisions of §§ 60-94 to 60-95 shall be liable to a penalty of one hundred dollars per day, to be recovered in an action brought against such company by any passenger on any train or boat of any railroad or steamboat company which is required by this chapter to furnish separate accommodations to the races, who has been furnished accommodations on such railroad train or steamboat only in a car or compartment with a person of a different race in violation of law. (Rev., s. 2622; 1899, c. 384, s. 5; C. S. 3497.)

§ 60-98. Exceptions to requirement of separate coaches and toilets.—As to trains consisting of not more than one passenger car unit, operated principally for the accommodation of local travel, although operated both intrastate and interstate and irrespective of the motive power used, the utilities commission is authorized to make such rules and regulations for the separation of the races and with regard to toilet facilities as in its best judgment may be feasible and reasonable in the circumstances, and the rules and regulations established pursuant to this authority shall be ex-
§ 60-99. Unused tickets to be redeemed.—When any round-trip ticket is sold by a railroad or other transportation company, it shall be the duty of such company to redeem the unused portion of said ticket by allowing to the holder thereof the difference between the cost thereof and the price of a one-way ticket between the stations for which such round-trip ticket was sold. Whenever any one-way or regular ticket is sold by a railroad or other transportation company, and not used by the purchaser, it shall be the duty of the company selling the ticket to redeem it at the price paid for it. All railroad and other transportation companies shall redeem in money all mileage tickets known as five-hundred thousand and two-thousand mile tickets, sold by them, if presented within a year from the date of the sale, when as much as fifty per centum of such ticket has been used by the purchaser, by paying the same price per mile paid for it, or shall release to the original holder to ride it out. (Rev. s. 2697; 1891, c. 290; 1893, c. 249; 1895, c. 83, ss. 2, 3; 1897, c. 418; C. S. 3503.)

§ 60-100. Ticket may be refused intoxicated person; prohibited entry misdemeanor.—The ticket agent of any railroad, steamboat or other transportation company shall at all times have power to refuse to sell a ticket to any person applying for the same who may at the time be intoxicated. The conductor, captain or other person in charge of any railroad car, steamboat or other conveyance for the use of the traveling public shall at all times have power to prevent any intoxicated person from entering such car, boat or other conveyance. If any intoxicated person, after being forbidden by the conductor, captain or other person having charge of any such railroad train, steamboat or other conveyance for the use of the traveling public, shall enter such train, boat or other conveyance, he shall be guilty of a misdemeanor. (Rev. s. 2695, 2626, 3877; 1885, c. 358, ss. 1, 2, 3; C. S. 3504.)

Cross References.—As to public drinking on railway passenger cars, see § 14-333. As to sale of whiskey on railroad cars, see § 18-70.

When Exemplary Damages Allowed.—In an action for damages for refusal to allow a person with a ticket to board a train because he was intoxicated, exemplary damages will be allowed if such refusal was made with malice, undue force, or insult. Story v. Norfolk, etc., R. Co., 133 N. C. 59, 45 S. E. 349.


§ 60-101. Entering cars after being forbidden misdemeanor.—No person shall enter any railroad passenger car, baggage car, mail car or caboose car, or go upon the platform of such cars, after being forbidden so to do by the conductor, his assistants, the baggage-master or other person in charge of such cars, unless the person enter such cars or go upon such platforms as a passenger or in some official capacity authorized by law, or on business with a passenger or some official or employee of the railroad, or for some other like purpose. Any person violating this section shall be guilty of a misdemeanor and shall be fined not exceeding ten dollars. (Rev., s. 3752; Code, s. 1979; 1893, c. 351; C. S. 3505.)

Cross References.—As to breaking into or entering railroad cars with malicious intent, see § 14-56. As to train robbery, see §§ 14-88 and 14-89.

§ 60-102. Riding in first-class cabin with second-class ticket misdemeanor.—If any passenger purchasing or holding a second-class ticket, after being requested or directed by any other officer in charge of any steamboat in this state, riding in any first-class cabin, refuses to pay the difference between a first-class and a second-class fare or rate, or refuses to go into the second-class cabin, when there shall be a comfortable second-class cabin on such steamboat, he shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days. Any justice of the peace in the county where such offense is committed shall have jurisdiction of the offense, upon sworn complaint of any officer of such steamboat company. (Rev., s. 3761; 1903, c. 795; C. S. 3506.)

§ 60-103. Passenger refusing to pay fare and violating rules may be ejected.—If any passenger shall refuse to pay his fare, or violate the rules of a railroad corporation, it shall be lawful for the conductor of the train and servants of the corporation to put him and his baggage out of the cars, using no unnecessary force, at any usual stopping place or near any dwelling house, as the conductor shall elect, on stopping the train. (Rev., s. 3233; C. S. 3507.)

Permission to Ride in Express Car.—Where a party shipped horses by express with an agreement that he should ride in the same car he cannot ride in the passenger coach without paying his fare. Teeter v. Southern Exp. Co., 172 N. C. 616, 90 S. E. 761.

Ejecting Person on Baggage Car.—A person who gets on a baggage car, though having a ticket, but not having told the conductor that he had it, and the conductor not having seen it, is not entitled to recover as a passenger for injuries received by being pulled off the train by the conductor. McGraw v. Southern R. Co., 135 N. C. 264, 47 S. E. 715.

Mileage Book Holder Must Comply With Terms.—The holder of a mileage book must comply with its terms if reasonable opportunity is given, as he may be ejected. McNary v. Norfolk, etc., R. Co., 130 N. C. 407, 40 S. E. 475; Mason v. Seaboard Air Line R. Co., 139 N. C. 183, 75 S. E. 25.

Ejection of Party Refusing to Show Mileage Book.—When a purchaser of a mileage book from a railroad company is riding on an exchange ticket, and refuses, without excuse, to show his mileage book, in connection with the ticket, to the conductor on the train, he is not regarded as a passenger, and the conductor has the right to eject him from the train. Mason v. Seaboard Air Line R. Co., 139 N. C. 183, 75 S. E. 25.

Evidence of Drunkenness Inadmissible.—In an action for wrongful ejection from a train, evidence of drunkenness of plaintiff is not admissible, where the answer simply denies the wrongful ejection alleged in the complaint. Raynor v. Wilmington Seacoast R. Co., 129 N. C. 195, 39 S. E. 821.

Ejection by Failure of Conductor to Return Ticket.—Where the conductor failed to return ticket to passenger to whom it was given, and the buyer thereof for lack of the ticket, the railroad is liable for all damages attending the ejection. Sawyer v. Norfolk, etc., R. Co., 171 N. C. 158, 14 S. E. 166.

(Rev., s. 3233; C. S. 3507.)

Cross References.—As to public drinking on railway passenger cars, see § 14-333. As to sale of whiskey on railroad cars, see § 18-70.

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(Rev., s. 3233; C. S. 3507.)

Cross References.—As to public drinking on railway passenger cars, see § 14-333. As to sale of whiskey on railroad cars, see § 18-70.
§ 60-104. Beating way on trains misdemeanor; venue.—If any person, other than a railroad employee in the discharge of his duty, without authority from the conductor of the train or by permission of the engineer, and with the intention of being transported free and without paying the usual fare for such transportation, rides or attempts to ride on top of any car, coach, engine or tender, or attempts to ride on any baggage car, wood or freight car, may pass carrying such person, or in any county in which such violation may have occurred or to the railroad station, or even to his own father's house, which was not far away. Roseman v. Carolina Cent. R. Co., 112 N. C. 709, 16 S. E. 766.

§ 60-105. Injury while on platform or in other prohibited places.—In case any passenger on any railroad shall be injured while on the platform of a car or on any baggage, wood or freight car, in violation of the printed regulations of the company posted up at the time in a conspicuous place inside its passenger cars; such company at the time furnish room to such passenger cars sufficient for the proper accommodation of its passengers. (Rev., s. 2628; Code, s. 1978; 1871-2, c. 138, s. 48; C. S. 3508.)

Cross Reference.—As to injury while riding on platform of street car, see § 60-106.

Effect of Posting Notice.—When this section has been complied with, a rule of a railroad company prohibiting passengers from going on the platform while the train is in motion shall relieve the railroad company of the former duty of barring recovery for injuries sustained under such circumstances. Shaw v. Seaboard Air Line R. Co., 143 N. C. 312, 55 S. E. 719.

§ 60-106. Checking baggage; liability for loss.—A check shall be affixed to every parcel of baggage when taken for transportation by the agent or servant of any railroad corporation, if there is a handle, loop or fixture so that the same can be attached upon the parcel or baggage so offered for transportation, and a duplicate thereof given to the person presenting it. Poole v. Imperial Mut. Life, etc., Co., 4188 N.G. 3468; 125 S. E. 4298.

Notice Need Be Only in English.—This section requires only that the notice to be placed by a railroad company in its coach, relieving the company from liability to a passenger injured while riding on the platform, etc., shall be in English, and that fact that such language in the language of the state and that language is immaterial. Bane v. Norfolk Southern R. Co., 176 N. C. 247, 97 S. E. 11.

Riding on Platform Prima Facie Negligence.—It is prima facie negligence for a passenger to voluntarily ride on the platform of a rapidly moving train. Wagner v. Atlantic Coast Line R. Co., 147 N. C. 315, 61 S. E. 171.

Same—Not Applicable When Passenger Alighting.—This section is for the protection of passengers and should not be applied when the injury complained of has been received as the passenger was alighting at a regular station after the train had stopped. Same.—When Getting on. — One who is on the platform of a railroad company at the time in which such person is for the purpose of becoming a passenger on its expected train is entitled to the protection due a passenger from dangerous conditions and usages there. Thomas v. Southern R. Co., 111 N. C. 464, 47 S. E. 121.


§ 60-107. Cars and toilets to be kept clean.—Every person or railroad company, whether incorporated or not, engaged in the regular business of carrying passengers on his or its railroad cars in this state, shall have such cars cleaned, brushed, dusted and the windows washed, if needed, at least once each day, and in each car, in which male and female passengers are carried, have therein a toilet-room for each sex, and have the same kept clean and decent. Any person or corporation engaged in the business aforesaid who shall willfully or negligently fail or refuse to give orders to his or its agent in charge of such cars to comply with the requirements of this section, shall forfeit twenty dollars for each day of such failure or refusal, to
be recovered by any person suing therefor. (1907, c. 474, ss. 1, 2; C. S. 3511.)

Cross Reference.—As to exception to this section, see § 62-98.

§ 60-108. Evidence of failure to order cleaning of cars; violation of orders misdemeanor.—The willful or negligent refusal or the failure on the part of the conductor or manager of any passenger car named in § 60-107 to comply with such section shall be received as evidence of failure or refusal of such person or railroad company to give the orders therein provided for. Moreover, such conductor or manager shall be guilty of a misdemeanor if he fail or refuse to carry out such orders of the persons or company mentioned in the said section. (1907, c. 474, s. 3; C. S. 3512.)

§ 60-109. Surcharge on Pullman car transportation.—It shall be unlawful for any railroad or Pullman car company doing business in North Carolina to collect from any person within the boundaries of North Carolina any surtax or surcharge for Pullman car transportation from one point to any other point within the bounds of the state of North Carolina; but nothing in this section shall be construed to affect in any way the charge which any railroad or Pullman car company may require for transportation on interstate travel. (1923, c. 147; C. S. 3512(a).)

Editor's Note.—It was said in 1 N. C. Law Rev. 305, that the power exercised in this section is clearly within the power of the state, and has been observed by carriers since 1923.

Art. 13. Carriage of Freight.

§ 60-110. No charge in excess of printed tariffs; refunding overcharge; penalty.—No railroad, steamboat, express or other transportation company engaged in the carriage of freight and no telegraph company or telephone company shall demand, collect or receive for any service rendered or to be rendered in the transportation of property or transmission of messages more than the rates appearing in the printed tariff of such company in force at the time such service is rendered, or more than is allowed by law. In case of any overcharge, contrary to the provisions of this section, the person aggrieved may file with any agent of the company collecting or receiving greater compensation than the amount allowed a written demand, supported by a paid freight bill and an original bill of lading or duplicate therefor; when the demand is not refused or to be refunded, though the particular transportation charges may appear disproportionately small. It is on failure to return the demand made specifically as to each, accompanied in a letter accompanying them, does not affect the demands for investigation rendered the defendant liable for the penalty imposed upon the carrier failing to refund such overcharge after the 60 days allowed for investigation. The penalty may be recovered by the party aggrieved as a lien upon the cargo or property or transmission of messages more than the rate appearing in the printed tariff of such company, and which cannot in any event exceed $100
governing sections of this chapter, the rate of the actual route of the shipment, and, in the absence of such rates, the rates as determined or to be rendered in the transportation of goods or property or transmission of messages more than is allowed by law. In case of any overcharge, contrary to the provisions of this section, the person aggrieved may file with any agent of the company collecting or receiving greater compensation than the amount allowed a written demand, supported by a paid freight bill and an original or duplicate bill of lading, etc. Tilley v. Southern R. Co., 172 N. C. 363, 90 S. E. 399.

Freight Charge on Undelivered Shipment.—Where the defendant collected freight charges for an entire shipment, as invoiced and originally billed, and the sum of 96 cents was paid as freight on that part of the shipment which was "short" and not delivered, this was an overcharge, and a penalty for investigation rendered the defendant liable for the penalty denounced by this section. Cottrell v. Carolina, etc., R. Co., 165 N. C. 395, 86 S. E. 1025.

Burden of Proof.—The burden is upon the plaintiff to show that a freight rate charged and collected by the carrier on an interstate shipment was in excess of its tariff required of the carrier to be published, when he seeks to recover this excess and the State statutory penalty; and when the plaintiff is required to prove the actual rate and the tariff filed by the carrier, the act of the plaintiff in failing to file the certificate in due form, and the tariff as so filed, is evidence of the rate charged. Hdw. Co. v. Seaboard Air Line R. Co., 170 N. C. 395, 86 S. E. 1025.
§ 60-111. Penalty for failure to receive and forward freight tendered. — Agents or other officers of railroad and other transportation companies whose duty it is to receive freight shall receive all articles of the nature and kind received by such company for transportation whenever tendered at a regular depot, station, wharf or boat landing, and every loaded car tendered at a sidetrack, or any warehouse connected with the railroad by a siding, and shall forward the same by the route selected by the person tendering the freight under existing laws; and the transportation company represented by any person refusing to receive such freight shall forfeit and pay to the party aggrieved the sum of fifty dollars for each day such company refuses to receive such freight shall forfeit and pay to the party aggrieved the sum of fifty dollars for each day such company refuses to receive such freight for shipment, and all damages actually sustained by reason of the refusal to receive such freight. If a regular station is used for the purpose of receiving freight, the agent of the railway in charge of such station shall seize all such freight or goods, although not tendered at a siding or warehouse at which there is no agent, notice for each day such company refuses to receive such freight shall forfeit and pay to the party aggrieved the sum of fifty dollars for such delay. (Rev., s. 2631; Code, s. 1903, cc. 444, 693; C. S. 3515.)

Cross References. — As to power of utilities commission to prevent discrimination, see § 62-56. As to venue of an action against a railroad, see § 1-61. As to the regulation of the shipment of inflammable substances and explosives, see § 62-58.

This section is constitutional as applied to intrastate shipments. Corbett v. Atlantic Coast Line R. Co., 205 N. C. 855, 150 N. E. 129.

Section Strictly Construed. — This is a penal statute and must be strictly construed. Cox v. Atlantic Coast Line R. Co., 148 N. C. 459, 62 S. E. 556.

Intrastate Shipments. — The penalty imposed by this section is not a burden upon interstate commerce when shipments are intrastate. Wampus Cotton Mills v. Carolina, etc., R. Co., 150 N. C. 612, 64 S. E. 588.

Interstate Shipments. — In Reid v. Southern R. Co., 150 N. C. 753, 64 S. E. 874, it was held that the penalty provided for by the provisions of this section would apply to interstate commerce, as it did not burden interstate commerce. In reviewing the same case the United States court reversed this decision and held that the section could not be applied to shipments between Kansas and Texas. Tenney v. Ry. Co. v. Reid, 222 U. S. 424, 32 S. Ct. 140, 56 L. Ed. 257.

Requisites of Valid Tender. — This section provides that the tender be made at a regular station and that the articles tendered be of the nature and kind required by the company for transportation, and it is necessary in an action for the penalty to show that the character of the shipment and place of tender are such as fall within its provisions. Oliver v. Atlantic Coast Line R. Co., 152 N. C. 279, 63 S. E. 383.

Same. — Sufficiency of Complaint. — A complaint alleging that plaintiff tendered to a carrier at a certain station a certain quantity of loose lumber for shipment, etc., which the defendant wrongfully and unlawfully refused to receive, states a good cause of action, even though the time of the tender was the 15th of February, after the train on which it was to be transported passed, would not prevent the company in an action brought to recover a penalty prescribed by this section. Also p. Southern Express Co., 104 N. C. 278, 10 S. E. 297.

Meaning of "Under Existing Laws." — The words "under existing laws," in this session, qualify the word "forward," and are used in reference to the rules governing the legal relations of consignor, consignee and the connecting lines. Also p. Southern Express Co., 104 N. C. 278, 10 S. E. 297.

Who is the "Party Aggrieved." — The person aggrieved is the "party aggrieved," and is the one entitled to sue for the penalty prescribed in this section which arises from the wrongful refusal of the carrier's agent to accept them for transportation. Reid v. Southern R. Co., 149 N. C. 423, 63 S. E. 112.

Same. — Consignee of Goods Shipped on Approval. — A consignee to whom goods are shipped on approval owes a duty to the party attaching them to refuse to receive such goods from the party in whose factory, and he must do so to relieve himself of liability to the consignor; and he is the party aggrieved, under this section, and may maintain an action for the penalty prescribed upon the refusal of the carrier to accept them for shipment. Burlington Lumber Co. v. Southern R. Co., 152 N. C. 70, 67 S. E. 167.

Same. — Agent of Attaching Creditor. — The penalty prescribed by this section is for the person who is interested in having the goods shipped, and whose legal right in respect thereto is gained; and a person may not maintain an action for the penalty, as the party aggrieved, who has no right or interest in the shipment, sue as the agent of the attaching creditor. Cox v. Atlantic Coast Line R. Co., 152 N. C. 279, 63 S. E. 383.

Goods Not Delivered to Carrier. — When the plaintiff did not deliver the goods to the carrier because they could not be transported, without expressly requiring its acceptance by the carrier, when unloaded or loose, and by express provision it does not require the carrier to receive "cotton or other merchandise and warehouse the same unless the articles offered to be shipped are in good shipping condition, etc., the carrier is not liable, for the penalty prescribed by this section, for refusing to receive for shipment a car-load of loose hay, such shipments evidently being of such a character as to endanger the property of the carrier by reason of their being received by the carrier for shipment. Tilley v. Norfolk & Western R. Co., 162 N. C. 37, 77 S. E. 994. (Rev.)

Peremptory Refusal. — If a railroad or other common-carrier company may show, in defense to an action for refusal to receive goods for shipment when tendered, such matters as would excuse its failure to do so at common law, unavoidable conditions being excepted, and the party aggrieved cannot prove by clear and convincing evidence that the carrier has refused a shipment of the nature and kind it was its business to receive, and which it could have received at the point tendered without working a hardship or oppression, the court may instruct the jury, that if the consignee's blocking the freight yards at destination, an embargo had been placed by the railroad for shipments ten- [684]
dered to be forwarded to him there. Garrison v. Southern R. Co., 150 N. C. 575, 64 S. E. 578.

Embargo by Connecting Carrier.—The penalty imposed by this section is enforceable against a railroad company refusing to transport goods when it was the duty of the defendant to receive the goods and make a tender to the connecting line to be relieved of the penalty. Wimpum Cotton Mills v. Caro-

line R. Co., 205 N. C. 85, 170 S. E. 129.

When Rate Unknown.—Where the defendant carrier refused to receive for shipment goods tendered to it, basing its refusal to receive the goods upon the fact that the rate was unknown, and the defendant carrier tendered the freight for storage, and refused to receive the goods, the defendant carrier was estopped to claim as a defense that a penalty was imposed for refusal on the ground that the agent did not know where the given destination was distant therefrom. Reid v. Southern R. Co., 149 N. C. 423, 49 S. E. 618.

In an action to recover the penalties alleged to have been incurred under this section, for refusing to receive freight for transportation, where the plaintiff delivered freight for transportation to the defendant agent, and the agent refused to receive the freight, the plaintiff was entitled to recover for the value of the freight. Reid v. Southern R. Co., 149 N. C. 423, 49 S. E. 618.

§ 60-112 Penalty for failure to transport within a reasonable time.—It shall be unlawful for any railroad company, steamboat company, express company or other transportation company doing business in this state to omit or neglect to trans-

port within a reasonable time any goods, merchandise or other articles of value received by it for shipment and billed to or from any place in the state of North Carolina, unless otherwise agreed upon between the company and the shipper, or unless the same be burned, stolen or otherwise destroyed, or unless otherwise provided by the North Carolina utilities commission.

Any company violating any of the provisions of this section shall forfeit to the party aggrieved the sum of fifteen dollars for the first day and two dollars for each succeeding day of such unlawful detention or neglect where such shipment is made in carload lots, and in less quantities than a carload lot, the same shall be a forfeiture in like kind upon ten dollars for the first day and one dollar for each succeeding day, but the forfeiture shall not be collected for a period exceeding thirty days.

In reckoning what is a reasonable time for such transportation, it shall be considered that such transportation company has transported freight within a reasonable time if it has done so in the ordinary time required for transporting such articles of freight between the receiving and shipping stations. A delay of two days at the initial point and forty-eight hours at any one intermediate point for each hundred miles of distance or fraction thereof over which such freight is to be transported shall not be charged against the transportation company as unreasonable and shall be held to be prima facie reasonable, and a failure to transport such freight within such time shall be held prima facie unreasonable. This section shall not be construed to refer not only to delay in starting the freight from the station where it is received, but to require the delivery at its destination within the time specified: Provided, that if such delay shall be due to causes which could not in the exercise of ordinary care have been foreseen, and which were unavoidable, then upon the establishment of these facts to the satisfaction of the jury the defendant transportation company shall be relieved from any penalty for delay in the transportation of freight, but it shall not be relieved from the costs of such action. In all actions to recover penalties against a transportation company under this section, the burden of proof shall be upon the transportation company to show where the delay, if any, occurred.

Sufficiency of Evidence.—Evidence that shipper's contract to deliver certain merchandise was canceled because of car-

rider's wrongful refusal to accept the merchandise for ship-

ment is sufficient to support the referee's finding of actual damages, profits which would have been certainly realized but for carrier's wrongful refusal of the shipment being recoverable under this section. Corbett v. Atlantic Coast Line R. Co., 205 N. C. 85, 170 S. E. 129.


Editor's Note.—Under this section as it formerly prevailed, a penalty was imposed for unreasonable delay in the trans-

portation of goods. Construing the statute in Alexander v. Atlantic Coast Line R. Co., 144 N. C. 93, 55 S. E. 697 the Court held that the term "transportation" did not include a delivery to consignee at the point of destination, and if goods shipped by a carrier had been properly placed at the

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point of destination, no penalty was incurred under this section for a negligent delay in delivery from the car or warehouse of the company. Subsequently the Legislature amended the statute so as to include delays in delivery after the goods have been transported and delivered to the party aggrieved, both points being in the State, the distance separating them 58 miles, with but one intermediate point between the place of shipment and destination, and that they were not delivered to plaintiff within twenty-one days, the delay was unreasonable. Watson v. Atlantic Coast Line R. Co., 145 N. C. 91, 56 S. E. 697.

Section Strictly Construed.—This is a penal statute and must be strictly construed. Alexander v. Atlantic Coast Line R. Co., 144 N. C. 93, 57 S. E. 671.

Does Not Apply to Interstate Shipment.—A penalty may not be recovered of the carrier of an interstate shipment for the failure to transport freight within a reasonable time, when the initial and terminal points are in different States, but the shipper tendered the freight and necessary time is lost in transit. Such is interstate commerce and cannot be interfered with by the State. Shelby Ice, etc., Co. v. Southern R. Co., 147 N. C. 66, 60 S. E. 721.

Days at Initial Point.—Under this section, the carrier is allowed two days at the initial point for the transportation of freight instead of the one day allowed by section 1-593. Wall-Huske Co. v. Southern R. Co., 147 N. C. 407, 61 S. E. 29. See also, Hickory Marble Co. v. Southern R. Co., 147 N. C. 593, 61 S. E. 719.

Section Strictly Construed.—This section does not supersede or alter the duty of a carrier at common law, but merely en- 

Common Law Duty.—This section does not alter the common law duty of a carrier at common law, but merely en- 

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Same.—Although Both Terminal Points in State.—A penalty cannot be recovered for the failure of a railroad company to transport freight within a reasonable time, when the initial and terminal points are in the State, but the shipper tendered the freight and necessary time is lost in transit. Such is interstate commerce and cannot be interfered with by the State. Rollins v. Seaboard Air Line Railway, 146 N. C. 178, 59 S. E. 663.

Same.—Burden of Proof.—When the evidence discloses that the time taken by the railroad company for transporting goods, etc., was prima facie reasonable as fixed by the statute, it is for the jury to determine from the evidence whether or not such measure by the statutory standard, the burden of proof lying upon the plaintiff. Alexander v. Atlantic Coast Line R. Co., 141 N. C. 91, 56 S. E. 697.

Same.—Evidence.—In an action to recover the penalty given by this section, the burden of proof is on the plaintiff to show that the carrier failed to transport and deliver the freight and deliver within a reasonable time. Jenkins v. Southern R. Co., 147 N. C. 178, 59 S. E. 663.

—Ordinary Time? Defined.—An "ordinary point" for which time is allowed under this section, in transporting freight is only where the freight is transferred to an- other road. Davis v. Atlantic Coast Line R. Co., 145 N. C. 407, 59 S. E. 53.

—Intermediate Point. Defined.—An "intermediate point" for which time is allowed under this section, in transporting freight is only where the freight is transferred to another road. Davis v. Atlantic Coast Line R. Co., 145 N. C. 407, 59 S. E. 53.

—Transfer at Carrier's Distributing Point.—When a car-load intrastate shipment necessarily is transferred with- out breaking bulk from one road of the carrier's system to another road at a distributing point in the car- rier's system in order to reach destination, the carrier is al- lowed thereat the statutory time for transportation at such point, unless the time thus fixed for transfer is unreasonable. Wall-Huske Co. v. Southern R. Co., 147 N. C. 407, 61 S. E. 277.

—Ordinary Time? A Question for Jury.—The question of "ordinary time" for the transportation of freight by the car- rier is a question of fact for the jury. In an action for recovery on this section, it is for the jury to find what was "ordinary time," under the surrounding circumstances, and whether the de- fendant failed to transport the freight within such time; also the amount of recovery after allowing for the "lay days," etc., provided by this section. It is error for the trial court to in- struct the jury, if they believed the evidence, to answer the issue in a certain way or in a sum certain. Davis v. Southern R. Co., 147 N. C. 407, 59 S. E. 663.

Computations of Time.—The time in which railroads shall be allowed to transport freight shall be computed by excluding the first day and including the last, except when the last day falls on Sunday. Davis v. Atlantic Coast Line R. Co., 145 N. C. 207, 59 S. E. 50.

When the carrier was allowed two days time for a ship- ment at an intermediate point, and therefore could not de- liver it before Sunday, delivery on the next succeeding day would be in accordance with the terms of the contract. Wall-Huske Co. v. Southern R. Co., 147 N. C. 407, 61 S. E. 277; Watson v. Atlantic Coast Line R. Co., 145 N. C. 407, 59 S. E. 53.

Issues.—An issue which presupposes a failure on defen- dant's part in its duty to transport freight, in an action for penalty, under this section, is objectionable. Davis v. South- ern R. Co., 145 N. C. 407, 59 S. E. 53.

—Why Entitled to Recover.—The real "party aggrieved" is entitled to recover the penalty, under this section, irrespec- tive of the party who is the party of knowledge, the de- signation of the party aggrieved appearing in the section. Cardwell v. Southern R. Co., 146 N. C. 218, 59 S. E. 674.

—Who Is "Party Aggrieved."—The plaintiff may maintain his action against the railroad company, under this section, for wrongful failure to transport certain goods received by the latter, and bill of lading issued by it to plaintiff, when it appears that plaintiff shipped the goods by another railroad, and that the carrier (the defendant or plaintiff) was the one who alone acquired the right to de- mand the service to be rendered by the defendant, and was the party aggrieved. Rollins v. Seaboard Air Line Railway, 146 N. C. 153, 59 S. E. 671.
When the consignor ships goods to be sold for his own benefit, he is the "party aggrieved," under this section. Robertson v. Atlantic Coast Line R. Co., 148 N. C. 323, 68 S. E. 413.

§ 60-113

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§ 60-114

When the consignor gave a bill of lading upon the statement of the consignee for the goods, as the evidence of the receipt of the contents of the car, the proper party plaintiff. Robertson v. Atlantic Coast Line R. Co., 148 N. C. 323, 68 S. E. 413.

§ 60-114

Freight charges to be at legal rates; penalty for failure to deliver to consignee on tender of same.—All flume companies exercising right of eminent domain become common carriers.—All flume companies availing themselves of the right of eminent domain under the provisions of the chapter Eminent Domain shall become public carriers of freight, for the purposes for which they are adapted, and shall be subject to the direction, control and supervision of the utilities commission in the same manner and for the same purposes as is by law provided for other public carriers of freight. (1907, c. 39, s. 4; 1933, c. 134, s. 8; 1941, c. 97, s. 5; C. S. §317.)

Local Modification.—Duplicat. 1921, c. 214.

§ 60-114. Freight charges to be at legal rates; penalty for failure to deliver to consignee on tender of same.—All common carriers doing business in this state shall settle their freight charges according to the rate stipulated in the bill of lading, provided the rate therein stipulated be in conformity with the classifications and rates made and filed with the interstate commerce commission in case of shipments from without the state.
the state and with those of the utilities commission of this state in case of shipments wholly within this state, by which classifications and rates all consignees shall in all cases be entitled to settle freight charges with such carriers; and it shall be the duty of such common carriers to inform any consignee of the correct amount due for freight according to such classification and rates. Upon payment or tender of the amount due on any shipment which has arrived at its destination according to such classification and rates, all common carriers shall deliver freight in question to the consignee. Any failure or refusal to comply with the provisions hereof shall subject such carrier so failing or refusing to a penalty of fifty dollars for each such failure or refusal, to be recovered by any consignee aggrieved by any suit in any court of competent jurisdiction. (Rev., s. 2633; 1905, c. 330, s. 1; 1933, c. 134, s. 8; 1941, c. 97, s. 5; C. S. 3518.)

Cross References.—As to obligations and rights of carriers upon bills of lading, see § 21-9 et seq. As to venue of mission of this state in case of shipments wholly upon bills of lading, see § 21-9 et seq. As to the power of jurisdiction... (Rev., s. 2633; 1905, c. 330, s. 1.

Constitutionality of Section.—The penalty for failure of a common carrier to deliver freight to the consignee, a penalty which by this section has been assessed against a railroad company which has the right, license or permission to use, operate or control the same, is constitutional and not a burden upon interstate commerce. Hockfield v. Southern R. Co., 150 N. C. 419, 64 S. E. 181.

Foreign Corporation Bound to Obey Laws.—A railroad corporation chartered by another state, leaves a railroad chartered by this state, it is bound to observe and obey all laws of this state regulating the business of transportation. Hines v. Wilmington, etc., R., 95 N. C. 434.

Intrastate Rebilling of Interstate Shipment.—An interstate shipment of goods which has been mislaid or unloaded and rebilled from one point in the State to another therein, is an intrastate shipment, and upon the carrier's violating the provisions of this section, the penalty therein accrues. Hockfield v. Southern R. Co., 150 N. C. 419, 64 S. E. 181.

Section Not Cumulative.—This section imposes only one penalty for the refusal of the railroad company to deliver freight upon demand and tender of charges, and it is not cumulative upon more than one demand for the same offense. Harrill Bros. v. Southern R. Co., 144 N. C. 524, 144 S. E. 242.

Consignee Must Produce Bill of Lading.—A consignee must produce, upon the carrier's demand, a bill of lading for a prepaid shipment of goods in the carrier's possession. Jeans v. Seaboard Air Line R. Co., 164 N. C. 224, 80 S. E. 242.

Insufficient Notice to Consignee.—Notice given by a carrier of the arrival of goods to a transfer company in the habit of hauling consignor's goods from the depot is not of itself sufficient notice to the consignor. Callow v. Southern R. Co., 150 N. C. 419, 64 S. E. 181.

Express Co., 166 N. C. 155, 82 S. E. 15.

Agent Ignorant of Amount of Charge.—It is no defense to an action to recover a penalty for refusing to deliver shipment upon tender of freight charges by the consignee, for the defendant company to show its agents did not know the correct amount of charges because of the defendant's failure to file its schedule of rates. Harrill Bros. v. Southern R. Co., 144 N. C. 524, 57 S. E. 383.

Rate When Smaller Cars Furnished.—Where a consignor requested two cars of a certain standard size and the carrier furnished four cars of a smaller size the rate for the shipment must be the same. Yorke Furniture Co. v. Railroad, 162 N. C. 138, 78 S. E. 67.

§ 60-115. Charging unreasonable freight rates misdemeanor.—If any railroad company doing business in this state shall charge, collect, demand or receive more than a fair and reasonable rate of toll or compensation for the transportation of freight of any description, or for the use and transportation of any railroad car upon its track or any of the branches thereof or upon any railroad in this state which has the right, license or permission to use, operate or control the same, it shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not less than five hundred nor more than five thousand dollars. (Rev., s. 3768; 1899, c. 164, s. 12; C. S. 3519.)

Cross References.—See also § 62-135. As to action for double of overcharge, see § 62-138. As to penalty for wilful overcharge, see § 62-139. As to violation of passenger rates, see § 60-91.

§ 60-116. Allowing or accepting rebates or pooling freights misdemeanor.—If any person shall be concerned in pooling freights or shall directly or indirectly allow or accept rebates on freights he shall be guilty of a misdemeanor, and upon conviction shall be fined not less than one thousand dollars or imprisoned not less than twelve months. (Rev., s. 3762; Code, s. 1968; 1879, c. 237, s. 2; C. S. 3520.)

Cross References.—As to a railroad or officer thereof allowing a rebate, see § 60-6.


§ 60-117. Partial charges for partial deliveries. —Whenever any freight of any kind shall be received by any common carrier in this state to be delivered to any consignee in this state, and a portion of the same shall not have been received at the place of destination, it shall not be lawful for the carrier to demand any part of the charges for freight or transportation due for such portion of the shipment as shall not have reached the place of destination. The carrier shall be required to deliver to the consignee such portion of the consignment as shall have been received or delivered, or to deliver in whole the shipment and collect the full freight charges due upon such portion. But nothing in this section shall be construed as interfering with, or depriving a consignor, or other person having authority, of his rights of stoppage in transitu. (Rev., s. 2611; 1893, c. 495; C. S. 3521.)

§ 60-118. Placing cars for loading.—Whenever an individual, firm or corporation intending to ship freight makes a written application to any railroad company for cars to be loaded in carload lots with any kind of freight embraced in the tariffs of the company, stating in the application the character of the freight, the number of cars wanted, the station, depot, siding, wharf or boatlanding on the line of the company whence the shipment is to be moved, and its final destination, the railroad company shall furnish the cars.
within four days from seven o'clock a. m., the day following such application. The application must be delivered to the agent of the railroad company at the station at or nearest the point of shipment. Any railroad company failing to furnish the cars named in such written application shall be subject to a penalty of five dollars per car per day for each car not furnished, to be recovered by the person, firm or corporation making application: Provided, that the railroad company, before furnishing the cars upon such application, may require the person, firm or corporation applying for the same to deposit five dollars for each car may be retained by the said railroad company as a forfeit for trackage in case the car or cars are not loaded within forty-eight hours after notice of the placement of car or cars in accordance with demand: Provided, that the utilities commission may excuse from the penalties imposed by this section line companies not owned, operated, or controlled by any other line or system when trackage is less than one hundred miles. (1907, c. 217, s. 3; 1983, c. 134, s. 8; 1941, c. 97, s. 5; C. S. 3522.)

Cross Reference.—As to the power of the utilities commission to regulate the delivery of baggage, see § 62-55. As to common carriers, see § 60-120.

Carrier Entitled to Notice.—The carrier is entitled to reasonable notice from the shipper for placing a car to be loaded, and when written notice is required by its rules, the rule may be waived or abandoned by a verbal agreement. Futch v. Atlantic Coast Line R. Co., 178 N. C. 282, 100 S. E. 436.

Same.—No Liability for Penalty unless Four Days Notice Given.—When a railroad company is not liable for the penalty for failure to furnish cars to those who apply in writing when the company is not allowed the four days therein specified within which to furnish them, notwithstanding the railway company did not furnish them for twenty-three days. Duffie v. Seaboard Air Line Ry., 145 N. C. 397, 399 S. E. 122.

When Action Not Brought for Penalty.—Where the recov- ery of the penalty is not sought, but the action is to recover damages for the carrier's failure to receive and ship the goods, a written demand for the cars is not required, and a verbal one is sufficient. Bell v. Norfolk Southern R. Co., 161 N. C. 400, 77 S. E. 339.

Cross Reference.—As to power of the utilities commission to regulate the delivery of baggage, see § 62-55. As to common carriers, see § 60-120.

Failure to Furnish Ventilated Cars.—When a railroad company fails in its duty to furnish the shipper a ventilated car for transporting his fruit, and furnishes a box car instead, the box car was not furnished by the company, and that the shipper knew his fruit was forwarded in a box car. Forrester & Co. v. Southern R. Co., 147 N. C. 553, 61 S. E. 594.

Interstate Shipment.—An action may be brought in the state courts to recover damages for failure to furnish cars to be used in interstate commerce. Smart v. Tallulah Falls R. Co., 173 N. C. 650, 92 S. E. 929.


§ 60-119. Baggage and freight to be carefully handled.—All railroad and steamboat companies shall handle with care all baggage and freights placed with them for transportation, and they shall be liable in damages for any and all injuries or damage to the baggage or freight of persons from whom they have collected fare or charged freight, while the same is under their control. Upon proof of injury to baggage or freight in the possession or unladen condition of such company, it shall be presumed that the injury was caused by the negligence of the company. (Rev., s. 9694; 1897, c. 46; C. S. 3583.)

Cross Reference.—As to the power of the utilities commission to regulate the delivery of baggage, see § 62-55. As to conveyance livestock in a cruel manner, see § 14-363. As to sanitary inspection, see § 130-279. As to carrier's liability for misdelivery, see § 21-11.

Delivery Necessary.—To fix the responsibility for lost bag-gage upon a railroad company, either as a common carrier or warehouseman, a delivery, actual or constructive, including an acceptance by the company, is necessary; and in order to render valid delivery the general rule is that when baggage is taken by the agent of the company, at the station, the baggage is usually received, some kind of notice must be given to the agent authorized to receive it. Williams v. Southern R. Co., 155 N. C. 260, 71 S. E. 346.

Same.—Estoppel.—The requisites of the general rule to affect delivery of baggage of a passenger to a railroad company in order to hold the company liable may become modi- fied by a custom of the latter to consider and treat baggage as received when left at a given place, without further notice. Williams v. Southern R. Co., 155 N. C. 260, 71 S. E. 346.

§ 60-120. Liability for Non-Personal Baggage.—While the obligation of a carrier of passengers is limited to ordinary baggage, yet if it knowingly permits a passenger, either with or without payment of an extra charge, to take articles as baggage which are not such as are commonly carried, and as are carried for payment of an extra charge, the bill of lading for the transportation of freight, are void as an attempt on the part of the carrier to contract against its own negligence. Cooper v. Norfolk Southern R. Co., 161 N. C. 400, 77 S. E. 339.


Liability for Non-Personal Baggage.—While the obligation of a carrier of passengers is limited to ordinary baggage, yet if it knowingly permits a passenger, either with or without payment of an extra charge, to take articles as baggage which are not such as are commonly carried, and as are carried for payment of an extra charge, the bill of lading for the transportation of freight, are void as an attempt on the part of the carrier to contract against its own negligence. Cooper v. Norfolk Southern R. Co., 161 N. C. 400, 77 S. E. 339.

When Liability as Carrier Ceases.—When the baggage has arrived at its destination and has been deposited at the usual or customary place of delivery and kept there a sufficient time for the passenger to claim and remove the same, the company's liability as a common carrier ceases, and it is thereafter liable only as a warehouseman, and bound to the use of ordinary care. Trouser Co. v. Seaboard Air Line R. Co., 139 N. C. 382, 51 S. E. 972.

Liability When Passenger Not Carried.—When there is no partnership arrangement between connecting lines of rail- roads, and a passenger fails to forward his baggage to his destination on a connecting line, checks his trunk through to his destination and voluntarily returns to the starting point without going upon the road of the connecting lines, the latter carrier is not liable as insurer of the contents of the trunk from larceny by reason of taking the trunk to its destination, storing it there in its baggage room until its return was requested and then forwarding it to the junc- tional point, without compensation. Kinsley v. Seaboard Air Line Ry. Co., 131 N. C. 207, 65 S. E. 897.

Baggage Not on Same Train.—The passenger's right to a particular amount of baggage as expressed in the price of his ticket is upon the condition that the baggage accompany the passenger on the same train; and where there is no default on the part of the carrier, its agent, without furnishing the baggage to a passenger, the carrier, agent or company, is not liable as insurer of the contents of the trunk from larceny by reason of taking the trunk to its destination, storing it there in its baggage room until its return was requested and then forwarding it to the junc- tional point, without compensation. Perry v. Seaboard Air Line R. Co., 171 N. C. 158, 88 S. E. 156.

§ 60-120. Claims for loss of or damage to goods; filing and adjustment.—Every claim for loss of or damage to property while in possession of a common carrier, including every express company, firm or corporation doing an express business within the state, shall be adjusted and paid within ninety days in case of shipments wholly within the state and within four months in case of shipments from without the state, after the filing of such claim with the agent of such carrier at the point of delivery of such shipment, or point of delivery to another common carrier, or for damage to them, though it may have been without any fault. Trouser Co. v. Seaboard Air Line R. Co., 139 N. C. 382, 51 S. E. 972.
liable for the amount of such loss or damage, together with interest thereon from the date of the filing of the claim therefor until the payment thereof. Failure to do so shall render such common carrier subject to the same penalty and the same procedure as herein provided for by this section for failure of a carrier to show to the satisfaction of the carrier that the circumstances of the loss bring it within the excepted causes, and when this is shown, the burden still rests upon the carrier of showing that the loss or injury was not due to its own negligence. Mitchell v. Carolina Cent. R. Co., 124 N. C. 236, 32 S. E. 671.

Connecting Carriers—Duty Assumed by Carrier.—Where a carrier accepts goods for transportation in bad condition, the burden of proof rests upon such carrier to show delivery in the same condition to the next carrier or to the consignee, such proof being peculiarly within its power. Meredith v. Seaboard Air Line Ry. Co., 137 N. C. 478, 59 S. E. 735.

Same—Presumption of Damage.—Among connecting lines of railway, that one in whose hands goods are found damaged is presumed to have caused the damage, and the burden is upon it to rebut the presumption. Gwyn Harper Mfg. Co. v. Carolina Central R., 125 N. C. 280, 38 S. E. 894; Mitchell v. Carolina Central R., 124 N. C. 236, 32 S. E. 671; Morgan Mfg. Co. v. Ohio, etc., R. Co., 121 N. C. 514, 28 S. E. 474.

Same—Goods Found Damaged at Destination.—When goods are found damaged at the destination, and are found in a damaged condition at destination, there is a rebuttable presumption that the injury was negligently inflicted by the last carrier. Boss v. Atlantic Coast Line R. R. 156 N. C. 706, 69 S. E. 355. Even if the goods are shipped under a special contract, or such contract is inapplicable, as the carrier is peculiarly in a position to know the facts, the burden of proof should rest on the consignee. Beville v. Atlantic Coast Line R. Co., 159 N. C. 257, 74 S. E. 474.

Same—Liability for Negligence of Connecting Carrier.—A railroad company whose line is one of several connecting lines between places from and to which freight is shipped, in the absence of a special contract, or proof of copartnership by which each of the connecting lines will become liable for the contracts of the others, is not responsible for damages for negligence occurring beyond its terminus. Knott v. Raleigh, etc., R. Co., 98 N. C. 73, 3 S. E. 735.

same Interstate Shipments. — The Interstate Commerce Act and Carmack Amendment placed the entire regulation of interstate commerce under Federal control. This is on the principle that the Government is peculiarly in a position to know the facts, the burden of proof should rest on the consignee. Beville v. Atlantic Coast Line R. Co., 159 N. C. 257, 74 S. E. 474.

§ 60-120 CH. 60. RAILROADS AND OTHER CARRIERS § 60-120

Prima Facie Case.—In an action against the carrier for damages for the destruction of a shipment of freight by fire, a prima facie case is made out when the plaintiff shows the receipt of the freight for transportation and its nondelivery. Osborne v. Southern Ry., 175 N. C. 994, 96 S. E. 34; Everett v. Central R. Co., 124 N. C. 236, 32 S. E. 671.

Same.—Limited Liability.—In cases of limited liability, proof of shipment and loss or injury makes a prima facie case for the owner, but the burden still rests upon the carrier to show that the circumstances of the loss bring it within the excepted causes, and when this is shown, the burden still rests upon the carrier of showing that the loss or injury was not due to its own negligence. Mitchell v. Carolina Cent. R. Co., 124 N. C. 236, 32 S. E. 671.

Cross Reference.—As to venue of an action against a railroad, see § 1-31.

Section Strictly Construed.—This is a penal statute, and in order to recover, the plaintiff must bring his case strictly within its terms. Watkins v. American Ry. Express Co., 190 N. C. 1005, 130 S. E. 355.

Section Must Be Followed.—The penalty imposed by this section is to enforce obedience to the mandate of the law by punishment of the carrier, and the statute must be strictly construed, requiring the consignee to bring his case clearly within its language and meaning; and in order to recover, the penalty, the consignee must file his claim with the agent as the statute directs, and the filing thereof with another of the carrier's agents is insufficient. Eagles Co. v. East Carolina Ry., 184 N. C. 66, 113 S. E. 512.

Who May Bring Action.—Ordinarily the title to a shipment passes to the consignee by common carrier passes to the consignee upon their acceptance by the carrier, and he may sue for damages thereto in transit; but when it is shown that the consignee was not the owner of the property at the time of shipment and at the time of suit, and is, therefore, the party aggrieved, in any court of competent jurisdiction: Provided, that unless such consignee or consignee recover in such action the full amount claimed, no penalty shall be recovered; but only the actual amount of the loss or damage, with interest as aforesaid; and that no penalty shall be recoverable under the provisions of this section where claims have been filed by both the consignor and consignee, unless the time herein provided has elapsed after the withdrawal of one of the claims.

Causes of action for the recovery of the possession of the property shipped, for loss or damage thereto, and for the penalties herein provided for, may be united in the same complaint. (Rev., s. 2634; 1905, c. 330, ss. 2, 4, 5; 1907, c. 983; 1911, c. 199; C. S. 3524.)

Cross Reference.—As to venue of an action against a railroad company to recover damages to a shipment of goods and the penalties for the refusal of the defendant to pay the value of a shipment of goods and the penalty for the failure of defendant to pay the same within 90 days, as allowed by this section, the issues may be united in the same complaint. (Rev., s. 2634; 1905, c. 330, ss. 2, 4, 5; 1907, c. 983; 1911, c. 199; C. S. 3524.)

Prima Facie Case.—In an action against the carrier for damages for the destruction of a shipment of freight by fire, a prima facie case is made out when the plaintiff shows the receipt of the freight for transportation and its nondelivery. Osborne v. Southern Ry., 175 N. C. 994, 96 S. E. 34; Everett v. Central R. Co., 124 N. C. 236, 32 S. E. 671.

Same.—Limited Liability.—In cases of limited liability, proof of shipment and loss or injury makes a prima facie case for the owner, but the burden still rests upon the carrier to show that the circumstances of the loss bring it within the excepted causes, and when this is shown, the burden still rests upon the carrier of showing that the loss or injury was not due to its own negligence. Mitchell v. Carolina Cent. R. Co., 124 N. C. 236, 32 S. E. 671.
ages to a shipment made over connecting lines. However this provision does not relieve the intermediate or delivering carrier of responsibility for its own negligence, or prevent the state court from requiring the carrier to show which is responsible for the damage. See Aydlett v. Norfolk Sou. R. Co., 133 N. C. 861, 48 S. E. 815. A claim made directly to the initial carrier of an interstate shipment of goods is sufficient notice to the connecting carrier. Gilikin v. Norfolk Southern R. Co., 172 N. C. 86, 89 S. E. 1057. If the initial carrier may also be held liable for damages to a shipment made over connecting lines, a direction of the court relieving it from liability does not necessarily relieve the intermediate or delivering carrier of responsibility for its own negligence, or prevent the state court from requiring the carrier to show which is responsible for the damage. Gilikin v. Railroad, 174 N. C. 137, 93 S. E. 469.

Parol Agreement to Ship Sufficient.—When a carrier has received goods for transportation over its own and a connecting line, and in answer to a parol request it has them reshipped to the initial or starting point, the latter agreement for reshipment, though resting in parol, sustains an action for damages against the carrier for the damages sustained while in the carrier’s possession. Lyon v. Atlantic Coast Line R. Co., 165 N. C. 143, 81 S. E. 1.

Filing of Claim Prerequisite to Penalty.—A consignor of a shipment of goods is required by this section to file a claim with the agent of the common carrier at the point of origin, and this he must have done to maintain his action against the carrier for the penalty prescribed for its failure to settle a claim for damages within ninety days, etc. Gwyn-Harper Mfg. Co. v. Carolina Central R., 128 N. C. 30, 38 S. E. 894. But an allowance of thirty days is unreasonable. Gwyn-Harper Mfg. Co. v. Carolina Central R., 128 N. C. 260, 38 S. E. 894.

Same—Notice to Agent.—Where the second carrier in the connecting line causes damages to the ship- ment by improperly loading it, it may not defeat an action to recover such damages, when the required notice within four months has been filed with and accepted without comment by it, on the ground that such notice had not been filed with the initial or final carrier under the terms of the contract of carriage. The doctrine of notice to the agent is applicable here. Aydlett v. Norfolk Southern R. Co., 172 N. C. 47, 89 S. E. 1000.

Same—Omission of Amount of Loss. — It is not required that the claimant state the amount of his loss, in his claim for damages against a carrier. McRary v. Southern Ry., 174 N. C. 563, 94 S. E. 107.

Same— Interstate Shipments.—The Federal statutes, while recognizing carriers’ rights to stipulate for the filing of claims within a reasonable period, provide that if the loss or damage is due to a delay in transit by negligence no notice shall be required as a condition precedent to recovery. Mann v. Transportation Co., 176 N. C. 104, 96 S. E. 731.

Same — By Mail.—The essential things for the proper filing of the claim against the common carrier for damages, and for the penalty under the provisions of this section, being its delivery to and acceptance by the carrier’s designated agent, such filing is not restricted to a manual delivery. Such an action can be done by mail and accepted as being made within the United States mail. The delivery of the mail will be presumed. Eagles v. East Carolina Railroad, 184 N. C. 701, 115 S. E. 714.

Same—Necessity of Written Demand.—A penal statute is to be strictly construed, and the provisions of this section are not complied with when oral demand is made, as such cannot be filed under the ordinary acceptance of the word mailed, and the carrier may not be deprived of the right to demand that a written demand be given. Thompson v. Southern Express Co., 147 N. C. 343, 61 S. E. 182. But failure to file a formal written demand does not necessarily relieve the carrier of actual damages sustained. Hinkle v. Southern Ry., 136 N. C. 933, 36 S. E. 348; Kime v. Sou. R. Co., 135 N. C. 361, 36 S. E. 349.

Stipulations May Be Waived.—The stipulation in a live-stock bill of lading requiring that notice in writing be given the carrier’s agent at destination, of claim for damages to the animals shipped, before they are released mingled with other animals, may be waived by the carrier’s agent at the delivering point. Newborn v. Louisville, etc. R. Co., 155 N. C. 575, 70 S. E. 37.

Recovery Must Equal Claim.—In order to recover the penalty for failure to settle a claim for damages within ninety days, etc., the burden is on plaintiff to show that the amount of his recovery be not less than the amount of his written demand. Watkins v. American Railway Express Co., 190 N. C. 605, 130 S. E. 305.

Settlement after Penalty Prerequisite.—The proviso that the consignor must first recover the full amount claimed is only to protect the carrier against excessive demands and not to discourage settlements for losses, and the plaintiff’s right to recover the penalty in such suits is not lost by accepting an unreasonable settlement for damages for full amount claimed after the penalty had accrued. Rabon v. Atlantic Coast Line R. Co., 149 N. C. 231, 75 S. E. 576.

Plaintiff Must Prove Failure to Settle.—The burden is on plaintiff to show that the common carrier has failed to settle his claim in ninety days, etc., after written demand under the provisions of this section, applying to interstate shipments, and the prima facie case made out by showing the unreasonable delay in the delivery of the shipment is not sufficient. Watkins v. American Ry. Express Co., 190 N. C. 605, 130 S. E. 305.

Measure of Damages for Delay.—In the trial of an action against a railroad company for loss occasioned by its delay in transporting machinery shipped over its line by plaintiff which was engaged in equipping a cotton factory, where it appeared that workmen employed by the plaintiff were forced to remain idle, though under pay of plaintiff, the measure of plaintiff’s damages was the wages paid to workmen and such other costs and expenses incurred by plaintiff in consequence of the delay. Rocky Mount Mills v. Wilmington, etc., R. Co., 119 N. C. 691, 25 S. E. 854.

§ 60-121. Existing remedies to continue.—Section 60-120 shall not deprive any consignee of any rights or remedies now existing against common carriers in regard to freight charges or claims for loss or damage to freight, but shall be deemed and held as creating an additional liability upon such common carriers. (Rev. s. 2635; 1905, c. 330, s. 5; C. S. 3252.)

Common Law Remedies.—The common law remedies of shippers and passengers are not taken away by the provisions of this chapter. Bell v. Norfolk Sou. R. Co., 163 N. C. 797, 75 S. E. 422, and cases there cited.

Action May Be Brought in Contract or Tort.—A person who has sustained injuries by reason of the failure of a railroad company to provide proper means of transporta- tion or to transport goods or passengers in a reasonable time or in a reasonable manner, or to perform any contract or in tort, independent of the statute. Purcell v. Richmond & Danville R. Co., 108 N. C. 414, 12 S. E. 954, 956; Va.-Carolina Peanut Co. v. Atlantic Coast Line R. Co., 155 N. C. 418, 171 S. E. 561, 571.

§ 60-122. Carrier’s right against prior carrier. — Any common carrier, upon complying with the provisions of §§ 60-114 and 60-120, shall have all the rights and remedies herein provided for against a common carrier from which it receives the freight in question. (Rev. s. 2636; 1905, c. 330, s. 3; C. S. 3252.)

Cross Reference.—As to power of utilities commission to act as arbitrator in disputes between carriers, see § 63-61.

§ 60-123. Regulation of demurrage.—No railroad or other transportation company doing business in the state shall make any charge on account of demurrage while a car, whether the same be a re- frigerator car or not, is being loaded for shipment, until it has remained at the place of loading for forty-eight hours from the time it has been so placed; but the utilities commission may change this provision, if it considers it unreasonable, under the power vested in it under the chapter Utilities Commission, to make regulations as to demurrage and the loading of cars. (Ex. Ses. 1913, c. 55; 1923, c. 154, s. 8; 1941, c. 97, s. 5; C. S. 3927.)

Cross Reference.—As to power of utilities commission to regulate demurrage, see § 62-59.
§ 60-124. Shipment of livestock on Scuppernong river regulated; violation of regulations misdemeanor.—If any transportation company or common carrier shall receive livestock for shipment at any of the landings or shipping points on Scuppernong river, Columbia excepted, between the hours of sunset and sunrise, or shall during the time any livestock may be held for shipment at any landing or shipping point on such river, Columbia excepted, fail to keep the same in a covered pound or inclosure, supplied with necessary food and drinking water, and at all times in full view of the public, such transportation company, common carrier, or the agent of either, shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned, or both, at the discretion of the court. (Rev., s. 3675; 1903, c. 283; C. S. 3528.)

§ 60-125. Carload shipments of watermelons regulated; violation of regulations misdemeanor.—It shall be the duty of all common carriers to furnish the weights of all carload shipments of watermelons originating within the state to the shippers thereof within forty-eight hours after receipt of the same. Any common carrier violating the provisions of this section shall upon conviction be fined ten dollars for each offense. (Ex. Sess. 1913, c. 68; C. S. 3529.)

§ 60-126. Express companies to settle promptly for cash-on-delivery shipments; penalty.—Every express company which shall fail to make settlement with the consignor of a cash-on-delivery shipment, either by payment of the moneys stipulated to be collected upon the delivery of the articles so shipped or by the return to such consignor of the article so shipped, within twenty days after demand made by the consignor and payment or tender of payment by him of the lawful charges for transportation, shall forfeit and pay to such consignor a penalty of twenty-five dollars, where the value of the shipment is twenty-five dollars or less; and, where the value of the shipment is over twenty-five dollars, a penalty equal to the value of the shipment; the penalty not to exceed fifty dollars in any case: Provided, no penalty shall be collectible where the shipment, through no act of negligence of the company, is burned, stolen or otherwise destroyed: Provided further, that the penalties here named shall not be in derogation of any right the consignor may now have to recover of the company damages for the loss of any cash-on-delivery shipment or for negligent delay in handling the same. (1909, c. 866; C. S. 3530.)

§ 60-127. Failure to place name on produce shipped—misdeemeanor.—Any person, firm or corporation selling or offering for sale or consignment any barrel, crate, box, case, package or other receptacle containing any berries, fruit, melons, potatoes, vegetables, truck or other produce of any kind whatsoever, to be shipped to any point within or without the state of North Carolina, without the true name of the grower or packer either written, printed, stamped or otherwise placed thereon in distinct and legible characters, shall be guilty of a misdemeanor and shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days: Provided, that this section shall not apply to railroads, express companies and other transportation companies selling or offering for sale, for transportation or storage charges or any other charges accruing to such railroads, express companies or other transportation companies, any barrel, crate, box, case, package, or other receptacle containing berries, fruit, melons, potatoes, vegetables, truck or other produce. (1915, c. 193; C. S. 3531.)

§ 60-128. Unclaimed freight to be sold.—Every railroad, steamboat, express or other transportation company which shall have had unclaimed freight, not perishable, in its possession for a period of six months, may proceed to sell the same at public auction, and out of the proceeds may retain the charges of transportation and storage of such freight and the expenses of the advertisement and sale thereof; but no such sale shall be made until the expiration of four weeks from the first publication of notice of such sale in a state paper and also in a newspaper published at or nearest the place at which such freight was directed to be left, and also at the place where such sale is to take place. The expenses incurred for advertising shall be a lien upon such freight in a ratable proportion according to the value of each article, package or parcel, if more than one. (Rev., s. 2637; Code, s. 1985; 1871-2, c. 138, s. 48; C. S. 3532.)

What Storage Charges Allowed for.—Storage charges are allowed the carrier for the service rendered in taking care of the goods, the inconvenience to the warehouseman, and the liability for their safe custody if they do not exercise proper care. Holloman v. Southern R. Co., 172 N. C. 372, 90 S. E. 292.

Same—When Consignee Refuses Good.—Where a consignee of goods wrongfully refuses to receive goods on account of excessive charge made for their transportation, no demurrage charges are collectible by the carrier, but only reasonable storage charges, until, in the exercise of its rights under this section, it could properly dispose of the goods and thereby be relieved of further charge concerning them. Norfolk Southern R. Co. v. New Bern Iron Works, 172 N. C. 188, 90 S. E. 149.

Applies to Interstate Shipment.—This section applies to interstate as well as intrastate shipments, in the absence of any interfering regulation by Congress or of the Interstate Commerce Commission. Norfolk Southern R. Co. v. New Bern Iron Works, 172 N. C. 188, 90 S. E. 149.

§ 60-129. Sale of unclaimed perishable freight.—In case such unclaimed freight shall in its nature be perishable, then the same may be sold as soon as it can be, on giving the notice required in § 60-128, after its receipt at the place where it was directed to be left. (Rev., s. 2638; Code, s. 1986; 1871-2, c. 138, s. 49; C. S. 3533.)

§ 60-130. Funds from unclaimed freight to be paid to state university.—Such railroad, steamboat, express or other transportation company shall make an entry of the balance of the proceeds of the sale, if any, of each parcel of freight owned by or consigned to the same person, as near as can be ascertained, and at any time within five years thereafter shall refund any surplus so retained to the owner of such freight, his heir, or assigns, on satisfactory proof of such ownership; if no person shall claim the surplus within five years, such surplus shall be paid to the state university. (Rev., s. 2639; Code, s. 1987; 1871-2, c. 138, s. 50; C. S. 3534.)

Cross Reference.—As to unclaimed personality escheating to the University of North Carolina, see § 116-23.
§ 60-131. Sale of unclaimed baggage or freight; notice; sale of neglected property.—Any common carrier which has had in its possession on hand at any destination in this state any article whether baggage or freight, for a period of sixty days from its arrival at destination, which said carrier cannot deliver because unclaimed, may at the expiration of said sixty days sell the same at public auction at any point where in the opinion of the carrier the best price can be obtained: Provided, however, that notice of such sale shall be mailed to the consignor and consignee, by registered mail, if known to such carrier, not less than fifteen days before such sale shall be made; or notice of the sale shall be published once a week for two consecutive weeks in some newspaper of general circulation published at the point of sale: Provided, that if there is no such paper published at such point, the publication may be made in any paper having a general circulation in the state: Provided further, however, that if the nondelivery of said article is due to the consignee’s and consignor’s rejection of it, then such article may be sold by the carrier at public or private sale, and at such time and place as will in the carrier’s judgment net the best price, and this without further notice to either consignee or consignor, and without the necessity of publication. (1921, c. 124, s. 1; C. S. 3534(a).)

§ 60-132. Sale of live or perishable or cheap freight.—Where the article referred to in § 60-131 is live freight, or perishable freight, or freight of such low value as would not bring the accrued transportation and other charges if held for sixty days as provided in said section, the common carrier may, with or without advertisement, sell the same in such manner and at such time and in such place as will best in its judgment protect the interests of the carrier, the consignor and the consignee, and whenever practicable the consignor and consignee shall be notified of the proposed sale of such live or perishable freight, or freight of such low value. (1921, c. 124, s. 2; C. S. 3534(b).)

§ 60-133. Record of articles and prices; deduction of expenses; payment of balance.—The carrier shall keep a record of the articles sold, and of the prices obtained therefor, and shall, after deducting all charges and expenses of the sale, including advertisement, if advertised, pay the balance to the owner of such articles on demand therefor made at any time within two years from the date of the sale. (1921, c. 124, s. 3; C. S. 3534(c).)


§ 60-134. May build and maintain water-power plants.—Where any street or interurban railway company owns lands on one or both sides of a stream which can be used in developing a water-power, and desires to erect and maintain a water-power plant for the purpose of generating electricity to be used in operating such railway, then such railway company shall have the power to erect, maintain and operate such water-power plant for such purpose, and may build, maintain and operate any and all dams, ponds, canals, bridges, ferries, aqueducts, flumes, water-ways, wasteways, reservoirs, and all works, machinery, houses, shops and buildings necessary for the use and operation of a water-power plant for generating electricity. Whenever such company shall not own the entire water-front, or all of the lands, water rights, or other easements necessary to be used in fully developing such water-power, it shall have the power to acquire any other lands, water rights or easements which may be needed to fully develop such water-power; and if the company cannot agree with the owners for the purchase of such lands, water rights or other easements, the same may be condemned by the railway company for that purpose, and the procedure shall be the same as that provided for the condemnation of lands for railroads: Provided, that no dwelling house, yard, garden, orchard or burial-ground shall be condemned for such purpose: Provided further, that such company shall not have the power to condemn any water-power, right or property of any person, firm or corporation engaged in the actual service of the general public, where such power, right or property is being used or held to be used or to be developed for use in connection with or in addition to any power actually used by such person, firm or corporation serving the general public. Any surplus electric power generated by any plant erected under the provisions of this section may be sold by such company upon reasonable terms. (1907, c. 302; 1913, c. 94; C. S. 3535.)

§ 60-135. Separate accommodations for different races; failure to provide misdemeanor.—All street, interurban and suburban railway companies, engaged as common carriers in the transportation of passengers for hire in the state of North Carolina, shall provide and set apart so much of the front portion of each car operated by them as shall be necessary, for occupation by the white passengers therein, and shall likewise provide and set apart so much of the rear part of such car as shall be necessary, for occupation by the colored passengers therein, and shall require as far as practicable the white and colored passengers to occupy the respective parts of such car so set apart for each of them. The provisions of this section shall not apply to nurses or attendants of children or of the sick or infirm of a different race, while in attendance upon such children or such sick or infirm persons. Any officer, agent or other employee of any street railway company who shall wilfully violate the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned in the discretion of...
of such car while the same is in motion, whether such passenger has or has not paid the usual fare for riding on such car. Any person willfully violating any of the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined not more than fifty dollars or imprisoned not exceeding thirty days. He may also be ejected from the car by the conductor and other agent or agents charged with the operation of such car, who are hereby invested with police powers to carry out the provisions of this section. (1907, c. 850, ss. 3, 6; C. S. 3539.)

§ 60-139. Sections 60-135 to 60-138 extended to motor busses used as common carriers.—The provisions of §§ 60-135 to 60-138 are hereby extended to motor busses operated in the urban, interurban or suburban transportation of passengers for hire, and to the operator or operators thereof, and the agents, servants, and employees of such operators. (1933, c. 489.)


§ 60-140. Passenger riding on rear platform assumes risk; copies of section to be posted.—Any person who shall ride upon the rear platform of any street-car in motion, when there is room for such person to sit or stand inside the car, shall be deemed to have assumed all the risks of being injured while so riding, as the result of any act of the street-car company; Provided, that such company shall make it appear that such passenger would not have been injured had he been on the inside of said car: Provided further, that before any street, interurban or suburban railway shall be allowed to invoke the provisions of this section it shall have copies thereof printed and framed and one copy hung in each end of all cars operated on its lines, and shall further have a placard hung in a conspicuous place on the rear of such cars, which shall read as follows: "Passengers are warned not to ride on this platform," and a placard hung on each side of open cars in a conspicuous place, which shall read as follows: "Passengers are warned not to ride on the running board." (1907, c. 850, s. 4; C. S. 3540.)

Cross Reference.—As to injury while on train platform, see § 60-105.

§ 60-141. Street-cars to have vestibule fronts; failure to provide them misdemeanor.—All street passenger railway companies shall use vestibule fronts, of frontage not less than four feet, on all passenger cars run by them on their lines during the latter half of the month of November and during the months of December, January, February and March of each year: Provided, that such companies shall not be required to close the sides of the vestibules: Provided further, that such companies may use cars without vestibule fronts in cases of temporary emergency in suitable weather, not to exceed four days in any one month within the period herein prescribed for the use of vestibule fronts. The utilities commission is hereby authorized to make exemptions from the provisions of this section in cases where in their judgment the enforcement of this section is unnecessary. Any such company that shall refuse or fail to comply with the provisions of this section shall be guilty of a misdemeanor and shall be subject to a fine of not less than ten dollars nor more than

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the court. (1907, c. 850, ss. 1, 5, 7; 1909, c. 851; C. S. 3536.)

Cross Reference.—As to railroads providing separate accommodations, see § 60-94.

"Willful," as used in a criminal statute, means something more than an intention to do a thing; it implies the doing of an act purposely and deliberately, without authority or carelessness whether one has the right to do the act or not, in violation of law. State v. Harris, 213 N. C. 758, 197 S. E. 594.

§ 60-136. Passengers to take certain seats; violation of requirement misdemeanor.—Any white person entering a street car or other passenger vehicle or motor bus for the purpose of becoming a passenger therein shall, in order to carry out the purposes of § 60-135, occupy the first vacant seat or unoccupied space nearest the front thereof, and any colored person entering a street car or other passenger vehicle or motor bus for a like purpose shall occupy the first vacant seat or unoccupied space nearest the rear end thereof, provided, however, that no contiguous seat on the same bench shall be occupied by white and colored passengers at the same time, unless and until all the other seats in the car have been occupied. Upon request of the person in charge of the street car, or other passenger vehicle or motor bus, and when necessary in order to carry out the purpose of providing separate seats for white and colored passengers, it shall be the duty of any white person to move to any unoccupied seat toward or in the front of the car, vehicle or bus, and the duty of any colored person to move to any unoccupied seat toward or in the rear thereof, and the failure of any such person to so move shall constitute prima facie evidence of an intent to violate this section. Any person violating the provisions of this section shall be guilty of a misdemeanor and, upon conviction, shall be fined not more than fifty dollars or imprisoned not exceeding thirty days. Any such person may also be ejected from the car, vehicle or bus by the person charged with the operation thereof. Each person now or hereafter charged with the operation of any such street car, passenger vehicle or motor bus is hereby invested with police powers and authority to carry out the provisions of this section. (1907, c. 850, ss. 2, 6; 1939, c. 147; C. S. 3537.)

Editor's Note.—The 1939 amendment inserted the words "or other passenger vehicle or motor bus" in the first sentence. It also inserted the second sentence and made other changes in the section.

§ 60-137. No liability for mistake in assigning passengers to wrong seat.—No street, suburban or intercity railway company, its agents, servants or employees, shall be liable to any person on account of any mistake in the designation of any passenger to a seat or part of a car set apart for passengers of the other race. (1907, c. 850, s. 8; C. S. 3538.)

§ 60-138. Misconduct on car; riding on front platform misdemeanor.—It shall be unlawful for any passenger to expectorate upon the floor or any other part of any street-car, or to use, while thereon, any loud, profane or indecent language, or to make any insulting or disparaging remark to or about any other passenger or person thereon within his or her hearing. It shall likewise be unlawful for any passenger to stand willfully upon the front platform, fender, bumper, running-board or steps
§ 60-142. Street cars to have fenders; failure to provide them misdemeanor.—All street passenger railway companies shall use practical fenders in front of all passenger cars run by them. The utilities commission is hereby authorized to make exemptions from the provisions of this section in cases where in their judgment the enforcement of this section is unnecessary. Any such company that shall refuse or fail to comply with the provisions of this section shall be guilty of a misdemeanor and shall be subject to a fine of not less than ten dollars nor more than one hundred dollars for each day of such refusal or failure. (Rev., ss. 2616, 3801; 1901, c. 743, s. 2; 1933, c. 134, s. 8; 1941, c. 97, s. 5; C. S. 3549.)

“Practical Fenders.”—The “practical fenders” required for street cars by this section are those which are efficient for the purpose of protecting human life, etc., or the most approved appliance in general use, and a violation of this statute is negligence per se. Smith v. Charlotte Elec. Ry. Co., 171 N. C. 489, 92 S. E. 382.

Violation Negligence Per Se.—The violation of this section by a street car company, in failing to provide a “practical fender” for its car, causing an injury, is evidence of actionable negligence per se. Hanes v. Southern Pub. Utilities Co., 191 N. C. 13, 131 S. E. 402; Ingle v. Asheville Electric Power, etc., Co., 172 N. C. 751, 90 S. E. 953.

Travelers by Vehicles Protected.—The requirement of this section, that all street cars when operated must have practical fenders on the lead end thereof, applies to the protection of those traveling by vehicles, automobiles, etc. Hanes v. Southern Pub. Utilities Co., 191 N. C. 13, 131 S. E. 402.

Burden of Proof as to Exemption.—The burden of proof is on a street railway company to show that the Corporation Commission, in its judgment, had found it unnecessary to enforce the provisions of this section, requiring the use of “practical fenders” on their street cars, in an action to recover damages caused by its negligence in not using them. Smith v. Charlotte Elec. Ry. Co., 173 N. C. 489, 92 S. E. 382.

Exemption of All Companies Unauthorized.—This section does not authorize an exemption of all the street railway companies by the Corporation Commission, as this amounts to a suspension of the statute. Henderson v. Durham Traction Co., 132 N. C. 779, 44 S. E. 598.

Evidence.—In an action for the killing of a dog by a street car, it is not competent to show the condition of the fenders on particular cars other than the one by which the dog was killed, it being shown that the fenders were different on different cars. Moore v. Electric Ry., etc., Co., 136 N. C. 554, 48 S. E. 822.

Art. 15. Electric Interurban Railways.

§ 60-143. Organization.—Any electric interurban railway company, whether organized under the laws of this or any other State, may construct, maintain and operate electric interurban railways and engage in business in this State. (1927, c. 33, s. 1.)

§ 60-144. Right of eminent domain.—Any such company may exercise the right of eminent domain under the provisions of chapter forty and acts amendatory thereof, and for the purpose of constructing its roads and other works, shall have the powers given railroad corporations by this chapter, and acts amendatory thereof, except that no such company when organized under the laws of another state shall operate any part of its line of railway in this State by steam motive power, or as a part of a general steam railroad system of transportation. (1927, c. 33, s. 2.)

§ 60-145. Status defined.—All such companies shall be deemed public service corporations and shall be subject to the laws of this State regulating such corporations. (1927, c. 33, s. 3.)

Art. 16. Pipe Line Companies.

§ 60-146. Right of eminent domain conferred upon pipe line companies; other rights.—Any pipe line company transporting or conveying natural gas, gasoline, crude oil, or other fluid substances by pipe line for the public for compensation, and incorporated under the laws of the State of North Carolina, may exercise the right of eminent domain under the provisions of chapter forty and acts amendatory thereof, and for the purpose of constructing and maintaining its pipe lines and other works shall have all the rights and powers given railroads and other corporations by chapters fifty-six and sixty and acts amendatory thereof, provided the pipe lines of such companies transporting or conveying natural gas, gasoline, crude oil, or other fluid substances shall originate within this state. Nothing herein shall prohibit any such pipe line company granted the right of eminent domain under the laws of this state from extending its pipe lines from within this state into another state for the purpose of transporting natural gas into this state, nor to prohibit any such pipe line company from conveying or transporting natural gas, gasoline, crude oil, or other fluid substances from within this state into another state. All such pipe lines companies shall be deemed public service companies and shall be subject to the laws of this state regulating such corporations. (1937, c. 280.)

Cross Reference.—As to supervision by the utilities commission, see § 69-30.

Editor's Note.—Both chapters 108 and 280 of the Public Laws 1937, apply only to pipe lines originating in North Carolina. Chapter 108 amends § 40-2. See 15 N. C. L. Rev. 364.
§ 61-1. Trustees may be appointed and removed.—The conference, synod, convention or other ecclesiastical body representing any church or religious denomination within the state, as also the religious societies and congregations within the state, may from time to time and at any time appoint in sufficient manner as such body, society or congregation may deem proper, a suitable number of persons as trustees for such church, denomination, religious society, or congregation. The body appointing may remove such trustees or any of them, and fill all vacancies caused by death or otherwise. (Rev., ss. 2670, 2671; Code, ss. 3667, 3668; R. C., c. 97; 1796, c. 457, ss. 1, 2; 1844, c. 47; 1848, c. 76; C. S. 3568.)

Applies Only to Religious Societies.—This section applies only to religious societies and not to educational institutions. (Rev., ss. 2670, 2671; Code, ss. 3667, 3668; R. C., c. 97; 1796, c. 457, ss. 1, 2; 1844, c. 47; 1848, c. 76; C. S. 3568.)

Society May Remove Trustee.—Under the provisions of this section, a religious society may remove a trustee of church property who proves faithless to his trust, and may remove trustees at will. Conference v. Allen, 156 N. C. 550, 14 S. E. 77.

Same—Trustee May Maintain Action.—A duly appointed trustee of a religious society may maintain an action for the removal of faithless or incompetent trustees, and compel them to convey the property held by them to the purposes for which it was designed, and such trustee may also maintain an action to set up a lost deed executed for the benefit of the cestui que trust. Nash v. Sutton, 117 N. C. 231, 23 S. E. 178.

Same—Member May Maintain Action.—In the absence of competent trustee and a governing body authorized to appoint trustees, any member of a religious society has such a beneficial interest as will enable him, in behalf of fellow members, to maintain such action as may be necessary to protect their common interest. Nash v. Sutton, 109 N. C. 559, 14 S. E. 77.

Same—Section Not Affected by Church Rule.—A church has authority to appoint a "suitable number" of its own trustees for the purpose of acquiring and holding church property, and remove them or any of them at will, and where the congregational regulations of the denomination with which a church is affiliated has provided a notice to be given for the trial of "offenses," it does not apply to the election or removal of trustees nor take from the church its rights when in conflict with the statutes. Conference v. Allen, 156 N. C. 524, 72 S. E. 617.

When All Trustees Are Dead.—Upon the death of the last survivor of a board of trustees named in a deed for property to be used as a "Baptist church and for the education of the youth of the colored race," it was held that their successors, under section 45-9, by the clerk of the court. Thornton v. Harris, 140 N. C. 498, 53 S. E. 341.

Voluntary Withdrawal of Members.—What amounts to a voluntary withdrawal of members from a religious association is a question of law. Perry v. Tupper, 74 N. C. 722.


§ 61-2. Trustees may hold property.—The trustees and their successors have power to receive donations, and to purchase, take and hold property, real and personal, in trust for such church or denomination, religious society or congregation; and they may sue or be sued in all proper actions, for or on account of the donations and property so held or claimed by them; and for and on account of any matters relating thereto. They shall be accountable to the churches, denominations, societies and congregations for the use and management of such property, and shall render to it any person authorized to demand it. (Rev., ss. 2670, 2671; Code, ss. 3667, 3668; R. C., c. 97; 1796, c. 457, ss. 1, 3; 1844, c. 47; 1848, c. 76; C. S. 3569.)

Cross References.—As to charitable trusts generally, see §§ 36-39 et seq. As to certain religious associations presumed to be incorporated, see §§ 55-13.

Applies Only to Property Held for Religious Purposes.—This section does not apply to property held or acquired not for religious purposes and not to property held in trust for a "Baptist church and for the education of the youth of the colored race." Thornton v. Harris, 140 N. C. 498, 53 S. E. 341.

General Capacity of Acquisition.—Religious societies or their trustees have not a general capacity of acquisition; they can only take for the use of the society. Trustees v. Dickens, 12 N. C. 189.

And by a conveyance to trustees, for purposes forbidden by the policy of the law, nothing passes. Trustees v. Dickens, 12 N. C. 189.

Original Trustees May Sue though Not Legally Appointed.—Where a conveyance is made to three persons for a certain tract of land, as trustees for a church, a suit of trespass may be brought by them against the wrongdoers, in which they may have a right to recover. Rountree v. Blount, 129 N. C. 550, 52 S. E. 77.

Same—Mortgage Property.—A congregation taking possession of a church cannot contest the validity of a mortgage given by the trustees for the purchase money on the ground that it was ultra vires. Rountree v. Blount, 129 N. C. 550, 52 S. E. 77.

Same—Parties to Enforce Bequest.—Where a testator provides for building a fence around a certain chapel cemetery, the trustees of the chapel are the proper parties to require the executor to perform this provision. Cabe v. Vanhook, 127 N. C. 424, 37 S. E. 404.

Same—Can Not Recover for Individual Suffering.—In suit by the trustees of a church against a railroad company for the improper use of its terminal or depot at or near the manse of the church, no recovery can be had for any physical suffering upon the part of their pastor, his family, or the individuals engaged in the church work. Cabe v. Seaboard Air Line Ry., 145 N. C. 400, 59 S. E. 129.

Title Vested Individually.—The title to church property is vested in the trustees individually and they may recover at law, though in the writ and declaration they style themselves "trustees." Walker v. Fawcett, 29 N. C. 44.

Church Has Right to Use of Property.—A church of the congregational system having elected certain trustees to succeed several therebefore elected, holds the church property through those trustees later elected, and has the right to the use of the church for religious services without molestation from the trustees removed, or from its conference. Conference v. Allen, 156 N. C. 550, 72 S. E. 617.

Interest of Individual Member.—An individual member of a religious society has an equitable interest in the property held by the society. Nash v. Sutton, 117 N. C. 231, 23 S. E. 178.
Title Not in Controversy in Contest between Trustees.—In a contest between two committees, each claiming to be the rightful board of trustees, to hold the same title in trust, and in the absence of facts to establish the contrary in controversy. Thornton v. Harris, 140 N. C. 498, 53 S. E. 341.

Levy on Communion Service.—A communion service of a church is not liable to seizure and sale under an execution by a pastor for salary due him. Lord v. Hardie, 82 N. C. 241.

Liability of Trustees.—The trustees of a church are liable for material ordered by one of their number and used in building the church although the order was not authorized. Tull v. Trustees, 75 N. C. 424. But the building committee of a church is not liable for injuries received by a workman from their negligence in the construction of a church. Paine v. Forney, 128 N. C. 237, 58 S. E. 885.

No Trust Created.—The recital in a deed conveying land to the vestry and wardens of a church that it was made "for the purpose of aiding in the establishment of a Home for In- digent Widows or Orphans, or in the promotion of any other charitable or religious objects to which the property might be appropriated" by the grantee, creates no trust, and the grantee can convey a perfect title. St. James v. Bagley, 138 N. C. 384, 50 S. E. 841.

Doctrine of Cy-Près Not Applicable.—In the case of devises for charitable purposes, a devisee will not obtain in this State. Bridges v. Pleasant, 39 N. C. 26.


§ 61-3. Title to lands vested in trustees, or in societies.—All glebes, lands and tenements, here-tofore purchased, given, or devised for the support of any particular ministry, or mode of worship, and all churches and other houses built for the purpose of public worship, and all lands and donations of any kind of property or estate that have been or may be given, granted or devised to any church or religious denomination, religious society or congregation within the State for their respective use, shall be and remain forever to the use and occupancy of that church or denomination, society or congregation for which the glebes, lands, tenements, property and estate were so purchased, given, granted or devised, or for which such churches, chapels or other houses of worship were so built; and the estate therein shall be deemed and held to be absolutely vested, as between the parties thereto, in the trustees respectively of such churches, denominations, societies and congregations, for their several uses, according to the intent expressed in the conveyance, gift, grant or will; and in case there shall be no trustees, then in such churches, denominations, societies and congregations, respectively, according to such intent. (Rev., s. 2672; Code, s. 3665; R. C., c. 97, s. 1; 1776, c. 107: 1796, c. 457, s. 4; C. S. 3570.)

Cross Reference.—See notes to the preceding section.

Exception.—An individual member of an individual congregation under the congregational system is discussed in Conference v. Allen, 156 N. C. 524, 526, 72 S. E. 617; and the connectional system is discussed in Kerr v. Hicks, 154 N. C. 565, 600, 117 S. E. 527, 528; Bridges v. Penn, 154 N. C. 524, 242, 26 S. E. 29; Gold v. Cozart, 173 N. C. 612, 614, 92 S. E. 600; Simmons v. Allison, 118 N. C. 763, 770, 24 S. E. 716.

No Legal Provision for Diffusing Christianity.—There is no provision in our laws for donations, to be employed in any general system of diffusing the knowledge of Christianity throughout the earth. Bridges v. Pleasant, 39 N. C. 26.

 Applies Only to Religious Societies.—This section applies only to religious societies and not to educational institutions. Allen v. Baskerville, 124 N. C. 126, 127, 31 S. E. 383.

Specific Trust Must Be Imperative.—A specific trust will not be superimposed upon a title conveyed to a religious congregation, authorizing the courts to interfere and control the management and disposition of the property, unless this is the clear intent of the grantor expressed in language which should be construed as imperative. Hayes v. Franklin, 141 N. C. 359, 54 S. E. 423.

Perpetuity Must Be Preserved.—A bequest for religious charity must, in this State, be to some definite purpose, and to some body or association of persons having a legal existence and with capacity to take. Bridges v. Pleasant, 39 N. C. 26.

Division of Devised Property.—Where a will devises certain lands to the diocese of a church and afterwards the diocese was divided into two dioceses the land becomes the property of both and not that of the diocese in which the land happens to be or is to be or will be. Clark v. Clark, 110 N. C. 364, 14 S. E. 902. Trustees v. Trustees, 102 N. C. 442, 9 S. E. 310.

Title by Adverse Possession.—A church holding real property for a hundred years, and using it for religious purposes, acquires a fee-simple title by adverse possession, independent of the validity of its deed. Gold v. Cozart, 173 N. C. 612, 92 S. E. 600.

Amount Insufficient.—A provision in a will that a church is to be built from certain funds will not fail because there is not sufficient amount of the funds to build a church as large as directed in the testator. Paine v. Forney, 128 N. C. 237, 58 S. E. 885.

No Trust Created.—The recital in a deed conveying land to the vestry and wardens of a church that it was made "for the purpose of aiding in the establishment of a Home for In- digent Widows or Orphans, or in the promotion of any other charitable or religious objects to which the property might be appropriated" by the grantee, creates no trust, and the grantee can convey a perfect title. St. James v. Bagley, 138 N. C. 384, 50 S. E. 841.

Doctrine of Cy-Près Not Applicable.—In the case of devises for charitable purposes, a devisee will not obtain in this State. Bridges v. Pleasant, 39 N. C. 26.


§ 61-4. Trustees may convey property.—The trustees of any religious body may mortgage or sell and convey in fee simple any land owned by such body, when directed so to do by such church, congregation, society or denomination, or its committee, board or body having charge of its finances, and all such conveyances so made or hereafter made, or hereafter to be made, shall be effective to the land so conveyed to the purchaser or to the mortgagee, to the same extent in such conveyances or mortgage expressed; and they may sell or mortgage its personal property. (Rev., s. 2673; 1855, c. 384; 1889, c. 484; C. S. 3571.)

Sale to Promote Testator's Purpose.—Where a testator devised lands to the trustees of a certain church, "to be held by them as a rectory or residence for the ministers of said church; that the same shall not be disposed of, sold, or used in any other way or for any other purpose than the one designated," the trustees might sell the property if the purpose declared would be promoted thereby; or the court might order a sale under its general equity power. Church v. Angel, 161 N. C. 314, 77 S. E. 239.

Same.—Lease of Part of Property.—Where land was conveyed to a church for the purpose of maintaining a church for worship, the court will not restrain the officers of the church from leasing a small portion of the lot for erecting a store. Hayes v. Franklin, 141 N. C. 359, 54 S. E. 423.


§ 61-5. Authority of bishops, ministers, etc., to acquire, hold and transfer property; prior transfers validated.—Notwithstanding the laws, rules, or ecclesiastical polity of any church or religious sect, society or denomination, commits to its duly elected or appointed bishop, minister or other ecclesiastical officer, authority to administer its affairs, such duly elected or appointed bishop, minister or other ecclesiastical officer shall have power to acquire by gift, purchase or otherwise, and to hold, improve, mortgage, sell and convey the property, real or personal, of any such church or religious sect, society or denomination, for the purposes, in the manner and otherwise as authorized and permitted by its laws, rules or ecclesiastical polity; and in the event of the transfer, removal, resignation or death of any such bishop, minister or other ecclesiastical officer, the title and all rights with respect to any such property shall pass to and become vested in his duly elected or appointed successor immediately upon appointment or election, and pending appointment or election of such successor, such title and all rights shall be vested in such person or persons as shall be designated by the laws, rules or ecclesiastical polity of such church or religious sect, society or denomination.

All deeds, deeds of trust, mortgages, wills or other instruments made prior to March 24, 1939, [637]
to or by a duly elected or appointed bishop, minister or other ecclesiastical officer, who, at the time of the making of any such deed, deed of trust, mortgage, will or other instrument, or thereafter, had authority to administer the affairs of any church, religious sect, society or denomination under its laws, rules or ecclesiastic polity, transferring property, real or personal, of any such church or religious sect, society or denomination, are hereby ratified and declared valid; and all transfers of title and rights with respect to property, prior to March 24, 1939, from a predecessor bishop, minister or other ecclesiastical officer who has resigned or died, or has been transferred or removed, to his duly elected or appointed successor, by the laws, rules or ecclesiastic polity of any such church, or religious sect, society or denomination, either by written instruments or solely by virtue of the election or appointment of such successor, are also hereby ratified and declared valid.

This section shall not affect vested rights, or repeal any of the provisions of §§ 61-1 to 61-4, or of §§ 36-21 to 36-23. (1939, c. 177.)

§ 61-6. House on vacant land vests title.—All houses and edifices erected for public religious worship on vacant lands, or on lands of the state not for other purposes intended or appropriated, together with two acres adjoining the same, shall hereafter be held and kept sacred for divine worship, to and for the use of the society by which the same was originally established. (Rev., s. 2674; Code, s. 5666; R. C., c. 97, s. 2; 1778, c. 132, s. 6; C. S. 3572.)


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62-4. Present utilities commissioner appointed to new commission; chairman.
62-5. Clerical assistance.
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62-45. To require construction of sidetracks.
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62-47. May authorize operation of fast mail trains; discontinuance of passenger service.
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62-50. To regulate crossings and to abolish grade crossings.
62-51. To require installation and maintenance of automatic signals at railroad intersections, etc.
62-52. To require railroads to enter towns and maintain depots in certain cases.
62-53. To consent to abandonment or relocation of depots.
62-54. To regulate crossings of telephone, telegraph and electric power lines.
62-55. To regulate delivery of freight, express, and baggage.
62-56. To prevent discriminations.
62-57. To fix a standard for gas.
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CHAPTER 62. UTILITIES COMMISSION

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Art. 1. Organization of the Commission.

§ 62-1. Number and appointment of commissioners; terms.—The North Carolina utilities commission shall consist of three commissioners, who shall be appointed by the governor, by and with the consent of the senate. The term of office of each commissioner shall be six years, provided that the first three commissioners shall be appointed one for a term of six years, one for a term of four years, and one for a term of two years, and their successors shall be appointed for a term of six years. (1941, c. 97, s. 2.)

§ 62-2. Salaries of commissioners.—The salary of the commissioners shall be as follows: chairman, six thousand and six hundred dollars ($6,600.00) per annum; commissioners, six thousand dollars ($6,000.00) each per annum; and the term of office for each commissioner shall begin on the first day of February, beginning with one thousand nine hundred and forty-one, provided, however, that the two commissioners to be named to new commission; chairman.—The president by the utilities commission and subject to the performance of the duties and functions of said commission, to hold such office during his term. The utilities commission shall be allowed such stenographic and other clerical assistance as it may require on any document, such seal so adopted by the courts therein will take judicial notice. Staton v. Atlantic Coast Line R. Co., 144 N. C. 135, 56 S. E. 794.

§ 62-5. Clerical assistance.—The utilities commission shall be allowed such stenographic and other clerical assistance as it may require for the performance of the duties and functions of the said office, to be established and fixed by such department, bureau, or other state agency as may be charged by law with the duty of determining the extent of such assistance in said departments; all such stenographers, clergers, and assistants and special investigators so provided for to be appointed by the utilities commission and subject to removal or discharge by it. The salaries and compensation of such clerical assistants, special investigators, or other office force as may be allowed in the office of the utilities commission shall be fixed in the manner as now provided by law for fixing and regulating the salaries and compensation by other state departments. (1933, c. 134, s. 14; 1941, c. 97.)

Cross Reference.—As to determination of extent of assistance and regulation of salaries of stenographers, see § 143-26 and § 143-37.

§ 62-6. To report annually to governor.—It shall be the duty of the commission to make to the governor annual reports of its transactions, and recommend from time to time such legislation as it may deem advisable under the provisions of this chapter, and the governor shall have one thousand copies of such report printed for distribution. (Rev., s. 1117; 1899, c. 164, s. 27; 1911, c. 211, s. 9, 1913, c. 10, s. 1; 1933, c. 134, s. 8; 1941, c. 97; C. S. 1065.)


§ 62-7. To keep record of receipts and disbursements.—The commission shall keep a record showing in detail all receipts and disbursements. (Rev., s. 1115; 1899, c. 164, s. 34; 1933, c. 134, s. 8; 1941, c. 97; C. S. 1063.)

§ 62-8. To pay fees and money into treasury.—All license fees and seal tax and all other fees paid into the office of the utilities commission shall be turned into the state treasury; also all moneys received from fines and penalties. (Rev., s. 1114, 1899, c. 164, ss. 26, 33; 1941, c. 97; C. S. 1064.)

§ 62-9. Adoption and use of seal; certificate.—The North Carolina Utilities Commission shall adopt a seal; and in all cases where a seal is required on any document, such seal so adopted by the utilities commission shall be sufficient; and whenever any record, paper, or document is required to be certified or evidenced by the certificate of the utilities commission or its chief clerk or wherever any act or thing is required or permitted to be evidenced by such certificate, the certificate shall be made by the utilities commission. (1933, c. 134, s. 15; 1941, c. 97, s. 7.)

§ 62-10. Public record of proceedings; chief clerk.—The utilities commission shall keep in its office at all times a record of its official acts, rulings, and transactions, which shall be public records of the state of North Carolina, and all rulings and determinations of said commission upon matters and things authorized to be passed upon by this chapter, and shall have and appoint a chief clerk, who shall be experienced in railroad and other public utilities statistics, transportation and public-service charges, and whose term of office shall be for a period of two years, and he shall file with the secretary of state the oath of office similar to that prescribed for the utilities commission. The utilities commission shall have power to remove such clerk for cause at any time. (1933, c. 134, s. 13; 1941, c. 97.)

Art. 2. Procedure before the Commission.

§ 62-11. Commission constituted court of record.—For the purpose of making investigations and conducting hearings, the utilities commission is hereby constituted a court of record and shall have all the powers and jurisdiction of a court of general jurisdiction as to all subjects embraced within this chapter. The commissioners and their clerks shall have full power to administer oaths, hear and take evidence, and said commission or commissioners shall render their decisions upon
questions of law and of fact as other courts of similar jurisdiction. (1933, c. 134, s. 9; 1941, c. 97.)


§ 62-12. Rules of practice.—The North Carolina utilities commission hereby created shall formulate and promulgate rules of practice, including rules for hearings by one or more members of the commission, provided that as to any hearing before less than a majority of the commission, the rules shall provide for a proposed report, exceptions to said report, and a final hearing before a majority of the commission upon the record, including the exceptions. (1941, c. 97, s. 6; 1943, c. 788, s. 1.)

Editor's Note.—The 1943 amendment omitted provisions relating to hearings before employees of the commission.

§ 62-13. Witnesses; production of papers; contempt. — The utilities commission shall have the same power to compel the attendance of witnesses, require the examination of persons and parties, and compel the production of books and papers, as is provided for contempt, as by law is conferred upon the superior courts. (Rev., s. 1067; 1899, c. 164, ss. 1, 9, 10; 1933, c. 134, s. 8; 1941, c. 97; C. S. 1906.)

Cross References.—As to attendance of witnesses, see § 8-59 to § 8-64. As to contempt, see §§ 5-1 et seq.

§ 62-14. Refusal of witness to testify.—If any person duly summoned to appear and testify before the utilities commission shall fail or refuse to testify without lawful excuse, or shall refuse to answer any proper question propounded to him by said commission in the discharge of its duty, or shall conduct himself in a rude, disrespectful or disorderly manner before said commission deliberating in the discharge of its duty, such person shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not less than fifty nor more than one thousand dollars. (Rev., s. 2691; 1899, c. 164, s. 10; 1933, c. 134, s. 8; 1941, c. 97; C. S. 1091.)

§ 62-15. Rules of evidence.—In all cases under the provisions of this chapter the rules of evidence shall be the same as in civil actions, except as provided by this chapter. (Rev., s. 1069; 1899, c. 164, s. 96; C. S. 1089.)

Cross References.—As to rules of evidence generally, see §§ 8-1 et seq.

Rule Same as in Civil Actions.—The section provides that the rules of evidence shall be the same as in civil actions. The question presented is whether the provisions of the section, as alleged as the basis for the relief sought, unless the respondent admits them or fails to answer. In case of failure to answer, the Commission will take such proof of the charge as may be deemed reasonable and proper, and make such order thereon as the circumstances of the case appear to require. Subpoenas will issue requiring the attendance of witnesses or the production of books, papers, documents, etc., relating to any matter pending before the Commission. And depositions may be taken in any cause at issue, 2 N. C. Law Rev. 74.

§ 62-16. Subpoenas; issuance; service. — All subpoenas for witnesses to appear before the commission, and notice to persons or corporations, shall be issued by the commission or its clerk and be directed to any sheriff, constable or to the marshal of any city or town, who shall execute the same and make due return thereof as directed therein, under the penalties prescribed by law for a failure to execute and return the process of any court. (Rev., s. 1070; 1899, c. 164, s. 10; 1933, c. 134, s. 8; 1941, c. 97; C. S. 1094.)

Cross Reference.—As to penalty upon sheriff for failing to execute and return process, see § 162-14.

§ 62-17. Service of orders.—The clerk of the commission may serve any notice issued by it, and his return thereof shall be evidence of said service; and it shall be the duty of the sheriffs and other officers to serve any process, subpoenas and notices issued by the commission, and they shall be entitled therefor to the same fees as are prescribed by law for serving similar papers issuing from the superior court. (Rev., s. 1071; 1899, c. 164, s. 9; 1933, c. 134, s. 8; 1941, c. 97; C. S. 1093.)

Cross Reference.—As to sheriffs fees, see § 162-6.

§ 62-18. Undertakings.—All bonds or undertakings required to be given by any of the provisions of this chapter shall be payable to the state of North Carolina, and may be sued on as are other undertakings which are payable to the state. (Rev., s. 1072; 1899, c. 164, s. 7; C. S. 1096.)

§ 62-19. Judgments of commission.—The Utilities Commission shall hear and determine such matter, thing, or controversy in dispute, pass upon and determine the issues of law involved therein, and make and promulgate their findings and conclusions thereon as the judgment of the said utilities commission. From the decision of said utilities commission any party to said proceeding may appeal to the superior court at term as designated in and under the rules of procedure required by §§ 62-20 to 62-25, said appeal to be prosecuted and the said matter and controversy thereon to be heard and disposed of as is now provided by law, and upon such appeal being taken, it shall be the duty of the utilities commission to certify its decision and rulings to the said superior court as now provided by law. (1933, c. 134, s. 12; 1941, c. 97.)


§ 62-20. Right of appeal; how taken.—From all decisions or determinations made by the utilities commission, any party affected thereby shall be entitled to an appeal. Before such party shall be allowed to appeal, he shall, within ten days after notice of such decision or determination, file with the commission exceptions to the decision or determination of the commission, which exceptions shall state the grounds of objection to such decision or determination. If any one of such exceptions shall be overruled, then such party may appeal from the order overruling the exceptions, and shall, within ten days after the decision overruling the exception, give notice of his appeal. When an exception is made and the case as found by the commission, the appeal shall be to the superior court in term time; otherwise to the judge of the superior court at chambers. The party appealing shall, within ten days after the notice of appeal has been served, file with the commission exceptions to the decision or determination overruling the exception, which statement shall assign the errors complained of and the
grounds of the appeal. Upon the filing of such statement the commission shall, within ten days, transmit all the papers and evidence considered by it, together with the assignment of errors filed by the appellant, to a judge of the superior court holding court at some place in the district in which such company operates or the party resides. If there be no exceptions to any facts as found by the commission, it shall be heard by the judge at chambers at some place in the district, of which all parties shall have ten days notice. (Rev., s. 1074; 1899, c. 161, ss. 7, 28; 1903, c. 126; 1907, c. 469, s. 6; 1913, c. 127, s. 4; 1933, c. 134, s. 8; 1941, c. 97; C. S. 1097.)

Right Confined to Parties.—The section distinctly confines the right of appeal to a party to the proceeding. North Carolina Corp. Comm. v. Winston-Salem, etc., R. Co., 170 N. C. 550, 87 S. E. 783.

Appeal Limited to Party.—The right of appeal, conferred by this section, is limited to a party to the proceedings. For purposes of appeal, those who have no property or interest in the proceeding or who are not parties by law are not thereby made parties. A party may appeal from any decision of any administrative agency within the state when the order is adverse to it or the interest it represents, when the order is made by an administrative agency of the state, and from the final decision of such agency, unless the decision is final in its nature. N. GC. 560, 87 S. E. 785.

From all decisions or determinations made by the Corporation [now Utilities] Commission any party affected thereby is entitled to appeal, and from a decision of the corporation any party affected thereby is entitled to appeal. C. S. 1097. Sections 619. For purposes of appeal, those who have no property or interest in the proceeding are not such parties. An appeal by those who have no property or interest, if not properly taken, will be dismissed by the court, for the reason that said persons who are not parties to the proceeding will be entitled to an appeal, must necessarily mean persons who are not parties to the proceeding.

WHO ARE NOT PARTIES.—Citizens seeking to have a railroad company, etc., order set aside, for the reason that said order is adverse to it or the interest it represents, when the order is made by a railroad company from an order of the Commission is removable from the superior court of the state to an inferior federal tribunal, upon the ground of diverse citizenship. North Carolina Corp. Comm. v. Southern R. Coz 197 N. C. 193, 195 S. E. 19, citing S. v. R. R., 161 N. C. 270, 76 S. E. 554.

Right Confined to Parties.—The section distinctly confines the right of appeal to a party to the proceeding. North Carolina Corp. Comm. v. Winston-Salem, etc., R. Co., 170 N. C. 550, 87 S. E. 783.


Notice.—When notice of appeal to the superior court is given to the Commission by a railroad company, and other requirements of the section relating thereto have been met by the company, it is sufficient without giving notice of the appeal to the complaining party in the proceedings had before the Commission, as upon this appeal the statute makes the Commission the party plaintiff. North Carolina Corp. Comm. v. Southern Ry. Co., 170 N. C. 550, 87 S. E. 785.

Same.—Mandatory.—The statutory notice of an appeal by a railroad company from an order of the Commission is mandatory and cannot be extended by the consent of the parties of record. State v. Southern R. Co., 185 N. C. 435, 177 S. E. 563.

Same.—De Novo.—And there the trial will be de novo, and from thence only will a further appeal lie to the Supreme Court, governed by the rule that it must not be fragmentary, but shall be upon the record made within a reasonable time at its own instance. State v. Cannon Mfg. Co., 185 N. C. 17, 116 S. E. 178.

Jurisdiction of Superior Court.—Disability.—The jurisdiction of the superior court with respect to the trial of law and fact on appeal under this section is derivative and not original, and therefore if the Commission was without jurisdiction of the proceeding in which the order was made, from which the appeal was taken, because of the absence of a necessary party, or upon any other ground, the superior Court is likewise without jurisdiction, and the proceeding pending therein, shall be dismissed by the superior court. State v. Southern Ry. Co., 196 N. C. 190, 191, 145 S. E. 19. Hearing on Appeal.—Upon appeal by a party to a proceeding before the Corporation Commission from an order made therein under §§ 62-42 and 62-43, the Superior Court has jurisdiction to try and determine both issues of law and issues of fact, duly presented by assignment of errors. Upon the filing of such exceptions daily taken by the appellant during the hearing before the Commission. The trial of such issues by the Superior Court is de novo. State v. Southern Ry. Co., 196 N. C. 190, 191, 145 S. E. 19, citing S. v. R. R., 161 N. C. 270, 76 S. E. 554.

This and the next following section do not contain any provision that the findings of fact by the utilities commission shall be conclusive on appeal. State v. Willis Barber, etc., State v. Burns, 219 N. C. 13, 15, 161 S. E. 721.


Same.—Diverse Citizenship.—Assuming that the mere fact that an order of the Commission made to compel the carrier to increase the fares charged for passengers by a street railway company, etc., for the purpose of increasing the public revenue, because of the increased cost of operation, to promote the convenience, security and accommodation of the public would be an invasion of interstate commerce, it does not transform the proceedings in issue out of a suit raised by the exceptions, and, as such, removable from the superior court of the state to an inferior federal tribunal, upon the ground of diverse citizenship. North Carolina Corp. Comm. v. Southern R. Co., 170 N. C. 560, 87 S. E. 785.

Removal to Federal Courts.—In proceedings for the removal of a cause from the state to the federal courts upon the question of diversity of citizenship under the federal jurisdiction applicable, the state court is not bound to surrender its orders and decrees by final process issuing directly therefrom, and for such purpose resort must be had to ordinary courts, either by independent proceedings or by process issued in cases carried before such courts on appeal. State v. Southern R. Co., 147 N. C. 483, 61 S. E. 271.

Removal of Franchise Restriction as to Carriage of Passengers.—This section authorizes a petitioner to appeal from the order of the utilities commission on its petition for the removal from its franchise of a restriction in regard to the carriage of passengers, and the contention that no appeal lies from the decision, because the right of appeal is governed by the motor carrier laws authorizing an appeal from an order affecting franchise only when entered for violation of law, is untenable. State v. Carolina Scenic Coach Co., 216 N. C. 225, 4 S. E. (2d) 897.

Petitioner has the right to appeal to the superior court from the denial of its petition for the removal from its franchise of a restriction prohibiting it from transporting passengers between two cities along its route in purely local traffic between the said cities. State v. Carolina Scenic Coach Co., 216 N. C. 225, 4 S. E. (2d) 897.


Same.—Mandatory.—The statutory notice of an appeal by a railroad company from an order of the Commission is mandatory and cannot be extended by the consent of the parties of record. State v. Southern R. Co., 185 N. C. 435, 177 S. E. 563.

To Superior Court.—Appeal from the Commission must be to the superior court. Pate v. Wilmington, etc., R. Co., 137 N. C. 269, 72 S. E. 334.

Same.—De Novo.—And there the trial will be de novo, and from thence only will a further appeal lie to the Supreme Court, governed by the rule that it must not be fragmentary, but shall be upon the record made within a reasonable time at its own instance. State v. Cannon Mfg. Co., 185 N. C. 17, 116 S. E. 178.

Jurisdiction of Superior Court.—Disability.—The jurisdiction of the superior court with respect to the trial of law and fact on appeal under this section is derivative and not original, and therefore if the Commission was without jurisdiction of the proceeding in which the order was
the same rules and regulations as are prescribed for the trial of other civil causes, except that the rates fixed or the decision or determination made by the commission shall be prima facie just and reasonable. (Rev., s. 1075; 1899, c. 164, s. 7; 1933, c. 134, s. 8; 1941, c. 97; C. S. 1098.)

**Preliminary.**—The provision of this section that the decision of the utilities commissioner shall be deemed final and conclusive upon the evidence, and that the right of appeal is confined to the superior court, and the right to appeal is of course confined to the party to the proceeding. North Carolina Corp. v. United States, 161 N. C. 270, 76 S. E. 554.

**Issues of Fact.**—While on appeal from the denial of a petition to remove certain restrictions from petitioner's franchise, the point at issue is the reasonableness of the commissioner's order which is a question of law, nevertheless the reasonableness of the order depends upon the attendant facts, and exceptions to the commissioner's findings as to which his order is predicated, raise issues of fact for the determination of the jury. State v. Carolina Scenic Coach Co., 213 N. C. 233, 10 S. E. (2d) 824.

Petitioner filed petition requesting the removal from its franchise of a restriction prohibiting it from transporting passengers between two cities along its route in purely local traffic between the cities. The utilities commissioner denied the petition upon his findings, among others, that the present service between the two cities furnished by another carrier is ample, that there was no necessity for permitting petitioner to furnish service between the two cities and that the removal of the restriction was not demanded by the public interest. Held: The exceptions raise issues of fact, and exceptions to the commissioner's findings upon the party appealing from the decision, but even if this section should be construed to raise a presumption of fact, an instruction that the findings and decision of the utilities commissioner shall be deemed prima facie just and reasonable gives the appellee the benefit of a presumption of fact when the evidence plainly indicates that the right of appeal is confined to the superior court by appeal. State v. Southern R. Co., 170 N. C. 560, 561, 87 S. E. 785.

**Right Confined to State and Corporation.**—The section plainly indicates that the right of appeal is confined to the state and the corporation whose legal rights are affected by the commissioner's order. North Carolina Corp. v. Winston-Salem, etc., R. Co., 170 N. C. 560, 561, 87 S. E. 785.

**Direct Appeal Does Not Lie.**—An appeal will not lie directly from the Commission to the Supreme Court. North Carolina Corp. v. Winston-Salem, etc., R. Co., 170 N. C. 560, 561, 87 S. E. 785.

**Judgment of superior court not vacated by appeal.**—Any freight or passenger rates fixed by the commission, when approved or confirmed by the judgment of the superior court, shall be and remain the established rates, and shall be so observed and regarded by an appealing corporation until the same shall be changed, revised or modified by the final judgment of the supreme court, if there shall be an appeal therefrom, and until changed by the utilities commission. (Rev., s. 1079; 1899, c. 164, s. 7; 1933, c. 134, s. 8; 1941, c. 97; C. S. 1101.)

**Irrelevant Evidence.**—In a case wherein a union passenger depot had been ordered by the Commission it was reversible error in the superior court, on appeal from the Commission, for the trial judge to admit evidence as to the effect the relocation would have on property values in a near-by town, where the present station of one of the roads is located. State v. Seaboard Air Line, etc., R. Co., 161 N. C. 270, 75 S. E. 554.

**Appeal Heard at Chambers by Consent.**—By consent of all parties the appeal may be heard and determined at chambers before any judge of a district through or into which the railroad may extend, or any judge holding court therein, or in which the person or company does business. (Rev., s. 1076; 1899, c. 164, s. 7; C. S. 1099.)

**Cross Reference.**—As to appeal generally, see §§ 1-263 et seq.
corporation affected thereby fails to put said order in operation, the utilities commission may apply to the judge riding the superior court district which embraces Wake County, or to the resident judge of said district sitting at chambers, upon ten days notice, for a peremptory mandamus upon said corporation for the putting in force of said judgment or order; and if said judge shall find that the order of said commission was valid and within the scope of its powers, he shall issue such peremptory mandamus. An appeal shall lie to the supreme court in behalf of the utilities commission, or the defendant corporation, from the refusal or granting of such peremptory mandamus. (Rev. c. 1911, c. 97; C. S. 1103.)

Mandamus to Enforce Final Order.—Where the commission has ordered two railroad companies to erect a union depot at a junction after a hearing upon the petition of the citizens of the town, and the railroads have lost or waived their statutory right to appeal, such order is regarded as a final judgment, to enforce them or to compel the execution of the final order upon failure of the railroads except and appeal therefrom is the remedy authorized by the section. State v. Southern R. Co., 185 N. C. 435, 117 S. E. 271.

Independent Proceedings for Mandamus.—Under this section an appeal may be had by independent proceedings for mandamus to enforce a valid order from which no appeal has been taken. State v. Southern R. Co., 147 N. C. 483, 488, 61 S. E. 271.

Orders of Commission Are Not Judgments.—The commission makes such order as the circumstances of the case justify, but these orders are not judgments of a court. The commission cannot issue execution to enforce them, they simply serve as the basis for judicial action in the superior court to enforce them or to punish their violation. North Carolina Corp. Comm. v. Winston-Salem, etc., R. Co., 170 N. C. 785, 184 S. E. 393, 32 Am. St. Rep. 805; in Corporation Comm. v. Sea-board Air Line Railroad, 127 N. C. 283, 57 S. E. 266, and cases there cited. Among the federal decisions, this was asserted in Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77, and has been reiterated in numerous cases. See Rose's Notes, pp. 21-55. And in New York is stated in People v. Budd, 117 N. Y. 1, 5 L. R. A. 566, 51 Am. St. Rep. 460. See Corporation Comm. v. Railroad, 137 N. C. 1, 14, 49 S. E. 191.


Does Not Interfere with Interstate Commerce.—The Railroad Commission, as established by the Constitution and laws of this State and having been created solely in the public interest, and being concerned solely in domestic affairs and trade, did not interfere with interstate commerce. Caldwell v. Wilson, 121 N. C. 425, 28 S. E. 554.

Cited in Russ v. Western Union Tel. Co., 222 N. C. 504, 21 S. E. (2d) 681.

§ 62-28. To make and enforce rules for public-service corporations. The utilities commission has power to make any necessary and proper rules, orders and regulations for the safety, comfort and convenience of passengers, shippers or patrons of any public-service corporation, and to require the observance of and to enforce the same by the company and its employees, such power being the same as that provided in this chapter in respect to railroads and other transportation companies. (1907, c. 469, s. 1a; 1913, c. 127, s. 2; 1933, c. 134, s. 8; 1941, c. 97; C. S. 1037.)

Cross Reference.—As to duty of the utilities commission to enforce rules against companies, see § 60-608.

Legislative Intent.—There was no intention to give a schedule of the thousands of appliances used in handling the business of common carriers, nor to enumerate the countless powers between them and their patrons, which such Commission should supervise. The clearly declared purpose was to put the control and supervision of the whole matter in the hands of an impartial commission. Legislative History.—The power to make rules and regulations for the protection of the rights of appeal by either party, the shipper or the carrier, to the courts, including such dealing to the unrestricted will be by one party—the carrier. Corporation Comm. Atlantic Coast Line R. Co., 139 N. C. 126, 132, s. E. 793.

Power to Make Orders and Regulations.—The Commission is given power to make orders and regulations for the public utilities corporation. Tilley v. Norfolk, etc., R. Co., 162 N. C. 37, 77 S. E. 994.

§ 62-29. Express and implied powers.—The utilities commission shall have, exercise, and perform all the functions, powers, and duties, and have all the regulations, powers, and duties, and to perform all the functions, powers, and duties of the utilities commission, as may be necessary or incident to the proper discharge of the duties of this office. (1933, c. 134, s. 6; 1941, c. 97.)
§ 62-30. Supervisory powers.—Under the rules and regulations herein prescribed and subject to the limitations hereinafter set forth, the said utilities commission shall have general supervision over the rates charged and the service given, as follows, to wit:

(1) By railroads, street railways, steamboats, canals, express and sleeping-car companies, and all persons, firms or corporations engaged in the carrying of freight or passengers or otherwise engaged as common carriers;

(2) By telephone and telegraph companies and all other companies engaged in the transmission of messages, and by all firms and individuals owning or operating telephone or telegraph lines in the state;

(3) By electric light, power, and water companies, pipe lines originating in North Carolina for the transportation of petroleum products, and corporations, other than as such as are municipally owned or conducted, and all other companies, corporations, or individuals engaged in furnishing electricity, electric light current, power, or in transmitting or selling the same or producing the same from the water courses of this state: Provided, that the exemption given to municipally owned or conducted electric light, power, and water companies from supervision by the utilities commission shall not apply to municipally owned electric light or power systems which are leased to, and operated by private individuals, firms, or corporations.

(4) By all water power and hydroelectric companies or corporations now doing business in this state or which may hereafter engage in doing business in this state, whether organized under the laws of this state or under the laws of any other state or country, and such companies and corporations are deemed to be public-service companies and subject to the laws of this state regulating the same;

(5) By flume companies, corporations, other than municipal corporations, or individuals owning or operating public sewerage systems in the state of North Carolina;

And the said utilities commissioner is hereby vested under this section with all power necessary to require and compel any public utility or public-service corporation of the kinds herein designated or any other class of public utility to provide and furnish to the citizens of this state reasonable service of the kind it undertakes to furnish and fix and regulate the rates of service and charges to be made to the citizens of the state who may be entitled to use the same under such rules and regulations as may be lawfully prescribed.

The power of control and supervision vested in the commission under this section with respect to the various classes of public service corporations and individuals engaged in furnishing the public utilities mentioned shall be the same as that vested in it in respect to railroads and other transportation companies (1913, c. 127, s. 7; 1933, c. 134, s. 3; 1937, c. 108, s. 2; 1941, cc. 59, 97; C. S. 1112(b.).)

Cross References.—As to municipal control of public utilities, see §§ 160-262 to 160-285. As to report from municipality operating own utilities, see § 62-99.

Editor's Note.—The 1937 amendment inserted the reference to pipe lines in subsection (3). The 1941 amendment added the proviso at the end of subsection (3).

This section supersedes the very similar § 62-30 of the Consolidated Statutes. The following cases, which were decided under that section, are given as an aid in construing the present law, but should be considered in the light of the former law.

General Considerations — Right of State to Regulate. — The right of the state to regulate the rates for public service corporations, and over business enterprises in which the owners, corporate or individual, have devoted their property to a public use, and to enforce these regulations by appropriate penalties, is now and for all time will be established to require or permit discussion. Efland v. Southern R. Co., 146 N. C. 135, 138, 59 S. E. 355, citing Harrill v. Southern R. Co., 144 N. C. 532, 57 S. E. 383; Stone & Co. v. Southern R. Co., 144 N. C. 230, 57 S. E. 912; Walker v. Railroad, 137 N. C. 168, 168, S. E. 473; McGowan v. Wilmington, etc., Railroad, 95 N. C. 417; Branch v. Wilmington, etc., Railroad, 140 N. C. 539, 54 L. Ed. 175; Missouri Pac. R. Co. v. Humes, 115 U. S. 513, 515, 6 S. Ct. 218, 240, 52 S. E. 941; Corporation Comm. v. Railroad, 137 N. C. 126, 44 L. Ed. 192, Chief Justice Fuller, quotes with approval from the decision in Orient Ins. Co. v. Dagg, 172 U. S. 557, 563, 19 L. Ed. 552: "The state in exercising the power to distinguish, select, and classify objects of legislation necessarily has a wide range of discretion; it was sufficient to satisfy the demands of the constitution if the classifications were practical and not palpably arbitrary.

Same—Classification Must Not Be Arbitrary.—An attempt to intrust or domesticate matters, the general assembly has the right to establish regulations for public service corporations and for business enterprises in which the owners have devoted their property to public use, and to apply these regulations to certain classes of occupations, in imposing these requirements equally on all members of a given class, the limitation of this right of classification being that the same must be on some rational ground that bears a just and proper relation to the attempted classification and is not a mere arbitrary selection. Efland v. Southern R. Co., 146 N. C. 135, 59 S. E. 355.

Same—Not a Federal Question.—Whether a regulation of a state railroad commission otherwise legal is arbitrary and beyond the power of the commission beyond the powers delegated to the commission is not a federal question. Atlantic Coast Line R. Co. v. North Carolina Corp. Comm., 206 U. S. 1, 17 S. Ct. 585, 51 L. Ed. 933.

Same—Legislature May Regulate Directly or Indirectly.—Railroad companies from the public nature of the business by them carried on, and the interest which the public has in their operation, are subject as to their state business to state regulation, which may be exerted either directly by the legislative authority or by administrative bodies endowed with power to that end. Atlantic Coast Line R. Co. v. North Carolina Corp. Comm., 206 U. S. 1, 17 S. Ct. 585, 51 L. Ed. 933.

Same—Rate Fixing Power May Be Delegated.—The general assembly has the power to establish a commission to supervise and regulate the rates of common carriers. Corporation Comm. v. Seaboard Air Line Railroad, 140 N. C. 239, 240, 52 S. E. 941; Corporation Comm. v. Railroad, 137 N. C. 114, et seq., 49 S. E. 191; Corporation Comm. v. Seaboard Air Line System, (Rate Case), 127 N. C. 283, 51 L. Ed. 952: "The state in exercising the power to distinguish, select, and classify objects of legislation necessarily has a wide range of discretion; it was sufficient to satisfy the demands of the constitution if the classifications were practical and not palpably arbitrary.

Same—Classification Must Not Be Arbitrary.—As to issuing regulations, the power of the state is not a federal question. Atlantic Coast Line R. Co., ("Track Scales case"), 139 N. C. 126, 51 L. Ed. 952.

Same—When State May Regulate Interstate Commerce. —The power of Congress over commerce between the states is, as a general rule, exclusive, and its inaction is equivalent to a declaration that it shall be free from any restraint which it has the right to impose, except by such states as are passed by the states for the purpose of facilitating the free transmission of goods and carriage of passengers, and are not in conflict with any valid federal law. William & Maryland Const. Lim. 595; Mobile v. Kimball, 102 U. S. 691, 697, 26 L. Ed. 238; Wilson v. McNamara, 102 U. S. 572, 26 L. Ed. 234; Wilson v. Blackbird Creek Marsh Co., 2 Peters, 245, 7 L. Ed. 167; Mo. State Found. v. Illinois, 195 U. S. 330, 49 S. E. 543;||||
§ 62-31. Commission to keep itself informed as to utilities.—The said utilities commission shall at all times be able, and shall keep itself informed as to the public-service corporations heretibfore specified and enumerated, their rates and charges for service, and the service supplied to the citizens of the state and purposes therefor; and it shall at all times be empowered and required to inquire into such service and rates charged therefor, and to fix and determine as herein provided the reasonableness thereof, and upon petition or otherwise to make full inquiry into such rates and charges in behalf of the citizens of the state, and compel and require compliance with the regulations and charges, and final determination fixed therefor under the provisions of this article, and not to sustain any of these regulations otherwise than the public-service corporation, or any other corporation here- in designated, shall be allowed to increase its rate and charge for service, or change its classification in any manner whatsoever except upon petition duly filed with the utilities commission and inquiry held thereon and final determination of the reasonableness and the necessity of any such increase or change in classification or service; Provided, however, that nothing herein shall be construed to prevent any public-service corporation under the jurisdiction of the commission from reducing its rates, either directly or by change in classification. (1933, c. 134, s. 16; 1937, c. 165; 1939, c. 365, ss. 1, 2; 1941, c. 97.)

Editor's Note.—The 1939 amendment changed the latter part of this section and repealed the 1937 amendment which had added a provision as to approval of rate increases in certain cases without a hearing. For a discussion of 1937 amendment, see 15 N. C. Law Rev. 205. For comment on the 1939 amendment, see 17 N. C. L. Rev. 374.

§ 62-32. To investigate companies and businesses under its control.—The commission shall from time to time visit the places of business, and investigate the books and papers of all corporations, firms or individuals engaged in the transportation of freight or passengers, the transmission of messages or in the furnishing of other public utilities, the supervision and control of which is vested in the utilities commission to ascertain if all the orders, rules and regulations of the utilities commission have been complied with, and shall have full power and authority to examine all officers, agents and employees of such corporations, firms or individuals, firms and other persons, under oath or otherwise, and to compel the production of papers and the attendance of witnesses to obtain the information necessary for carrying into effect and otherwise enforcing the provisions of this chapter. (Rev., s. 1064; 1913, c. 127, ss. 1, 2, 7; 1917, c. 194; 1899, c. 164, s. 1; 1933, c. 134, s. 8; 1941, c. 97; C. S. 1060.)

§ 62-33. System of accounts.—The utilities commission may establish a system of accounts to be kept by the public utilities, under its jurisdiction, or may classify said public utilities and establish a system of accounts as between certain localities; and where the power to regulate is so arbitrarily exercised as to infringe the rights of the owner or lessee of railroad property, Southern R. Co. v. North Carolina Corp. Comm., 211 N. C. 109, 163 S. E. 694.

Where certain carriers by truck sought injunctive relief against railroad carriers for reduction in rates as to certain commodities, and as between certain localities, it was held that they had no legal right to have their contracts protected against lawful competition from railroad carriers, who could, under this section, reduce rates at will. Trujillo Motor Service Atlantic Coast Line R. Co., 210 N. C. 35, 183 S. E. 479, 104 A. L. R. 1165.

§ 62-34. Reports.—The utilities commission shall at least once every twelve months require any public utility to file annual reports in such form and of such content as the commission may require and special reports concerning any matter about which the commission is authorized to inquire or to keep itself informed, or which is authorized to enforce. All reports shall be under oath when required by the commission. (1931, c. 455; 1933, c. 134, s. 8; 1941, c. 97.)
§ 62-33. Investigations. — The utilities commission may, on its own motion and whenever it may be necessary in the performance of its duties, investigate and examine the condition and management of public utilities or any particular utility. In conducting such investigation the commission may proceed either with or without a hearing as it may deem best, but shall make no order without affording the parties affected thereby a hearing. If after such an investigation, or investigation and hearing, the commission, in its discretion, is of the opinion that the public interest shall be more greatly conserved by an appraisal of any properties in question, the investigation of any particular construction, the audit of any accounts or books, the investigation of any contracts, or the practices, contracts or other relations between the utility in question and any holding or finance agency with which such public utility may be affiliated, it shall be the duty of the commission to report its findings and recommendation to the governor and council of state with request for an allotment from the emergency and continuity fund to defray such expense which may be granted as provided by law for expenditures from such fund or may be denied. (1931, c. 455; 1933, c. 134, s. 8; 1941, c. 97.)

§ 62-36. To fix rates for public utilities in cities. — The utilities commission shall have full power and authority to fix and establish any and all rates which any public-service or quasi public-service corporation other than railroads using steam as motive power shall charge or exact from any person, firm or corporation in any city for the services rendered or commodity furnished. (1917, c. 136, sub-ch. 3, s. 1; 1933, c. 134, s. 8; 1941, c. 97; C. S. 2783.)

City's Charter Subject to State Powers. — The power conferred by its charter upon the city of Henderson "to provide water and lights and to contract for same, provide for cleaning and repairing the streets, regulate the market, take proper means to prevent and extinguish fires," is subject to the following rules, with the exception of the power charged under such contracts as the city may make under its charter by a public-service corporation. Corporation Comm. v. Henderson Water Co., 190 N. C. 70, 128 S. E. 465.

Contract Rate May Be Changed. — Although the rate to be charged is fixed by contract this may be changed by the Commission if it appears that the rate contracted for is too low, and the one fixed is just. The burden of proof is on the one alleging that the rate fixed by the Commission is unreasonable. Corporation Comm. v. Henderson Water Co., 196 N. C. 70, 128 S. E. 465.

Same—Rights of Party Relieved. — A public service corporation, having a contract with a city, applying to the commission for the increase of the rate contracted for with the city, and obtaining partial relief will not be granted an injunction by the Federal Court against the Commission on the grounds that the rate is confiscatory for such increase as is allowed. It is not inconsistent with the terms of the contract which has been received under the contract with the city had the Commission refused to act. Henderson Water Co. v. Corporation Comm., 186 U. S. 278, 46 S. Ct. 112, 70 L. Ed. 273.

§ 62-37. Manner of enforcing above regulations. — The North Carolina utilities commission shall have the power to require such improvements and extensions to the service of public-service corporations mentioned in § 62-36 as it may deem necessary after the investigation of any complaint of any person, corporation, or municipality as to the inadequacy of such service. Upon application being made, the utilities commission shall proceed to hear, pass on, and determine, in the manner prescribed by law, a just or reasonable rate or charge for the service or other commodity rendered or furnished; the hearing before the utilities commission shall be governed by the law as to the commission relating to the fixing of rates and rules and orders of the commission as to the enforcement thereof by the commission. The utilities commission shall have the same power and authority in hearing and passing on any matter or case under § 62-36, enforcing or fixing of rates, supervising and regulating said corporation or otherwise as they now have under the general law. The failure or refusal to conform to or obey any decision, rule, regulation, or order made in such cases by the utilities commission shall subject said public-utility corporation or quasi public-utility corporation refusing or failing to comply herewith to the penalties provided in this chapter. (1917, c. 136, sub-ch. 3, s. 2; 1933, c. 134, s. 8; 1941, c. 97; C. S. 2784.)

§ 62-38. Sections 62-36 and 62-37 not to affect existing power. — Nothing contained in §§ 62-36 and 62-37 shall be construed to deprive the utilities commission of the authority and power which it now has under the laws of North Carolina to supervise and regulate and fix the rates for public-utility corporations or quasi public-utility corporations or quasi public-service corporation other than railroads doing business in such city. (1917, c. 136, sub-ch. 3, s. 3; 1933, c. 134, s. 8; 1941, c. 97; C. S. 2785.)

§ 62-39. To require transportation and transmission companies to make a register. — The utilities commission has power to require all transportation and transmission companies to establish and maintain all such public-service facilities and conveniences as may be reasonable and just. It may require steamboat companies to provide such wharf and warehouse facilities as may be reasonable and just. (1907, c. 469, s. 2; Ex. Sess. 1913, c. 52, s. 1; 1933, c. 134, s. 8; 1941, c. 97; C. S. 1038.)

§ 62-40. To authorize lumber companies to transport commodities. — The utilities commission has power to authorize lumber companies, having logging roads, to transport all kinds of commodities other than their own and passengers, and to charge therefor reasonable rates to be approved by the commission. (1915, c. 160, s. 1; 1915, c. 6; 1933, c. 134, s. 8; 1941, c. 97; C. S. 1039.)

Establishing Joint Rate of Transportation. — A lumber company, chartered and organized for the purpose of transporting its own products, may be created a limited public carrier by the order of the Commission, under the provisions of this section. Corporation Comm. v. Atlantic Coast Line R. Co., 187 N. C. 424, 121 S. E. 767.

§ 62-41. To establish and regulate stations for freight and passengers. — The commission is empowered and directed to require, where the public necessity demands, and it is demonstrated that the revenue received will be sufficient to justify it, the establishment of stations by any company or corporation engaged in the transportation of freight and passengers in this state, and to require the erection of depot accommodations commensurate with such business and revenue, and to require the erection of accommodations for loading and unloading livestock and for feeding, sheltering and protecting the same in transportation. The commission shall not require any company or corporation to establish any station nearer to another station than five miles. (Rev. s. 1097; 1899, [ 647 ]
§ 62-42. To provide for union depots.—The commission is empowered and directed to require a change of any station or the repairing, addition to, or change of any station house by any railroad or other transportation company, in order to promote the security, convenience and accommodation of the public, and to require the raising or lowering of the track at any crossing when deemed necessary. (Rev. s. 1907; 1899, c. 164, s. 2, subsec. 13; 1933, c. 134, s. 8; 1941, c. 97; C. S. 1940.)

Cross Reference.—As to power of utilities commission to regulate the building of shelters at railroad division points, see § 63-54.

Power to Require and Regulate Depots.—The Commission can order new depots established wherever they are needed, Minneapolis, etc., R. Co. v. Southern Ry. Co., 139 N. C. 126, 131, 51 S. E. 793. The court or the jury, upon proper instructions, as the case may be, shall pass upon the reasonableness and necessity of an order of the Commission requiring track scales to be put in. Corporation Comm. v. Atlantic Coast R. Co., 139 N. C. 126, 131, 51 S. E. 793.

May Require Track Scales.—The Commission is empowered, under this section, to require "depot accommodations commensurate with such business and revenue," which satisfies the Commission in requiring "track scales" at points along the line. Corporation Comm. v. Atlantic Coast Line R. Co., 139 N. C. 126, 131, 51 S. E. 793.

The court or the jury, upon proper instructions, as the case may be, shall pass upon the reasonableness and necessity of an order of the Commission requiring track scales to be put in. Corporation Comm. v. Atlantic Coast R. Co., 139 N. C. 126, 131, 51 S. E. 793.

§ 62-42. To require change, repair, and additions to stations.—The commission is empowered and directed to require a change of any station or the repairing, addition to, or change of any station house by any railroad or other transportation company in order to promote the security, convenience and accommodation of the public, and to require the raising or lowering of the track at any crossing when deemed necessary. (Rev. s. 1907; 1899, c. 164, s. 2, subsec. 13; 1933, c. 134, s. 8; 1941, c. 97; C. S. 1940.)

Cross Reference.—As to power of railroads to condemn land for union station, see also, § 62-43.

Remedial in its Nature.—The statute in its principal purpose may be considered as remedial in its nature, and as such, as that feature which distinguishes it from a mere exercise of police power. State v. Atlantic Coast Line R. Co., 142 N. C. 392, 399, 55 S. E. 292.

When Union Stations May Be Required.—Under the section the Commission is empowered to direct the establishment of union stations under certain conditions, to wit: when practicable, and when the necessities of the case require two or more railroads entering a city or town to have one common union passenger depot for the security, accommodation, and convenience of the traveling public. State v. Seaboard Air Line, etc., R. Co., 161 N. C. 270, 274, 76 S. E. 354.

Whenever the remedy was intended to apply to all the towns and cities in the state where, in the legal discretion of the commissioners, the move is practicable, the convenience of the traveling public requires it, and the existing facilities, in the judgment of the commissioners, are inadequate. Dewey v. Atlantic Coast Line R. Co., 142 N. C. 392, 401, 55 S. E. 292.

Same.—Must Be Practicable.—Whenever the Commission requires and orders a union station to be built, the only restriction in the statute is when "practicable." The other matters as to the security, accommodation, and convenience of the public apply to the judgment of the commissioners. When there is an appeal from their order, the sole query for a jury, under the statute, is whether the execution of the order is "practicable." The remedy was intended to apply to all the towns and cities in the state where, in the legal discretion of the commissioners, the move is practicable; and the burden is upon the defendant to show evidence to the contrary. State v. Seaboard Air Line, etc., R. Co., 161 N. C. 270, 274, 76 S. E. 354.

Same.—With Business and Revenues.—When these conditions are found to exist, then the two railroads may be compelled to unite in the erecting, constructing, and maintaining such union passenger depot commensurate with the business and revenues of such railroad companies on such terms, regulations, provisions and conditions as the Commission shall prescribe. State v. Seaboard Air Line, etc., R. Co., 161 N. C. 270, 274, 76 S. E. 354.

New Union Station.—Under the provisions of this section and § 62-43, the commission has the power to require railroad companies to construct, or to alter, a new passenger station in a city or town of the State, to construct or equip a new passenger station in any city or town upon the finding that the present station is inadequate. State v. Southern Ry. Co., 196 N. C. 190, 145 S. E. 19.

Jurisdiction Original.—Exercised Upon Own Motion or Petition of Railroad Companies.—When the Commission with respect to the construction of passenger stations is original, and may be exercised either upon its own motion or upon petition of interested parties. State v. Southern Ry. Co., 196 N. C. 190, 145 S. E. 19.

Parties.—Under this section the commission is not without jurisdiction of a proceeding with respect to the erection, construction, and maintenance of a new union passenger station in any city or town, because one or more railroad companies entering such city or town are not made parties in the proceeding. The presence of two or more

Same—Lessor—Appeal.—Where three railroad companies use a union station in a city in connection with the operation of their railroads, two as owners, and the other as lessee of a fourth road, it is not jurisdictional before the Commission or the Superior Court on appeal under § 62-20 that in the proceedings before the Commission under this section and § 62-42 to compel them to build and maintain an additional sidetrack. The lessor railroad be a party, but it is not error for the trial Court to order that the lessor railroad be made a party and the cause proceed with therein. State v. Southern Ry. Co., 196 N. C. 190, 145 S. E. 19.

Transportation or the "Esch-Cummings" Act is prospective. —The commission is empowered and directed to require the construction of sidetracks by any railroad company to industries already established or that may establish itself in the state. State v. Southern Ry. Co., 185 N. C. 435, 117 S. E. 563.

Powers Given by Necessary Implication.—The statute authorizing the Commission to order union stations to be built and maintained carries with it the power to do what is reasonably necessary to execute such order, including the use of the streets of a town for legitimate railroad purposes, if the laying of tracks, etc., necessary to that end. Griffin v. Southern Ry., 190 N. C. 48, 137 S. E. 16.

Inter and Intra-State Carriers.—In ordering the Commission for the joint erection by an intrastate carrier and an interstate carrier of a union station at a junction cannot be regarded as taking the part of the Commission. The matter is left to the intrastate carrier, as a burden on interstate commerce, when it appears that the commission was passing upon the petition of only a few cities or towns in the state separately and not as a part of a state-wide solution, and that expenditures required were in amount too small to affect such commerce. State v. Southern R. Co., 185 N. C. 435, 117 S. E. 563.

Same—"Esch-Cummings" Act Prospective.—The Federal Transportation or the "Esch-Cummings" Act is prospective in its enforcement, and cannot relate back to a final order of the Commission not appealed from, for the erection of a union station at a junction, which station is to be served by an intrastate and interstate carrier cross each other, the execution of which has been stayed by the Commission until after the passage of the Federal Statute solely for the advantage of the carriers at their request. State v. Southern R. Co., 185 N. C. 435, 117 S. E. 563.


§ 62-44. To provide for separate waiting rooms for races. The commission is empowered and directed to require the establishment of separate waiting rooms at all stations for the white and colored races. (Rev. s. 1097; 1899, c. 239, s. 94; 1941, c. 117, s. 19.)

Cross References.—As to separate accommodations for different races on train or steamboat, see § 60-94; on street railways, see § 60-135; on motor carriers, see § 62-109.

§ 62-45. To require construction of sidetracks.—The commission is empowered and directed to require the construction of sidetracks by any railroad company to industries already established or to be established: Provided, it is shown that the proportion of such revenue accruing to such sidetrack is sufficient within five years to pay the expenses of its construction. This shall not be construed to give the commission authority to require railroad companies to construct sidetracks more than five hundred feet in length. (Rev. s. 1097; 1899, c. 164, s. 2, subsec. 15; 1933, c. 134, s. 8; 1941, c. 97; C. S. 1044.)

Cross Reference.—As to condemnations of land for an industrial sideway, see § 405.

Editor's Note.—Prior to the enactment of this provision of the statute, the establishment of such sidings rested in the arbitrary will of the common carrier, who could also discontinue them at will. Such power, it will be seen at the mercy of the railroad management, which could mar the prosperity of any plant along its line by refusing a siding, or arbitrarily disconnecting it, if established. This power could be used for both political and pecuniary advantage. The General Assembly, while not prohibiting the carrier from continuing to establish sidings at its pleasure, deemed it wise to take the power of refusing to grant or continue such sidings away from the common carrier by authorizing the Commission to require the establishment of such sidings in proper cases. Corporation Comm. v. Seaboard Air Line Railroad, 140 N. C. 239, 241, 52 S. E. 941.

Restriction upon Power.—The Commission can require a railroad company to continue or build a side track for an industrial plant only upon the company's right of way or upon the right of way is tendered. State v. Southern R. Co., 193 N. C. 559, 69 S. E. 621.

Same—Revenue.—The power conferred upon the Commission to order a railroad company to build a side track, is with the restriction that the revenue from such side track shall be sufficient within five years to pay the expenses of its construction. The Federal Court having denied the authority of the Commission in this section, the presumption is in favor of its judgment, and it must be presumed that the revenue will be sufficient according to the terms of the statute. State v. Southern R. Co., 153 N. C. 559, 69 S. E. 461.

Same—Length.—The section confines upon the Commission the power to establish sidings under certain conditions, and restricts the exercise of such a right to a length in length to build a side track other than that which the commission ordered or directed. Hales v. Atlantic Coast Line R. Co., 172 N. C. 104, 90 S. E. 11, 13.

Rights of Intervening Owners.—A railroad company, of its own initiative or by virtue of a contract with private persons, can acquire no right to construct and use side tracks to private industries off their right of way and over the lands of intervening owners against the will of such owners. When they have once permanently located their lines, they are not entitled to construct and use side tracks over the lands of intervening owners against the will of way incident to it. Pierce on Railroads, c. 9, p. 254; Elliot on Railroads (3d Ed.) section 930. Hales v. Atlantic Coast Line R. Co., 172 N. C. 104, 90 S. E. 11, 13.

Non-Resident Railroad without Power of Eminent Domain.—The Commission cannot confer the power of eminent domain, and when the Legislature has not conferred such power upon a nonresident railroad company respecting the construction of a side track over the lands of others, it is not jurisdictional by an order of the Commission for the railroad to build such a track over the lands of others. State v. Southern R. Co., 193 N. C. 559, 69 S. E. 621; Butler v. Pen. Tobacco Co., 152 N. C. 416, 68 S. E. 12.


§ 62-46. To require trains to be run over railroad tracks and connections at intersections.—The commission is empowered and directed to require, when practicable and when the necessities of the traveling public, in the judgment of the commission, demand, that any railroad in this state shall install and operate one or more passenger or freight trains over its road, and also require any two or more railroads having intersecting points to make close connection at such points: Provided, the order under this section shall be made under the business of the railroad justifies it. (1907, c. 469, s. 3; 1941, s. 8; 1941, c. 97; C. S. 1045.)

Connection Contemplated One of Trains as Well as Tracks.—The connection required is one of trains as well as of tracks. The public cannot travel upon a track alone, nor upon a track only to an inter-change point, for such facil- nishes for traveling at all, and close connection of both to secure the convenience of the traveling public. Whitaker v. Carolina Corp. Comm. v. Atlantic Coast Line R. Co., 137 N. C. 1, 49 S. E. 191, 192.

Running Additional Trains.—It is within the power of a state railroad commission to compel a railroad company to operate additional trains for the purpose of promoting the convenience of the traveling public, and an order requiring the running of an additional train for that purpose is not a violation of the "Esch-Cummings" Act. Corporation Comm. v. Atlantic Coast Line R. Co., 137 N. C. 1, 49 S. E. 191, 192.
§ 62-47. To inspect railroads as to equipment and facilities, and to require repair.—The commission is empowered and directed, from time to time, to fully examine into and inspect the condition of each railroad, its equipment and facilities, in regard to the public's safety and convenience; and if any are found by it to be unsafe, it shall at once notify and require the railroad company to put the same in repair. (1907, c. 469, s. 3; 1933, c. 134, s. 8; 1941, c. 97; C. S. 1046.)

§ 62-49. To require installation and maintenance of block system and safety devices. — The commission is empowered and directed to require any railroad company to install and put in operation and maintain upon the whole or any part of its road a block system of telegraphy or any other reasonable safety device, but no railroad company shall be required to install a block system upon any part of its road unless at least eight trains each way per day are operated on that part. (1907, c. 469, s. 1b; 1933, c. 134, s. 8; 1941, c. 97; C. S. 1047.)

The lack of a "block system" when required, is held to be negligence per se. Gerringer v. North Carolina R. Co., 146 N. C. 32, 59 S. E. 132; Stewart v. Raleigh, etc. R. Co., 137 N. C. 687; 50 S. E. 312; Stewart v. Railroad, 141 N. C. 253, 53 S. E. 857.

§ 62-50. To regulate crossings and to abolish grade crossings.—The commission is empowered and directed to require the raising or lowering of any train on any highway at any highway or railroad crossing, and to designate who shall pay for the same; and, when it thinks proper, partition the cost of abolishing grade crossings and the raising or lowering of said track or highway among the railroads and municipalities interested. (1907, c. 469, s. 1 (c); 1911, c. 197, s. 1; 1933, c. 34, s. 8; 1941, c. 97; C. S. 1048.)

Cross References.—As to intersection with highways, see § 60-42. As to obstructing highways and maintaining defective crossings, see § 60-43. As to cattleguards and private crossings, see § 60-44. As to the power of the state highway commission to require the installation of signals and other safety devices, see § 136-20.

Editor's Note.—Throughout Europe grade crossings are forbidden by law. Some few of the American States, including New York, New Jersey, and Connecticut have followed the European example and abolished such crossing. This section confers upon the Utilities Commission the power to require the track to be raised or lowered at crossings where deemed necessary.
§ 62-52. To require railroads to enter towns and maintain depots in certain cases.—Where two or more railroads may maintain freight depots and a union passenger depot within one mile of a town of two thousand population for the convenience of the inhabitants thereof, and do not enter the corporate limits of the town, it is the duty of the utilities commission, upon the petition of a majoritv of the qualified voters of the said town, which petition shall be properly sworn to, to require and compel, where practicable, the said railroads to run their lines into or through the corporate limits of the said town, and construct, equip, and maintain suitable passenger and freight depots at some convenient place or places therein, and the passenger depot shall be a union station and be built and maintained by the several railroads according to a plan and in such a manner as shall be approved by the commission.

When a petition is filed with the utilities commission as aforesaid, the commission shall set a day for the hearing thereof, which day shall be not more than twenty days from the filing of said petition, and shall immediately cause a notice to issue to the railroads interested in the matter set out in the petition, and after the hearing of the matter on the day named in the notice, the commission, if it deem it practicable, shall thereupon cause an order to be made requiring the said railroads to build, equip, and maintain in a suitable manner roadbeds, yards and depots, and any other necessary buildings or equipment, at convenient places within the limits of said town, as to it seems proper for the needs and growth of the business and inhabitants of the said town.

The order of the utilities commission to the railroads shall name a time within which all the necessary work of entering the said town and construction of depots and other buildings shall be completed and opened to the public for the transaction of business, and the said railroads, for every day beyond the said time that they shall not be in operation according to the said order, shall pay the sum of fifty dollars for each and every day of such failure and neglect, to the order of the utilities commission whenever such depots are substantially diminished or abandoned, which shall be for the benefit of the said town, this amount to be recovered as in other actions.

This section shall also apply to any railroad that may hereafter enter into or run within one mile of the corporate limits of said town, and the utilities commission shall have the power to require such railroads to unite with the other railroads in maintaining the depots, tracks, and other structures, and also pay such part of the cost thereof as to the said utilities commission may seem proper.

The railroads have the power to condemn such quantity of lands, including gardens, yards, residences and the premises pertaining thereto, as are necessary for the purposes of this section, the condemnation proceedings to be had in the same manner as now provided by law. (1907, c. 465; 1933, c. 134, s. 8; 1941, c. 97; C. S. 1050.)

§ 62-53. To consent to abandonment or relocation of depots.—A railroad corporation which has established and maintained for a year a passenger station or freight depot at a point upon its road shall not abandon such station or depot, nor substantially diminish the accommodation furnished by the stopping of trains, except by the order of the commission. Freight or passenger depots may be relocated upon the written approval of the commission. (Rev., s. 1098; 1899, c. 164, ss. 19, 20; 1933, c. 134, s. 8; 1941, c. 97; C. S. 1051.)

§ 62-54. To regulate crossings of telephone, telegraph and electric power lines.—Power is conferred on the utilities commission whenever any telephone, telegraph or electric power lines cross, to require such crossings to be constructed and maintained in a safe manner, so that the wires of one line will not fall upon the other; to prescribe the manner in which this shall be done; to discontinue or prohibit such crossings where they are unnecessary and can reasonably be avoided; and to apportion the cost of proper changing and construction of such crossings among the lines interested, as to said commission may seem just: Provided, that in all crossings made dangerous by the presence of high tension wire or wires of any power or light company, the cost shall be paid by such power or light company. (1913, c. 130, s. 1; 1933, c. 134, s. 8; 1941, c. 97; C. S. 1052.)

Local Modification.—Ashe: 1929, c. 101.

§ 62-55. To regulate delivery of freight, express, and baggage.—The utilities commission shall make reasonable and just rules—

1. For the handling of freight and baggage at stations.

2. As to charges by any company or corporation engaged in the carriage of freight or express for the necessary handling and delivery of the same at all stations. (Rev., s. 1094; 1899, c. 164, s. 2, subsecs. 2, 7; 1933, c. 134, s. 8; 1941, c. 97; C. S. 1053.)

Cross Reference.—As to penalty for failure to deliver freight upon tender of payment for carriage, see § 60-114.

§ 62-56. To prevent discriminations.—The utilities commission shall make reasonable and just rules and regulations—

1. To prevent discrimination in the transportation of freight or passengers, or in furnishing electricity, electric light, current, power or gas.

2. To prevent the giving, paying or receiving of any rebate or bonus, directly or indirectly, or the misleading or deceiving the public in any manner as to real rates charged for freight, express or passengers, or in furnishing electricity, electric light, current, power or gas. (Rev., s. 1095; 1899, c. 164, s. 2, subsecs. 3, 5; 1913, c. 130, s. 6; 1933, c. 134, s. 8; 1941, c. 97; C. S. 1054.)

Cross Reference.—As to discrimination in railroad rates, see § 60-5 to § 60-9, § 62-92, and § 62-143.

Discrimination Defined.—In discrimination in freight tariffs by railroad companies, means to charge shippers of freight unequal sums for carrying the same quantity of freight equal distances; that is, more in proportion for a short than for a long distance. Hines v. Wilmington, etc., Railroad, 95 N. C. 434.

Discrimination in Log Road.—A railroad carrying logs to a sawmill cannot charge a shipper agreeing to ship the manufactured products by the same line less for the same service than for a long distance. Hines v. Wilmington, etc., Railroad, 136 N. C. 479, 48 S. E. 813.
§ 62-57. To fix a standard for gas.—The utilities commission shall fix, establish and promulgate a standard of quality for gas and prescribe rules and regulations for the enforcement of and obedience to the same. (1919, c. 32; 1933, c. 134, s. 8; 1941, c. 97; C. S. 1958.)

§ 62-58. To regulate shipment of inflammable substances.—The utilities commission is authorized and empowered to adopt and promulgate rules for the shipment of inflammable and explosive articles; cotton which has been partially consumed by fire, and such other like articles as in its opinion may be apt to render transportation dangerous. And after the promulgation of such rules, no common carrier shall be required to receive or transport any such articles except when tendered in accordance with the said rules; nor shall such common carrier be liable for any penalty for refusal to receive such article for shipment until all the rules prescribed by the utilities commission in regard to the shipments of the same shall be complied with. (1907, c. 471, s. 1; 1933, c. 134, s. 8; 1941, c. 97; C. S. 1958.)

The commission is particularly authorized to regulate the carriage of inflammable and explosive articles as freight. Tilley v. Norfolk, etc., R. Co., 162 N. C. 37, 39, 77 S. E. 994.

§ 62-59. To regulate demurrage, storage, placing, and loading of cars.—The commission shall make rules, regulations and rates governing demurrage and storage charges by railroad companies and other transportation companies; and shall make rules governing railroad companies in the placing of cars for loading and unloading and in fixing time limit for delivery of freight after the same have been received by the transportation companies for shipment. (Rev., ss. 1100; 1903, c. 342; 1933, c. 134, s. 8; 1941, c. 97; C. S. 1957.)

Cross References.—As to time before charge for demurrage may be made, see § 60-113. As to placing cars for loading, see § 60-118. As to reasonable time for transporting freight, see § 60-112.

§ 62-60. To fix rate of speed through towns; procedure.—If a railroad company is of the opinion that an ordinance of a city or town through which a railroad company passes or in its opinion may be made which at which trains may run while passing through said city or town, is unreasonable or oppressive, such railroad company may file its petition before the utilities commission, setting forth all the facts, and asking relief against such ordinance, and that the utilities commission prescribe the rate of speed at which trains may run through said municipality. Upon the filing of the petition a copy thereof shall be mailed, in a registered letter, to the mayor or chief officer of the town or municipality, together with a notice from the utilities commission, setting forth that on a day named in the notice the petition of the railroad company will be heard, and that the city or town named in the petition will be heard at that time in opposition to the prayer of the petition. And upon the return day of the notice the utilities commission shall hear the petition, but any hearing granted by the utilities commission shall be had at the town, city or locality where the conditions complained of are alleged to exist, or some member of the said commission shall take evidence, both for the petition and against it, at such city, town or locality, and report to the full commission before any decision is made by the commission.

Either party, petitioner or respondent, has the right to introduce testimony and to be heard by counsel; and the utilities commission, after hearing the petition, answer, evidence and argument, shall render judgment thereon. If the commission finds that such ordinance is reasonable and just the petition shall be dismissed, and the petitioner shall pay all the costs, to be taxed by the clerk to the utilities commission. If the commission is of the opinion that the ordinance is unreasonable, it shall so adjudge; and in addition thereto it shall prescribe the maximum rates of speed for passing through such town. And thereafter the railroad company may run its trains through such town or city at speeds not greater than those prescribed by the utilities commission, and the ordinance adjudged to be unreasonable shall not be enforced against such railroad company.

If the judgment of the utilities commission is in favor of the petitioner, it shall be lawful for the utilities commission to make such order as to the payment of the costs as shall seem just. It may require either party to pay the same or it may divide the same. The costs in such proceeding shall be the same as are fixed by law for similar services in the superior court. (Rev., ss. 1101, 1102, 1103; 1903, c. 552; 1933, c. 134, s. 8; 1941, c. 97; C. S. 1958.)


§ 62-61. To regulate within the Police Power of State.—In Gladden v. Minnesota, 166 U. S. 427, 430, 17 S. Ct. 628, 41 L. Ed. 1064, the court said: "The state which created the corporation may make all needful regulations of a police character for the government of the company while operating its road within the jurisdiction. It may prescribe the rate of speed at which the trains shall run, and the places at which they shall stop, and may make any other reasonable regulations for their management in order to secure the object of its incorporation, and the safety, good order, convenience and comfort of its passengers and of the public." North Carolina Corp. Comm. v. Atlantic Coast Line R. Co., 137 N. C. 1, 49 S. E. 193, 197.

§ 62-62. To hear and determine controversies submitted.—When a company or corporation embraced in this chapter has a controversy with another corporation or person, and all the parties to such controversy agree in writing to submit such controversy to the commission as arbitrator, the commission shall act as such, and its award shall be final. Such award may be presented to the court in any case where land or an interest in land is concerned shall immediately be certified to the clerk of the superior court of the county in which said land is situated, and shall by such clerk be docketed in the judgment docket for such county, and from such docketing shall be a judgment of the superior court for such county. Parties may appear in person or by attorney before such arbitrator. (Rev., ss. 1073; 1899, c. 164, s. 25; 1933, c. 134, s. 8; 1941, c. 97; C. S. 1959.)

Cross Reference.—As to power of utilities commission to settle dispute between a railroad and a drainage district, see § 156-91.

§ 62-62. To investigate accidents.—The commission may investigate the causes of any accident on a railroad or steamboat which it may deem to require investigation, and any evidence taken upon such investigation shall be reduced to writing, filed in the office of the commission, and be subject to [693]
§ 62-63. To notify of violation of rules and institute suit.—The commission, whenever in its judgment any public utility has violated any law, shall give notice thereof in writing to such corporation, and, if the violation or neglect is continued after such notice, shall forthwith present the facts to the attorney-general, who shall take such proceedings thereon as he may deem expedient. (Rev., s. 1113; 1899, c. 164, s. 8; 1935, c. 134, s. 8; 1941, c. 97; C. S. 1062.)

Construed as Mandatory.—This provision is positive, and must be construed as being mandatory. In this case the statute of North Carolina makes it clearly the duty of the Attorney-General, when called upon, to prosecute any suit or action which may be deemed necessary to secure the enforcement of the laws of the State, in regard to the fixing of maximum rates. This section, when construed in accordance with the rule laid down in the Regan case, 154 U. S. 362, 14 S. Ct. 1047, 38 L. Ed. 1014, and the Ames case, 169 U. S. 466, 18 S. Ct. 418, 43 L. Ed. 819, clearly charges the Attorney-General with a duty in relation to the enforcement of the act in question. Southern R. Co. v. McNell, 155 Fed. 756, 775.

§ 62-64. Utilities commission authorized to enter agreement of indemnity as to oyster beds in New River.—The utilities commission is authorized and empowered to enter into a contract with the United States or the Secretary of War on behalf of the State of North Carolina, by the terms of which it shall be agreed that the State of North Carolina will save the United States free from liability for damages to oyster beds in New River arising from the dredging and maintenance of a channel ten feet deep and ninety feet wide therein, between the Inland Waterway and Jacksonville: Provided, the liability of the State of North Carolina, by the terms of which it shall be agreed that the State of North Carolina will save the United States free from liability for damages to oyster beds in New River arising from the dredging and maintenance of a channel ten feet deep and ninety feet wide therein, between the Inland Waterway and Jacksonville: Provided, the liability of the State of North Carolina under such contract shall not exceed the total sum of five thousand dollars ($5,000).

The enactment of this statute shall not be treated as a waiver or release by any party of the State that the owner of such oyster beds who have not executed waivers or releases prior to February 24, 1939, shall be entitled to any damages by reason of the dredging and maintenance of the said channel, and no payment shall be made on account of such claims unless and until the owners of such oyster beds shall show that there has been sustained actual damages to such oyster beds on account of the dredging and maintenance of said channel. (1939, c. 51; 1941, c. 97.)

Art. 4. Public Utilities Act of 1933

§ 62-65. Definitions.—(a) The term "corporation," when used in this article, includes a private corporation, an association, a joint stock association or a business trust.

(b) The term "person," when used in this article, includes a natural person, a partnership or two or more persons having a joint or common interest, and a corporation as hereinbefore defined.

(c) The term "municipality," when used in this article, includes a city, a county, a village, a town, and any other public corporation existing, created or organized as a governmental unit under the constitution or laws of the State.

(d) The term "commission" shall mean the utilities commission.

(e) The term "public utility," when used in this article, includes persons and corporations, or their lessees, trustees and receivers now or hereafter owning or operating in this state equipment or facilities for:

1. Producing, generating, transmitting, delivering or furnishing gas, electricity, steam or any other agency for the production of light, heat or power to or for the public for compensation;
2. Diverting, developing, pumping, impounding, distributing or furnishing water to or for the public for compensation;
3. Transporting persons or property by street, suburban or interurban railways for the public for compensation;
4. Transporting persons or property by motor vehicles for the public for compensation, but not including taxicab, operating on call, or truck transfer service in cities or towns;
5. Transporting or conveying gas, crude oil or other fluid substance by pipe line for the public for compensation;
6. Conveying or transmitting messages or communications by telephone or telegraph, where such service is offered to the public for compensation;
7. The term "public utility" shall for rate making purposes only include any person producing, generating or furnishing any of the foregoing services to another person for distribution to or for the public for compensation.

The term "public utility" shall not include any person not otherwise a public utility, who furnishes the services or commodity only to himself, his employees or tenants when such service or commodity is not resold to or used by others. The business of any public utility other than of the character defined in subdivisions 1 to 7, inclusive, of subdivision (e) of this section is not subject to the provisions of this article.

(f) The term "rate," when used in this article, means and includes every compensation, charge, fare, toll, rental and classification, or any of them, demanded, observed, charged or collected by any public utility, for any service, product or commodity offered by it to the public, and any rules, regulations, practices or contracts affecting any such compensation, charge, fare, toll, rental or classification. (1933, c. 307, s. 1; c. 134, s. 8; 1941, c. 97.)

The provisions of this article as to rate regulation are not in conflict with chapter 78. Bennett v. Southern Ry. Co. 111 N. C. 474, 191 S. E. 240.


§ 62-66. Rates must be just and reasonable.—Every rate made, demanded or received by any public utility, or by any two or more public utilities jointly, shall be just and reasonable. (1933, c. 307, s. 2.)

§ 62-67. Service.—Every public utility shall furnish adequate, efficient and reasonable service. (1933, c. 307, s. 3.)

§ 62-68. To file rate schedules with commission.—Under such rules and regulations as the commission may prescribe, every public utility shall file with the commission, within such time and in such form as the commission may designate, schedules showing all rates established by it and
collected or enforced, or to be collected or enforced within the jurisdiction of the commission. The utility shall keep copies of such schedules open to public inspection under such rules and regulations as the commission may prescribe. (1933, c. 307, s. 4.)


§ 62-69. Rates varying from schedule prohibited.—No public utility shall directly or indirectly, by any device whatsoever, or in any wise, charge, demand, collect or receive from any person a greater or less compensation for any service rendered or to be rendered by such public utility than that prescribed in the schedules of such public utility applicable thereto then filed in the manner provided in this article, nor shall any person receive or accept any service from a public utility for a compensation greater or less than that prescribed in such schedules. (1933, c. 307, s. 5.)

Where, at termination of contract between city and electric company, city officials were doubtful whether it would be advantageous to adopt new schedule of electric company and elected to take current on basis from month to month, electric company was not exacting an unlawful rate by billing the city for current on rates contained in old contract rather than under new schedule. High Point v. Duke Power Co., 34 F. Supp. 339.


§ 62-70. Discrimination prohibited.—No public utility shall, as to rates or services, make or grant any unreasonable preference or advantage to any person or subject any corporation or person to any unreasonable prejudice or disadvantage. No public utility shall establish or maintain any unreasonable difference as to rates or services either as between localities or as between classes of service. The commission may determine any questions of fact arising under this section. (1933, c. 307, s. 6.)

Editor’s Note.—For a discussion of this and related sections, see 11 N. C. Law Rev. 246.

Party Entitled to Injunctive Relief.—Where certain carriers by truck sought injunctive relief against railroad carriers for discrimination in rates against certain cities and against certain commodities, it was held that the basis for injunctive relief must be an interference or threatened interference with a legal right of the petitioner, not of a third party and that the shippers would be the real parties in interest, not the contract truck carriers. Carolina Motor Service v. Atlantic Coast Line R. Co., 210 N. C. 36, 38, 185 S. E. 479, 104 A. L. R. 1165.

§ 62-71. Change of rates.—Unless the commission otherwise orders, no public utility shall make any changes in any rate which has been duly established under this article, except after thirty days’ notice to the commission, which notice shall plainly state the changes proposed to be made in the rates then in force, and the time when the changed rates will go into effect. The utility shall also give such notice of the proposed changes to other interested persons as the commission in its discretion may direct. All proposed changes shall be shown by filing new schedules, or shall be plainly indicated upon schedules filed and in force at the time and kept open to public inspection. The commission, for good cause shown, may allow changes in rates, without requiring the thirty days’ notice, under such conditions as it may prescribe. All such changes shall be immediately indicated upon its schedules by such public utility.

Whenever there is filed with the commission by any public utility any schedule stating a new rate or rates, the commission may, either upon complaint or upon its own initiative, upon reasonable notice, enter upon a hearing concerning the lawfulness of such rate or rates; and pending such hearing and the decision thereon the commission, upon filing with such schedule and delivering to the utility affected thereby a statement in writing of its reasons therefor, may, at any time before they become effective, suspend the operation of such rate or rates, but not for a longer period than ninety (90) days beyond the time when such rate or rates would otherwise go into effect unless the commission shall find that a longer time will be required, in which case the commission may extend the period for not to exceed six (6) months: Provided, and notwithstanding any such order of suspension, the public utility may put such suspended rate or rates into effect on the date when it or they would have become effective, if not so suspended, by filing with the commission a bond in a reasonable amount approved by the commission, with sureties approved by the commission, conditioned upon the refund, in a manner to be prescribed by order of the commission to the persons entitled thereto of the amount of the excess, if the rate or rates so put into effect are finally determined to be excessive; or there may be substituted for such bond, other arrangements satisfactory to the commission for the protection of the parties interested. If the public utility fails to make refund within thirty (30) days after such final determination, any person entitled to such refund may sue therefor in any court of this state of competent jurisdiction and be entitled to recover, in addition to the amount of the refund due, all court costs, but no suit may be maintained for that purpose unless instituted within two years after such final determination. Any number of persons entitled to such refund may join as plaintiffs and recover their several claims in a single action; in which action the court shall render a judgment severally for each plaintiff as his interest may appear. During any such period of suspension the commission may, in its discretion, require that the public utility involved shall furnish to its consumers or patrons a certificate or other evidence of payments made by them. (1933, c. 307, s. 7.)


§ 62-72. Changing unreasonable rates after hearing.—Whenever the commission, after a hearing had after reasonable notice upon its own motion or upon complaint, finds that the existing rates in effect and collected by any public utility for any service, product, or commodity, are unjust, unreasonable, insufficient or discriminatory, or in any wise in violation of any provision of law, the commission shall determine the just, reasonable and sufficient rates to be therefrom observed and in force, and shall fix the same by order as hereinafter provided. (1933, c. 307, s. 8.)

§ 62-73. Compelling telephone and telegraph
companies to form continuous lines to certain points.—The commission may upon complaint, in writing, by any person, or on its own initiative after a hearing on reasonable notice, by order require any two or more telephone or telegraph companies whose lines or wires form a continuous line of communication, or could be made to do so by the construction and maintenance of suitable connections or the joint use of equipment, or the transfer of messages at common points, between different localities which can not be communicated with or reached by the lines of either company alone, where such service is not already established or provided, to establish and maintain through lines within the state between two or more such localities. The rate for such service shall be just and reasonable and the commission shall have power to establish the same, and declare the portion thereof to which each company affected thereby is entitled and the manner in which the same must be secured and paid. All necessary construction, maintenance and equipment in order to establish such service shall be constructed and maintained in such manner and under such rules, with such division of expense and labor as may be required by the commission. (1933, c. 307, s. 9.)

§ 62-74. Compelling efficient service after hearing.—Whenever the commission, after a hearing on reasonable notice had upon its own motion or upon complaint, finds that the service of any public utility is unreasonable, unsafe, inadequate, insufficient or unreasonably discriminatory, the commission shall determine the reasonable, safe, adequate sufficient service to be observed, furnished, enforced or employed and shall fix the same by its order, rule or regulation. (1933, c. 307, s. 10.)

§ 62-75. Fixing standards, classifications, etc.; testing service. — The commission may, after hearing upon reasonable notice had upon its own motion or upon complaint, ascertain and fix just and reasonable standards, classifications, regulations, practices or service to be furnished, imposed, observed and followed by any or all public utilities; ascertain and fix adequate and reasonable standards for the measurement of quantity, quality, pressure, initial voltage or other condition pertaining to the supply of the product, commodity or service furnished or rendered by any and all public utilities; prescribe reasonable regulations for the examination and testing of such product, commodity or service and for the measurement thereof; establish or approve reasonable rules, regulations, specifications and standards to secure the accuracy of all meters and appliances for measurement; and provide for the examination and testing of any and all appliances used for the measurement of any product, commodity or service of any public utility. (1933, c. 307, s. 11.)

§ 62-76. Valuing and revaluing utility property.—The commission may, on hearing after reasonable notice, ascertain and fix the value of the whole or any part of the property of any public utility insofar as the same is material to the exercise of the jurisdiction of the commission, and may make revaluations from time to time and ascertain the value of all new construction, extension and additions to the property of every public utility. (1933, c. 307, s. 15.)

§ 62-77. Establishment of accounting system. —The commission may establish a system of accounts to be kept by the public utilities, subject to its jurisdiction, or may classify said public utilities and establish an account system for each class, and prescribe the manner in which such accounts shall be kept. (1933, c. 307, s. 13.)

§ 62-78. Visitorial and inspection powers of commission.—The commissioners and the officers and employees of the commission may, during all reasonable hours enter upon, search, examine, test, inspect, make and test appliances necessary therefor. Such public utility shall have the right to be represented at the making of such examination, tests and inspections. (1933, c. 307, s. 14.)

§ 62-79. Annual reports. — The commission may require any public utility to file annual reports in such form and of such content as the commission may require and special reports concerning any matter about which the commission is authorized to inquire or to keep itself informed, or which it is required to enforce. All reports shall be under oath when required by the commission. (1933, c. 307, s. 15.)

§ 62-80. Investigation into management of utilities. — The commission may, on its own motion and whenever it may be necessary in the performance of its duties, investigate and examine the condition and management of public utilities or any particular utility. In conducting such investigations the commission may proceed either with or without a hearing as it may deem best, but it shall make no order without affording the parties affected thereby a hearing. (1933, c. 307, s. 16.)

§ 62-81. Permission to pledge assets or pay fees. —No public utility shall pledge its faith, credit, moneys or property for the benefit of any holder of its preferred or common stocks or bonds, nor for any other business interest with which it may be affiliated through agents or holding companies or otherwise by the authority of the action of its stockholders, directors, or contract or other agents, the compliance or result of which would in any manner deplete, reduce, conceal, abstract or dissipate the earnings or assets thereof, decrease or increase its liabilities or assets, without first making application to the commission and by order obtain its permission so to do; nor shall any such utility pay any fees, commissions or compensation of any description whatsoever to any holding, managing, operating, constructing, engineering, financing, or purchasing company or agency including subsidiary or affiliated companies, for services rendered or to be rendered without first filing copies of all proposed agreements and contracts with the commission and obtaining its approval. (1933, c. 307, s. 17.)

§ 62-82. Assumption of certain liabilities and obligations to be approved by commission.—No
utility shall issue any securities, or assume any liability or obligation as lessor, lessee, guarantor, indorser, surety, otherwise, in respect to the securities of any other person unless and until, and then only to the extent that, upon application by the utility, and after investigation by the commission of the purposes and uses of the proposed issue, and the proceeds thereof, or of the proposed assumption of obligation or liability in respect of the securities of any other person, the commission by order authorizes such issue or assumption. The commission shall make such order only if it finds that such issue or assumption (a) is for some lawful object within the corporate purposes of the utility, (b) is compatible with the public interest, (c) is necessary or appropriate for or consistent with the proper performance by the utility of its service to the public as such utility and will not impair its ability to perform that service, and, (d) is reasonably necessary and appropriate for such purpose. Any such order of the commission shall specify the purposes for which any such securities or the proceeds thereof may be used by the utility making such application. (1933, c. 307, s. 18.)

§ 62-83. Commission may approve in whole or in part or refuse approval.—The commission, by its order, may grant or deny the application provided for in the preceding section as made, or may grant it in part or deny it in part or may grant it with such modification and upon such terms and conditions as the commission may deem necessary or appropriate, in the premises and may, from time to time, for good cause shown, make such supplemental orders in the premises as it may deem necessary or appropriate; and may, by any such supplemental order, modify the provisions of any previous order as to the particular purposes, uses, and extent to which or the conditions under which any securities so theretofore authorized or the proceeds thereof may be applied; subject always to the requirements of the foregoing section. (1933, c. 307, s. 19.)

§ 62-84. Contents of application for permission.—Every application for authority for such issue or assumption shall be made in such form and contain such matters as the commission may prescribe. Every such application and every certificate of notification hereinafter provided for, shall be made under oath, signed and filed on behalf of the utility by its president, a vice-president, auditor, controller, or other executive officer having knowledge of the matters thereinafter set forth and duly designated for that purpose by the utility. (1933, c. 307, s. 20.)

§ 62-85. Applications to receive immediate attention; continuances. — All applications for the issuance of securities or assumption of liability or obligation shall be placed at the head of the commission's docket and disposed of promptly, and all such applications shall be disposed of in thirty (30) days after the otherwise filed with the commission, unless it is necessary for good cause to continue the same for a longer period for consideration. Whenever such application is continued beyond thirty (30) days after the time it is filed, the order making such continuance must state fully the facts necessitating such continuance. (1933, c. 307, s. 21.)

§ 62-86. Notifying commission as to disposition of securities.—Whenever any securities set forth and described in any such application for authority or certificate of notification as pledged or held unencumbered in the treasury of the utility shall, subsequent to the filing of such application or certificate, be sold, pledged, repledged, or otherwise disposed of, by the utility, such utility shall, within ten days after such sale, pledge, repledge, or other disposition, file with the commission a certificate of notification to that effect, setting forth therein all such facts as may be required by the commission. (1933, c. 307, s. 22.)

§ 62-87. No guarantee on part of state.—Nothing herein shall be construed to imply any guarantee or obligation as to such securities on the part of the state of North Carolina. (1933, c. 307; s. 23.)

§ 62-88. Article not applicable to note issues; renewals likewise excepted.—The provisions of the foregoing sections shall not apply to notes issued by a utility for the proper purposes and not in violation of law, payable at a period of not more than two (2) years from the date thereof, and shall not apply to like notes issued by a utility payable at a period of not more than two (2) years from date thereof, to pay, retire, discharge, or refund in whole or in part any such note or notes and shall not apply to renewals thereof from time to time not exceeding in the aggregate six (6) years from the date of the issue of the original note or notes so renewed or refunded. No such notes payable at a period of not more than two (2) years from the date thereof, shall, however, in whole or in part, directly or indirectly, be paid, retired, discharged or refunded by any issue of securities of another kind of any term or character or from the proceeds thereof without the approval of the commission. (1933, c. 307, s. 24.)

§ 62-89. Not applicable to debentures of court receivers; notice to commission.—Nothing contained in this article shall limit the power of any court having jurisdiction to authorize or cause receiver's certificates or debentures to be issued according to the rules and practice obtaining in receivership proceedings in courts of equity. Within ten (10) days after the making of any such notes, so payable at periods of not more than two (2) years from the date thereof, the utility issuing the same shall file with the commission a certificate of notification, in such form as may from time to time be determined and prescribed by the commission. (1933, c. 307, s. 25.)

§ 62-90. Periodical or special reports. — The commission shall require periodical or special reports from each utility hereafter issuing any security including such notes payable at periods of not more than two (2) years from the date thereof, which shall show, in such detail as the commission may require, the disposition made of such securities and the application of the proceeds thereof. (1933, c. 307, s. 26.)

§ 62-91. Failure to obtain approval not to invalidate securities or obligations.—(a) Securities issued and obligations and liabilities assumed by a utility, for which under the provisions of this
article the authorization of the commission is required, shall not be invalidated because issued or assumed without such authorization therefor having first been obtained or because issued or assumed contrary to any term or condition of such order of authorization as modified by any order supplemental thereto entered prior to such issuance or assumption. (b) Securities issued or obligations or liabilities assumed in accordance with all the terms and conditions of the order of authorization therefor shall not be affected by a failure to comply with any provision of this article or rule or regulation of the commission relating to procedure and other matters preceding the entry of such order of authorization or order supplemental thereto. (c) A copy of any order made and entered by the commission as in this article provided (dually certified by the clerk of the commission) approving the issuance of any securities or the assumption of any obligation or liability by a utility shall, in and of itself, be sufficient evidence, for all purposes, of full and complete compliance by the applicant for such approval with all procedural and other matters required precedent to the entry of such order. (d) Any utility which willfully issues any such securities, or assumes any such obligation or liability, or makes any sale or other disposition of securities, or applies any securities or the proceeds thereof to purposes other than the purposes specified in an order of the commission with respect thereto, contrary to the provisions of this article, shall be liable to a penalty of not more than ten thousand dollars, but such utility is only required to specify in general terms the purpose for which any securities are to be issued, or for which any obligation or liability is to be assumed, and the order of the commission with respect thereto shall likewise be in general terms. (1933, c. 307, s. 27.)

§ 62-92. Commission may act jointly with agency of another state where utility operates. — If a commission or other agency or agencies is empowered by another state to regulate and control the utility and character of securities to be issued by any public utility within such other state, then the utilities commission of the state of North Carolina shall have the power to agree with such commission or other agency or agencies of such other state on the issue of stocks, bonds, notes or other evidences of indebtedness by a public utility owning or operating a public utility both in such state and in this state, and shall have the power to approve such issue jointly with such commission or other agency or agencies and to issue joint certificate of such approval: Provided, however, that no such joint approval shall be required in order to express the consent to an approval of such issue by the state of North Carolina if said issue is separately approved by the utilities commission of the state of North Carolina. (1933, c. 307, s. 28; c. 134, s. 8; 1941, c. 97.)

§ 62-93. Willful acts of employees deemed those of utility. — The willful act of any officer, agent, or employee of a utility, acting within the scope of his official duties of employment, shall, for the purpose of this article be deemed to be the willful act of the utility. (1933, c. 307, s. 29.)

§ 62-94. Actions to recover penalties. — Actions to recover penalties under this article shall be brought in the name of the state of North Carolina, in the county in which the offense was committed. Whenever any utility is subject to a penalty under this article, the commission shall certify the facts to the attorney-general, who shall institute and prosecute an action for the recovery of such penalty: Provided, the commission may compromise such action and dismiss the same on such terms as the court will approve. (1933, c. 307, s. 30.)

§ 62-95. Penalties to school fund. — All penalties recovered by the state in such action shall be paid into the state treasury to the credit of the school fund. (1933, c. 307, s. 31.)

§ 62-96. Abandonment and reduction of service. — Upon finding that public convenience and necessity are no longer served, or that there is no reasonable probability of a utility realizing sufficient revenue from the service to meet its expenses, the commission shall have power, after order any utility to abandon or reduce its service or facilities. (1933, c. 307, s. 32.)

Order Must Be Obtained. — Where a power company discontinues its service for nonpayment of charges, the customer, upon payment of the charges, is entitled to restoration of the service where the company did not obtain an order under this section. Sweetheart Lake v. Carolina Power, etc., Co., 211 N. C. 269, 271, 189 S. E. 785.

§ 62-97. Water gauging stations. — The commission may require the location, establishment, maintenance and operation of water gauging stations, and the commission and the North Carolina department of conservation and development may co-operate with each other as to such locations, construction and reports and upon the results of operation. (1933, c. 307, s. 33.)

§ 62-98. Reports from municipalities operating own utilities. — Every municipality engaged in operating any works or systems for the manufacture and supplying of gas or electricity, or purchasing same for distribution and resale, or operating telephone exchanges, shall make an annual report to the commission, verified by the oath of the general manager or superintendent thereof, on the same blanks as now provided for reports of privately owned utilities, giving the same information as required of such utilities. (1933, c. 307, s. 34.)

§ 62-99. Refusal to permit commission to inspect records made misdemeanor. — Any public utility, its officers or agents in charge thereof, that fails or refuses upon the written demand of the commission to supply a majority of said commission, and under the seal of the commission, to permit the commission, its authorized representatives or employees to examine and inspect its books, records, accounts and documents, or its plant, property, or facilities, as provided for by law, shall be guilty of a misdemeanor. Each day of such failure or refusal shall constitute a separate offense and each such offense shall be punishable by a fine of not less than five hundred and not more than five thousand dollars. (1933, c. 307, s. 35.)

§ 62-100. Willful disobedience to orders of commission incurs forfeiture. — Every public utility and the officers, agents and employees there-
of shall obey, observe and comply with every order or direction made by the commission under authority of this article; and as long as the same shall be in force. Any such person or corporation, or any officer, agent or employee thereof, who knowingly fails or neglects to obey or comply with such order, or any provision of this article, shall forfeit to the state of North Carolina not to exceed the sum of one thousand dollars for each offense. Every distinct violation of any such order or of this article shall be a separate and distinct offense, and in case of a continuing violation each shall be deemed a separate and distinct offense.

No present provision of law shall be deemed to be repealed by this article except as such are directly in conflict therewith. (1933, c. 307, ss. 36, 37.)

Art. 5. Miscellaneous Provisions as to Public Utilities.

§ 62-101. Certificate of convenience and necessity.—No person, or corporation, their lessees, trustees or receivers shall thereafter begin the construction or operation of any public utility plant or system or acquire ownership or control of, either directly or indirectly, without first obtaining from the utilities commission a certificate that public convenience and necessity requires, or will require, such construction, acquisition, or operation: Provided, that this section shall not apply to new construction in progress on May 27, 1931, nor to construction into territory contiguous to that already occupied and not receiving similar service from another utility, nor to construction in the ordinary conduct of business.

The utilities commission is hereby empowered to make rules governing the application for, and the issuance of such certificates of public convenience and necessity. (1931, c. 455; 1933, c. 134, s. 8; 1941, c. 97.)

Cross Reference.—As to necessity for certificate of convenience and necessity for housing projects, see § 157-27.

Editor's Note.—For article, "Public Utilities—Rural Electrification Co-operatives—Certificate of Convenience and Necessity," see 16 N. C. Law Rev. 46.

This section is not applicable to an electric membership corporation, organized under the provisions of §§ 117-6 to 117-27. And by reason of the provisions of section 117-27 of the statute under which it was organized, there was no error in the holding of the lower court that the defendant electric membership corporation was not required, before beginning the construction or operation of its facilities for serving its members by furnishing them electricity for lights and power, to obtain from the Utilities Commissioner of North Carolina a certificate that public convenience and necessity requires or will require the construction and operation of said facilities by said defendant. McGuinn v. High Point, 219 N. C. 56, 13 S. E. (2d) 48 (opinion of Clarkson, J.).

§ 62-102. Contracts of public service corporations.—All public service corporations when requested by the utilities commission shall submit copies of contracts made with any person, firm or corporation classed as a holding, managing or operating company or selling service of any kind, and the utilities commission shall have the right to disapprove any such contract, after hearing, if in its judgment it is found to be unjust or unreasonable, and designed, or entered into for the purpose of concealing, abstracting, or dissipating the net earnings of the public service corporation receiving such services. (1931, c. 455; 1933, c. 134, s. 8; 1941, c. 97.)


§ 62-103. Definitions.—In all matters relating to the administration of this article, whenever and wherever the following terms are used they shall be construed and defined as follows:

(a) The term “article” means this article.
(b) The term “state” means the State of North Carolina.
(c) The term “person” means an individual, a firm or a co-partnership.
(d) The term “corporation” means a corporation, a company, an association or a joint-stock association.
(e) The term “commission” means the Utilities Commission of North Carolina.
(f) The term certificate means the franchise certificate, granting authority to a motor vehicle carrier to operate motor vehicle service over a specific route.
(g) The term “driver’s permit” means the permit issued, after examination, authorizing a person to drive a motor vehicle operating under the article.
(h) The term “vehicle permit” means the card, or other marker, bearing the identification of the motor vehicle and the highway routing.
(i) The term “motor vehicles” means vehicles driven by gas, oil, electric or steam motors and not operated on rails.
(j) The term “trailer” means a vehicle without attached motor, designed for carrying property wholly on its own structure and for being drawn by a motor vehicle.
(k) The term “motor vehicle carrier” means every corporation or person, as the term “corporation” and the term “person” are hereinbefore defined, or the lessees, trustees or receivers owning, controlling, operating or managing any motor vehicle used in the business of transporting persons or property for compensation between cities, or between towns, or between cities and towns, or over a regular route, over the public highways of the state, as public highways are defined herein.
(l) The term “city” means any collection of people incorporated pursuant to the provisions of section four, article eight, of the Constitution of North Carolina.
(m) The term “town” means any unincorporated community, point, or collection of people having a geographical name by which it may be generally known and is so generally designated.
(n) The term “service” means that motor vehicle service which is held out to the public and of which the public may avail itself at will for transportation over the public highways between cities or between towns, or between cities and towns, irrespective of whether the service is upon regular schedule or otherwise.
(o) The term “public highway” means every street, road or highway in this State, whether within or without the corporate limits of any municipality.
(p) The term “between fixed termini or over a regular route" means the termini or route, respectively, between or over which any motor ve-
hicle carrier usually or ordinarily operates any motor vehicle, even though there may be period-
ical or irregular departures from such termini
or route.

(q) The term "casual trip" means a trip on call for the purpose of transporting passengers or property to a given destination and return, or either.

(r) The term "broker" means any person not included in the term "motor vehicle carrier" and not a bona fide employee or agent of any such carriers, who or which as principal or agent sells or offers for sale any transportation, or negotiates for or holds himself, or itself, out by solicitation, advertisement, or otherwise, as one who sells, furnishes, contracts, or arranges for such transportation for compensation, either directly or indirectly.

(s) The term "forwarder" means any person not included in the terms "motor vehicle carrier" or "broker" as herein defined, who or which is engaged in the receipt of bills for property received by it for transportation, forwarding, or consolidating or for distribution by any medium of transportation or combination of mediums of transportation, and who is not a carrier by rail, water, air or express, and other than the operations of a bona fide warehousemen.

(t) The term "restricted common carrier by motor vehicle" means any person not included in the definition "common carrier by motor vehicle" who or which undertakes, whether directly or by lease or other arrangement, to transport passengers or property restricted to any class or classes of passengers or to any class, kind or commodity or property by motor vehicle for compensation, whether over regular or irregular routes, and/or "excursion passenger vehicles" as defined in § 20-38 subsection (q). (1925, c. 50, s. 1; 1927, c. 136, s. 1; 1929, c. 193, s. 1; 1933, c. 134, s. 8; 1937, c. 247, ss. 1, 2; 1941, c. 97.)

Editor's Note.—The Bus Law of 1925 was repealed, amended, and re-enacted by the Act of 1927.

The Act of 1929 amended subsection (q) of this section by striking out the words "under contract or" following the word "or".

The 1937 amendment inserted the words "or over a regular route" in subsection (k), and added subsections (r), (s) and (t).

Purpose of Article.—It was the intent of this statute, to regulate the public service of automobiles on the highways of the State between cities and towns through classifications of the commission requiring a license therefor, and making a violation thereof indictable as a criminal offense. State v. Andrews, 191 N. C. 545, 132 S. E. 568.

Article Contemplates a Continuous Business.—This statute contemplates a continuous business. The "service" rendered in contemplation of this statute construed with the classifications made by the commission, does not include without limitation, the making of an occasional delivery or service rendered at the request of the passenger, and not constituting a regular business of practice of a public service between or at the termini of designated or fixed routes, and an indictment under it will not be upheld. State v. Andrews, 191 N. C. 545, 132 S. E. 568.

§ 62-104. To whom applicable.—No corporation or person, their lessees, trustees, or receivers shall operate over the public highways in this state any motor vehicle or motor vehicle with trailer, as hereinbefore defined as a motor vehicle carrier, for the transportation of persons or property between cities, or between towns, or between cities and towns, or over a regular route, for compensation, except in accordance with the provisions of this article, and said operation shall be subject to control, supervision, and regulation by the commission in the manner provided by this article:

Provisions that which franchise or corporate limits of two or more cities join, they shall be treated as one for purposes of administering this article: provided, further, that nothing in this article shall prohibit a motor vehicle carrier under this article, nor any motor vehicle on which the franchise tax has been paid as provided in the current revenue act, from making casual trips on call over routes established hereunder; provided, that on said casual trips no one shall be allowed to pick up any passenger or property along the route, nor be permitted on the return trip to carry any passengers or property other than those or that included in the original trip; nor shall any motor vehicles used exclusively for transporting school students from and to their homes; nor to motor vehicles used exclusively for transporting persons to or from religious services; nor to motor vehicles used exclusively in transporting farm and dairy products from the farm or dairy to warehouse, creamery or other original storage or market; nor to motor vehicles used exclusively in the distribution of newspapers from the publisher to subscribers or distributors; nor to motor vehicles used exclusively by the trade's and or employees of an industrial plant to and from any places of their regular employment: Provided, that if a franchise operator shall furnish such transportation facilities to such mill or factory maintaining a residential unit of one thousand inhabitants or more, the foregoing exception shall not be operative. (1925, c. 50, s. 2; 1927, c. 136, s. 2; 1929, c. 193, s. 1, 254, s. 1; 1935, c. 111; 1937, c. 247, s. 2.)

Editor's Note.—This section was twice amended by Public Laws of 1929. Chapter 190 struck out the words "under contract or" following the word "trips" in line 20. Chapter 254 inserted in lines 18 to 20 the words "on which the franchise tax has been paid as provided in the current revenue act" in lieu of the words formerly appearing.

The amendment of 1925 added "or" after the term "creek" and to the end of the section and the clause immediately preceding such proviso reading: "nor to motor vehicles used exclusively." etc.

The 1937 amendment inserted the words "or over a regular route" in the eighth line of this section.

A person transporting persons or property by motor vehicles for hire between cities and towns to or as a business, excepting all persons for the transportation who properly present themselves, must obtain the franchise required by this and the following section, unless he becomes within the exception specifically pointed out, regardless whether or not any other person or corporation holds a valid franchise covering that section of highway, while persons operating motor vehicles for hire without regard to fixed termini are required to obtain only a "for hire" license. Winborne v. Mackey, 206 N. C. 554, 174 S. E. 577; Winborne v. Browning, 174 S. E. 580.

The requirement of a franchise under this and following sections, for hire between fixed termini which are cities or towns, is not affected by the fact that no other person or corporation has a valid franchise covering the same section of highway, nor does the exception relating to U. S. mail apply unless the motor vehicle is used exclusively for carrying mail. Winborne v. Sutton, 206 N. C. 559, 174 S. E. 580.

Motor vehicles are not "used exclusively in carrying United States mail" or any other passengers and property for compensation, and such operation shall not come within the exception relating to United States mail under this section. Winborne v. Browning, 206 N. C. 557, 559, 174 S. E. 579.

§ 62-105. Application for franchise certificate.—Every corporation or person, their lessees, trustees, or receivers, before operating any motor vehicle included in the term "motor vehicle carrier" and not a bona fide employee or agent of any such carriers, who or which as principal or agent sells or offers for sale any transportation, or negotiates for or holds himself, or itself, out by solicitation, advertisement, or otherwise, as one who sells, furnishes, contracts, or arranges for such transportation for compensation, either directly or indirectly.
vehicle upon the public highways of the State for the transportation of persons or property for compensation, within the purview of this article, shall apply to the commission and obtain a franchise certificate authorizing such operation, and such franchise certificate shall be secured in the manner following:

(a) Application for such certificate shall be made by such corporation or person, their lessees, trustees, or receivers, to the commission in the manner prescribed, and on forms furnished, by the commission.

(b) Upon the filing of said application, the commission may, in its discretion, fix a time and place for the hearing of said application. When the time and place for the hearing have been fixed, the applicant shall, at least ten days prior to said hearing, cause to be published in a newspaper of general circulation in the territory to be served a notice reciting the fact of the filing of said application together with a statement of the time and place for the hearing of said application.

(c) At the time specified in said notice, or at such time as may be fixed by the commission, a public hearing upon said application shall be held by said commission: Provided, that in passing upon applications for certificates, the commission may take into consideration the reliability of the applicant, his court record, and any other matters tending to qualify or disqualify him as a carrier. After such hearing, the commission may issue the license certificate, or refuse to issue it, or may issue it with modifications and upon such terms and conditions as in its judgment the public convenience and necessity may require.

(d) Before granting the franchise certificate to an applicant for operation of passenger or freight motor vehicles over the public highways of the State, the commission shall request and the Highway Commission of the State shall furnish to the commission its recommendations as to the size and weight of the motor vehicles and the type of tires with which said motor vehicles may be equipped, which may be safely operated over said highways and may be operated over the same without greatly damaging them, and such recommendations made by the Highway Commission shall in all cases be observed by the commission in granting franchise certificates to applicants for operation over said highways.

(e) No license certificates shall be issued for the operation on any highway in the State of any motor propelled vehicles of greater width than eighty-six (86) inches and greater loaded weight than fifteen thousand (15,000) pounds for passenger traffic, and greater width than eighty-six (86) inches and greater loaded weight than nine (9) tons for freight traffic, and the commission shall have power at any time, when in its judgment the public convenience or safety requires, or upon request of the Highway Commission, to reduce the size and weight of motor vehicles operated upon the public highways under this article, whether upon hard-surfaced or other types of highway construction.

(f) The commission may refuse to grant any application for a franchise certificate where the granting of such application would duplicate, in whole or in part, a previously authorized similar class of service, unless it is shown to the satisfaction of the commission that the existing operations are not providing sufficient service to reasonably meet the public convenience and necessity and the existing operators, after thirty days' notice, fail to provide the service required by the commission: Provided, that where two or more highways intersect within less than twenty-five miles of any incorporated city and the business of such lines transacted at such intersection is insufficient to warrant the maintenance of a bus station, then the commission may in its discretion authorize all operators to the next city in which a bus station is established be maintained.

(g) All applications not acted upon by the commission within sixty days from date same were filed because of request of applicant shall become null and void.

(h) No license certificate shall be issued to two or more persons until such persons have executed a partnership agreement and registered the same in each county in which they propose to operate.

(i) Applications may be tentatively granted pending purchase of equipment and equipment specifications and insurance, or bond; but no franchise certificate shall be issued until equipment has been purchased and equipment specifications and insurance, or bond, have been filed and approved.

(j) Franchise certificates may be granted to restricted common carriers as defined herein for any period in the discretion of the commission not to exceed three years.

(k) A brokerage license shall be issued to any qualified applicant therefor authorizing the whole or any part of the operations covered by the application if it is found that the applicant is fit, willing and able properly to perform the service proposed to and to conform to the provisions of this article and the requirements, rules and regulations of the commission thereunder, and that the proposed service, to the extent to be authorized by the license, is or will be consistent with the public interest and policy declared herein; otherwise, such application shall be denied.

(l) No person shall engage in the business of a forwarder, subject to the provisions of this article, in intrastate operations within this state unless such person makes application to the commission and obtains a certificate issued by the commission authorizing such person to engage in such business as provided herein for other common carriers by motor vehicle: Provided, that where any such forwarder hires instead of owning motor vehicle equipment, such forwarder shall become subject to the provisions herein prescribed for brokers: Provided further, that it shall be unlawful for any such forwarder in the performance of its operation in intrastate commerce to employ or use any motor vehicle carrier which is not the lawful holder of an effective certificate issued as provided in this article. The commission may in any certificate issued restrict or prohibit the direct operation of any motor vehicles by such forwarder in intrastate commerce. Subject to the foregoing part of this subsection (l), a certificate shall be issued to any qualified applicant to conduct the business of for-
warder in whole or in part. If it is found that the applicant is fit, willing and able properly to perform the service proposed and to conform to the provisions of this article and the requirements of rules and regulations of the commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be consistent with the public interest and policy declared by this article, otherwise, such application shall be denied. (1925, c. 50, s. 3; c. 137; 1927, c. 136, s. 3; 1931, c. 182; 1933, c. 440, s. 1; 1937, c. 247, s. 3.)

Editor's Note.—The Act of 1931 added the provision to subsection (d) of this section.

Prior to the 1933 amendment subsection (f) of this section provided that the commission could not refuse to grant the certificate because of the multiplicity of operators over the proposed route.

The 1933 amendment added subsections (j), (k) and (l).

§ 62-108. Franchise certificate.—Upon granting a franchise under this article, the commission shall issue to such applicant a franchise certificate which shall expire automatically three years from the date thereof and shall contain the following matters:

(a) The name and post office address of the grantee.
(b) The public highway or highways over which, and the fixed termini between which, the grantee is permitted to operate.
(c) The kind of transportation, whether passenger or freight, in which the grantee is permitted to engage.
(d) Such additional matters as said commission may deem necessary or proper. (1927, c. 136, s. 4.)

§ 62-107. Sale or other disposition of franchise.—No franchise certificate, issued under the provisions of this article, may be assigned or transferred, or pledged, or hypothecated in any way without the written consent of the commission. (1927, c. 136, s. 5.)

§ 62-108. Insurance.—The commission shall, in granting a franchise certificate, require the applicant to procure and file with the commission acceptable liability and property damage insurance in a company licensed to do business in the State; or, in lieu of such insurance may accept bond with solvent surety, on such motor vehicles to be used in such service, in such amount as the commission may determine, insuring passengers and the public receiving personal injury by reason of an act of negligence arising from the operation of any motor vehicle by the applicant upon the public highways of the State, and for damage to baggage in the custody of the assured and for loss of baggage when checked by the assured; and insuring the passengers and the public receiving personal injury by reason of any act of negligence arising from the operation of any motor vehicle by the applicant upon the route designated in the applicant's franchise certificate, whether such motor vehicle shall be specifically named, numbered or designated in the insurance policy or bond, or not, and whether such motor vehicle be in regular or temporary use by the applicant. Such policy, or bond, shall contain such other conditions, provisions and limitations as the commission may prescribe, and shall be kept in full force and effect. Property carriers may, in the discretion of the commission, be required to secure and file acceptable cargo insurance, or bond, which shall cover damage or loss of property only when listed on a duly prescribed and authorized bill of lading and received for by the assured or his agent. Before final judgment has been rendered by a competent court of jurisdiction, in any case arising from the operation under any franchise certificate, no attachment shall lie against motor vehicles used in such operation by any motor vehicle carrier, who has filed with the commission such damage liability policy, or bond, so long as such policy or bond is in full force and effect.

In any action in the courts arising out of damage to person or property, the assured shall not be joined in the action against the assured; but upon final judgment against the assured, the assured shall be liable within the limitations of the policy for the amount recovered and all court costs. Provided, that the commission may permit the filing by any licensed assured of a uniform master insurance policy contract, the terms of which shall conform to the foregoing, and when approved and accepted by the commission, shall be applicable to all insurance policy contracts filed by such assured for operating vehicles and otherwise under this article, and thereafter, so long as the master policy contract shall remain in force, carriers under this article may be permitted to file certificates, in such form as the commission may prescribe, evidencing fleet coverage under the term of such master policy instead of filing a separate individual policy contract in each case. Provided, that brokers and forwarders not operating motor vehicles under a certificate shall be required to file bond to cover financial responsibility not in excess of amounts required by the interstate commerce commission. (1927, c. 136, s. 4; 1937, c. 403; 1941, c. 97.)

Editor's Note.—The 1937 amendment added the two provisos at the end of the section.


Purpose of Section.—It seems that the Legislature enacted this section to meet the decision in Harrison v. Transit Co., 192 N. C. 682, 143 S. E. 256; Brown v. Brevard Auto Service Co., 195 N. C. 647, 143 S. E. 256; and where an assurer was joined in such action the com-
not be greater than that prescribed by law; to regulate the accounts and to require the filing of annual and other reports and of other data by such motor vehicle carriers; to require the increase of equipment capacity to meet public convenience and necessity; and to supervise and regulate motor vehicle carriers in all other matters affecting the relationship between such carriers and the traveling and shipping public. The commission shall have power and authority, by general order or otherwise, to prescribe rules and regulations applicable to any and all motor vehicle carriers, and the said commission is authorized, directed and empowered, whenever the public convenience and necessity may require, to increase, or decrease, or suspend temporarily the service upon any route for which a franchise certificate has been issued; and is hereby authorized, empowered, and directed to see that such rules and regulations and all, and singularly, the provisions of this article are enforced. The commission shall require any motor vehicle carrier operating on a franchise granted by the utilities commission and coming within the provisions of this article, if engaged in the transportation of both white and colored passengers for hire, to provide separate but equal accommodations for the white and colored races at passenger stations or waiting rooms where the carrier receives passengers of both races and/or on all busses or motor vehicles operating on a route or routes over which such carrier transports passengers of both races. Such accommodations may be furnished either by separate motor vehicles or by equal accommodations in motor vehicles. Provided that any requirement as to separate accommodation for the races shall not apply to specially chartered motor vehicles or to negro servants and attendants on their employers, or to officers or guards transporting prisoners; and provided that operators of motor vehicles or bus lines or taxicabs engaged in the transportation of passengers of only one race shall not be required to provide any accommodations for the other race, and provided that an operator shall not be required to furnish any accommodations to the other race over a line or route where he has undertaken and is engaged in the transportation of passengers of only one race, and provided, further, that nothing contained in this section shall be construed to declare operators of busses and/or taxicabs common carriers. (1925, c. 50, s. 4; 1927, c. 136, s. 7; 1929, c. 216, s. 1; 1933, c. 134, s. 8; 1941, c. 97.)

Cross References.—As to separate waiting rooms for races, see § 62-44. As to provisions for equal accommodations for the races, see § 62-94; § 60-98.

Editor’s Note.—The Act of 1929 added part of this section, beginning with the word “The” in line 33.

In Corporation Commission v. Interracial Commission, 198 N. C. 317, 151 S. E. 648 (1930), the Interracial Commission petitioned the Corporation Commission to make regulations to insure the negro traveling public separate but equal accommodations on the busses and in the passenger stations of the respondent bus companies. The petition was dismissed by the Corporation Commission on the ground that it had no power to interpret carriers by bus to be common carriers within the terms of the 1927 statute. On appeal to the Supreme Court, it was held, (1) That bus lines operating within the state are not carriers under any (2) That the provisions for the supervision of common carriers and to prevent unjust discriminations and preferences. This authority may be delegated to an administrative board or commission, and Corporation Commission or other such body created for the purpose, and the powers and duties of such board or commission are to be exercised in accordance with the policy of the state. It is submitted that the Fourteenth Amendment prevents the legislature from declaring a carrier private or public unless there is a reasonable basis of fact for so doing. N. C. L. Rev. 495.
whereupon the commissioner of motor vehicles shall cause the license or licenses of the offending motor vehicle carrier to be canceled, and such offending carrier who shall thereafter engage in the hauling of any persons or property for compensation shall be guilty of a misdemeanor, and each day's operation shall constitute a separate offense: Provided, the holder of any certificate, franchise or license whose certificate, franchise or license is ordered canceled hereunder shall have the right of appeal to the superior court as is now provided by law for appeals from the commission. But no such holder shall operate pending such appeal unless permitted to do so by order of the commission. (1927, c. 136, s. 8; 1937, c. 247, s. 4; 1941, c. 36, s. 97.)

Editor's Note.—This section is leveled at those carriers operating or purporting to operate under contract with particular shippers rather than operating under a franchise and serving the public generally. Such contract carriers must now have bona fide contracts. This probably means that they may not take occasional business, but must have contracts which will last over a period of time and calling for continued service. The provisions designed to prevent contract carriers from obtaining business by cutting rates below those of common carriers are a step in the direction already taken by other states which have set up systems of control of private contract motor carriers. 15 N. C. Law Rev. 360, 361.

§ 62-111. Cancellation of franchise certificates. (a) Franchise certificates issued under this article shall become null and void for the following causes:

1. For failure for thirty days to pay the franchise tax as provided by law.
2. For abandonment of authorized operation for a period of thirty days without the written consent of the commission.
3. For failure to begin operation within thirty days after the issuance of certificate.
4. Such franchise certificates may be cancelled in the discretion of the commission after ten days' notice for the following causes:
   a. For failure to pay station rent where a station has been designated and the expense apportioned among the operators by the commission.
   b. For failure to provide tickets for sale at the several stations designated by the commission.
   c. For failure to check baggage as provided by this article and the commission's regulations.
   d. For failure to keep equipment in safe and sanitary condition.
   e. For operating a motor vehicle over a route established hereunder without first obtaining a permit therefor.
   f. For operating a motor vehicle over a route established hereunder without having insurance, or bond, as provided in § 62-108 on file with the commission and in full force and effect at the time of the operation of such motor vehicle.
   g. For failure to observe and comply with schedules and tariffs made or approved by and on file with the commission.
   h. For removing a number plate from a motor vehicle designated by the commission for such motor vehicle, or for attaching or placing on a motor vehicle a number plate not authorized or designated therefor.
   i. For the violation of any other provision of this article, or the commission's regulations, or the willful or negligent violation of any other statute of this State, relating to the use or operation of motor vehicles on the public highways.
   j. For the violation and conviction of the criminal laws of this State, or for such other acts or conduct that may, in the opinion of the commission, disqualify such operator for rendering the public service contemplated by this article.

Sufficient notice shall be deemed to have been given under this article when notice in writing shall have been addressed to an operator and posted by registered mail to the address contained in the certificate with return receipt requested, or when such written notice has been delivered by a duly authorized agent of the commission or by any officer authorized by law to serve process in this State. (1927, c. 136, s. 10.)

Cross References.—As to sale under execution and cancellation of franchise for failure to pay franchise tax, see § 20-99. As to forfeiture of railroad charter for preferences to shippers, see § 60-52.

§ 62-112. Depots and stations. — The commission shall designate the towns and cities in which stations shall be maintained by passenger carriers and shall prescribe the rules and regulations under which the expense shall be borne by the respective carriers using such stations and may prescribe rules and regulations governing the maintenance and operation thereof. (1927, c. 136, s. 11.)

§ 62-113. Inspection of bus stations by State Board of Health; reports; action by N. C. Utilities Commission. — The State Board of Health is hereby authorized and directed to inspect bus stations with reference to general sanitation thereof and upon inspection to file with the bus station manager, the North Carolina Utilities Commission, and any and all bus companies operating into the station a copy of the report of inspection, together with such recommendations as said State Board of Health may make. The North Carolina Utilities Commission, upon the receipt of any report of inspection is authorized and empowered to take such action with reference thereto as the public interest may require. If the North Carolina Utilities Commission shall propose any change with reference to the station inspected, it shall give notice to the bus companies affected of the time and place to be heard in connection therewith, and after hearing, the commission may make such order as in its discretion promotes the public interest. (1941, c. 228.)

§ 62-114. Baggage, express, loading, etc.—The amount of express or baggage that may be carried in any motor vehicle with passengers shall not be greater than can be safely and conveniently carried, without causing discomfort to the passengers; and no motor vehicle shall be operated with any baggage, trunk, crate, or other article extending beyond the running board on the left side of such motor vehicle; doorways and aisles of passenger motor vehicles shall be kept clear of all obstruction, and the front seat of all motor vehicles of greater passenger capacity than seven shall be considered an emergency seat, and no passenger shall be allowed to occupy the same unless all other seats of such vehicle are fully occupied. (1937, c. 136, s. 12.)

§ 62-115. Fares, charges, and free transporta-
tion.—No motor vehicle carrier shall charge, demand, collect, or receive a greater or less or different compensation for the transportation of persons or property, or for any service in connection therewith, than the rates, fares, and charges applicable to such carrier as specified in its tariffs filed with and approved by the commission and in effect at the time; nor shall any such carrier refund or remit in any manner or by any device any portion of the rates, fares, or charges so specified, or extend to any person, firm, copartnership, or corporation, or other organization, or association, privileges or facilities in the transportation of persons or property except such as are regularly and uniformly extended to all; and no such carrier shall, directly or indirectly, issue, give, tender, or honor any free fares except to its bona fide officers, agents, employees, and members of their immediate families, and such persons as the commission may designate in its employ, the employ of the state highway and public works commission and/or the motor vehicle department, for the inspection of equipment and supervision of traffic upon the highways of the state: Provided, that motor vehicle carriers under the article may exchange free transportation within the limits of this section. Provided, that any motor vehicle carrier may carry free any blind preacher within the state of North Carolina upon its busses or motor vehicles operating in the state of North Carolina, under the condition that said preacher shall carry or present to such motor vehicle carrier a certificate showing what church or sect he may represent and that he is in good and regular standing with that denomination or sect. (1927, c. 136, s. 13; 1929, c. 58, s. 1; 1937, c. 247, s. 8; 1941, c. 36.)

Cross Reference.—As to free carriage, see §§ 62-133 and 62-134.

Editor's Note.—The 1937 amendment added the clause relating to employees of the state highway and public works commission and the motor vehicle department.

The act of 1929 added the last proviso to this section.

§ 62-116. Renewal of franchise certificates.—Any holder of a franchise certificate granted under this article, which is in force and effect on the date that such certificate expires automatically under the law, who makes application for the renewal thereof, other qualifications of applicants in the discretion of the commission being equal, shall be given preference over other applicants. (1927, c. 136, s. 14.)

§ 62-117. Foreign and interstate commerce.—Neither this article nor any provisions thereof shall apply or be construed to apply to commerce with foreign nations, or commerce among the several states of this Union, or business conducted for the United States Government, except insofar as the same may be permitted under the Constitution of the United States and the acts of Congress, as construed by the United States Supreme Court. (1927, c. 136, s. 15.)

§ 62-118. Violations.—Every corporation and every officer, agent, or employee of any corporation, and every other person who wilfully violates or fails to comply with, or who procures, aids or abets the violation of any provision of this article, or who fails to obey, observe or comply with any order, decision, rule or regulation, direction or requirement of the commission, made under the provisions of this article, or any part or provision thereof, or who operates any motor vehicle for the transportation of persons or property for compensation while under the influence of intoxicating liquors or drugs or in such a reckless manner or at such a rate of speed as would endanger the safety of the passengers or any person along such highway, shall be guilty of a misdemeanor, and upon conviction shall be punishable by fine of not less than fifty dollars nor more than five hundred dollars, or imprisonment, in the discretion of the court, or both fine and imprisonment, in the discretion of the court. (1927, c. 136, s. 16.)

§ 62-119. Maintenance of actions; fees; funds for enforcement; conferences, etc.—The commission shall have the right and authority to enforce by injunction or other ancillary remedy the provisions of this article or the rules and regulations made under this article. (a) Fees.—Each applicant for a certificate shall deposit with the commission as a filing fee the sum of ten dollars ($10.00) at the time of application, and fee of one dollar ($1.00) for each motor vehicle added thereafter; and for annual re-registration for the purchase of license, number plates, or tags, a fee of twenty-five cents (25¢) for each motor vehicle so re-registered; and for renewal of certificate, a fee of twenty-five cents (25¢) for each motor vehicle being operated under the certificate at the time application for renewal is filed; Provided, that brokers and forwarders not applying for nor holding certificates for the operation of motor vehicles shall deposit a filing fee of twenty-five dollars ($25.00) each at the time of application and twenty-five dollars ($25.00) per annum thereafter in addition to any other tax or fee provided by law. Such fees, when received by the commission, shall be paid forthwith to the state treasurer and credited to the highway fund for enforcement purposes. (b) Funds for Enforcement.—The highway and public works commission is hereby empowered, with the approval of the director of the budget, from time to time to appropriate sufficient funds for the use of the commission for the reasonable enforcement of this article, to be by him disbursed under the supervision of the director of the budget. (c) Conferences and Joint Hearings.—The commission or its authorized representative is authorized to confer with and hold joint hearings in connection with the authorities of any other state or representatives of the interstate commerce commission in connection with any matter arising under the Federal Motor Carrier Act, one thousand nine hundred thirty-five, or in establishing jurisdiction under this article or the Federal Act. (1927, c. 136, s. 18; 1937, c. 247, s. 6; 1941, c. 97.)

Editor's Note.—The 1937 amendment added subsections (a), (b) and (c) to this section.

§ 62-120. Construction of article.—Nothing herein contained shall be construed to relieve any motor vehicle carrier of the duties and responsibilities defined in the act regulating otherwise imposed by law or lawful authority; neither shall chapter 136 of the Public Laws of 1927 be construed to affect any obligation arising under duty imposed by nor right of action accruing under chapter 50, Public Laws of 1925, and amendments thereto. (1927, c. 136, s. 20.)

§ 62-121. Enforcement employees.—The commission shall have authority to employ such persons as may be necessary to enforce the provisions of this article, and their compensation shall be fixed in the manner now provided by law. (1927, c. 136, s. 21.)

Art. 7. Rate Regulation.

§ 62-122. Commission to fix rates for public utilities.—Subject to the provisions as to passenger rates in the chapter, Railroads, and as to railroad freight rates in this chapter, the commission shall make reasonable and just rates and charges, including state-street traffic, and regulate the same, of and for—

Cross References.—As to railroad passenger rates, see §§ 62-89 et seq. As to railroad freight rates, see §§ 62-135 et seq. As to utilities commission's authority to fix rates charged by public utilities, see also § 62-36. As to penalty for overcharge, see § 60-110. As to the regulation of rates for ferries connecting links of the state highway system, see §§ 136-84 and 136-85.

Efland v. State. —§ 12 N. C. Law Rev. 289, 294, for article on "Electric Rates."

General Rate Fixing Power.—By the section the commission is given broad and general powers to make rates for fixed and reasonable rates, and to establish, by statute, just and reasonable rates to be charged for such services. Corporation Comm. v. Henderson Water Co., 190 N. C. 70, 72, 128 S. E. 465.

Power to Classify.—The Legislature has absolutely no power to classify persons, natural or artificial, engaged in the same line of business, paying certain premiums required to meet operating expenses, and other specific matters pertinent to such an inquiry, and these are police powers delegated to this commission by the authority of the State, and as such are subject to public regulations and reasonable control, and is required to afford its service at uniform and reasonable rates and without discrimination among its subscribers and patrons for like service under the same or substantially similar conditions." Godwin v. Telephone Co., 190 N. C. 274, 133 S. E. 636; Walls v. Strickland, 174 N. C. 298, 300, 93 S. E. 857.

Same—Preference to Railroad.—A contract whereby a telegraph company gives to a railroad company a preference over other companies in the transmission of a message sent over the lines of one company to place telephones and furnish telephonic facilities for the transmission and delivery of messages, and for the transmission of intelligence and news. Godwin v. Telephone Co., 190 N. C. 274, 133 S. E. 636; Walls v. Strickland, 174 N. C. 298, 300, 93 S. E. 857.

When Message Transmitted Over Lines of Another Company.—Where a telegraph company has a continuous line between two points, by which it can order or confirm a telegram without the intervention of a messenger, it is absolutely necessary for it properly to maintain its system, allowing a reasonable profit, to meet the requirements of the public for adequate, safe, and convenient service. In re Southern Pub. Utilities Co., 122 N. C. 173, 29 S. E. 619.

When Fares of Street Railway May Be Raised.—A public service street railway company, operating under a city charter, and with the city restraining the passenger fare authorized to be charged its patrons, may be authorized by the commission to raise its charges to its passengers, when in the opinion of the commission such is necessary for it to properly maintain its system, allowing a reasonable profit, to meet the requirements of the public for adequate, safe, and convenient service. In re Southern Pub. Utilities Co., 122 N. C. 173, 29 S. E. 619.

CANNOT FIX RATES BY CONTRACT.—A public service railway company operating in various localities may not by contract fix its passenger fares and thus prevent the commission from exercising the authority conferred by statute, for determining what rates are, under the circumstances, just and reasonable, for such would authorize such companies to discriminate, unlawfully, among its patrons. In re Southern Pub. Utilities Co., 122 N. C. 173, 29 S. E. 619.

2. The transmission and delivery of messages by any telegraph company, and for the rental of telephone and furnishing telephonic communication by any telephone company or corporation.

Telephone System Must Not Discriminate.—In Telegraph Co. v. Telephone Co., 61 Vt. 241, 15 Am. St. Rep. 893, 3 Am. Elec. Cases, at p. 435, it is said: "A telephonic system is simply for the transmission of intelligence and news. It is, perhaps, in a limited sense, and yet in a strict sense, a common carrier. It must be equal in its dealings with all."


Telephones are public vehicles of intelligence, and they who own or control them can no more refuse to perform impartially the functions they have assumed to discharge than a railway company, as a common carrier, can refuse to discharge these functions. Efland v. Southern R. Co., 146 N. C. 135, 142, 59 S. E. 355.

In Clinton-Dunn Tel. Co. v. Carolina Tel. Co., 159 N. C. 9, 16, 74 S. E. 636, the court says of the duty and the remedy: "It is very generally recognized that a telephone company acting under a quasi public franchise, is properly classified among the public-service corporations, and as such is subject to public regulations and reasonable control, and is required to afford its service at uniform and reasonable rates and without discrimination among its subscribers and patrons for like service under the same or substantially similar conditions." Godwin v. Telephone Co., 190 N. C. 274, 133 S. E. 636; Walls v. Strickland, 174 N. C. 298, 300, 93 S. E. 857.

Mandamus to Compel Telegraphic Accommodations.—In Godwin v. Telephone Co., 156 N. C. 258, 259, 48 S. E. 365, the court declares: "A mandamus lies to compel a telephone company to place telephones and furnish telephonic facilities at the standard rates and under substantially similar conditions to other companies for like service, and abide by the reasonable regulations of the company." State v. Telephone Co., 52 Am. Rep. 404; Am. & Eng. Encyc. (2d Ed.), 1022, 19 ib., 877; Joyce on Electric Law, sec. 1036; Walls v. Strickland, 174 N. C. 298, 300, 93 S. E. 857.

When Message Transmitted Over Lines of Another Company.—Where a telegraph company has a continuous line between two points, by which it can order or confirm a telegram without the intervention of a messenger, it is absolutely necessary for it to properly maintain its system, allowing a reasonable profit, to meet the requirements of the public for adequate, safe, and convenient service. In re Southern Pub. Utilities Co., 122 N. C. 173, 29 S. E. 619.

Messages Transcending State Lines.—Telegraphic messages transmitted by a company from and to points in this State, although traversing another State in the route, are subject to the tariff regulations of the commission of this State. State v. Western Union Tel. Co., 113 N. C. 213, 18 S. E. 389.

Public Duty to Transmit Messages.—It is the duty of a telegraph company to transmit all messages over lines fixed by the commission to transmit all the business offered to it for all points at which it has offices, since it is not a mere private duty but a public duty which its franchise authorizes it to perform. Leavell v. Western Union Tel. Co., 98 N. C. 498, 37 S. E. 455.

Power to Ascertain Corporation in Control.—The commission has the incidental power (subject to the right of appeal) to determine whether a corporation is in the control of or operates any line in this State, in which it may exercise its authority to fix rates, as well as to know against whom to proceed for a violation of its regulations. State v. Western Union Tel. Co., 113 N. C. 213, 18 S. E. 389.

Cited in Russ v. Western Union Tel. Co., 222 N. C. 504, 23 S. E. (2d) 681. [665]
3. Persons, companies, and corporations, other than municipal corporations, engaged in furnishing electricity, gas, heat, light, water, gas, or owning or operating a public sewerage system in North Carolina.

Discrimination Remedied by Mandamus.—Where a public-service corporation has discriminated among its patrons in its charges for the same or similar service, a mandamus may be obtained to compel it to charge a uniform discriminating rate; for the question does not require the courts to fix a rate, or pass upon its reasonableness, the lowest rate charged becoming automatically, the proper rate. Corporation v. Service Co. v. Southern Power Co., 179 N. C. 18, 101 S. E. 593.

Rates Coextensive with State's Jurisdiction.—When the Commission has finally established, under the provisions of the statute, a rate or charge by a public service corporation for furnishing electrical power, the rates are coextensive with the State's jurisdiction and territory, and conclusive on all corporations, companies, or persons who are parties to the suit and have been afforded an opportunity to be heard. State v. Cannon Mfg. Co., 185 N. C. 17, 116 S. E. 178.

Police Power of State.—The authority, conferred upon the Commission to establish reasonable and just rates of charges by a public-service corporation for furnishing its customers electrical power, comes within the police powers of the State. Rates so made are subordinate to the public interest that such rates be reasonable and just, and afford the corporation supplying the service a safe return on the investment invested proper regard to the public interest that plants of this character, and their operation and maintenance. State v. Cannon Mfg. Co., 185 N. C. 17, 116 S. E. 178.

Sale or Use of Electricity Generated in Another State.—While the generation of electricity in another State when transported to purchasers in this State may be regarded as interstate commerce, its distribution and sale here is local, and the laws of the State may regulate it. State v. Cannon Mfg. Co., 185 N. C. 17, 116 S. E. 178.

Hydroelectric Company Authorized to Sell to Other Companies.—Where a public-service corporation engages in a class of business authorized by its charter, it dedicates its property to that particular class of use, and where a hydroelectric company having a monopoly has been authorized by its charter to sell to other electric companies, etc., power, etc., for retail or distribution among customers, it may not resist the jurisdiction of our courts upon the ground that they were not legally required to do so, though the district in which each company is in a sense a competitor, and has the charter right to generate and distribute its own electricity. North Carolina Pub. Service Co. v. Southern Power Co., 179 N. C. 18, 101 S. E. 593.

4. The through transportation of freight, express or passengers.

5. The use of railway cars carrying freight or passengers.

6. And shall make rules and regulations as to contracts entered into by any railroad company or corporation to carry over its line or any part thereof the car or cars of any other company or corporation.

7. And it shall make, require or approve for in-transit shipments what is known as milling-in-transit, or warehousing in transit rates on grain, or cotton or peanuts or tobacco.

Editor's Note.—This subsection was amended by c. 37 of the Acts of 1925, by adding at the end the provision giving the Commission "authority to make, require and approve what is known as warehousing-in-transit rates on cotton." Corpus Juris of 1929, which is identical, substituted the above in lieu of the subsection as amended by the 1925 act.

Milling in Transit." Where freight is shipped a long distance and the carrier will, at its own cost, defray the expense of its change in form en route because of the easier handling in a more compact shape, as, for example, Cowan v. Bond, 39 Fed. 54, where a railroad company receiving cotton in Louisiana for shipment to mills in New England had it compressed en route at Vicksburg at its own expense, charging the shipper no more than if it had carried the uncompressed cotton all the way, the same privilege being open to all shippers. Lumber Co. v. Railroad Commission (Case 156 N. C. 479, 48 S. E. 813.

8. Any railroad, or with such railroad companies, shall have authority to make special rates for the purpose of developing all manufacturing, mining, milling and industrial improvements in the state.

Nothing in this chapter shall prohibit railroad or steamboat companies from making special passenger rates with excursion or other parties, also rates on such freights as are necessary for the comfort of such parties, subject to the approval of the commission.

The powers vested in the commission by this section over the several subjects enumerated shall be the same as that vested in it in respect to railroads and other transportation companies. (Rev., ss. 1096, 1099; 1899, c. 164, ss. 2, 14; 1903, c. 683; 1907, c. 465, ss. 4; 1913, c. 127, s. 2; 1917, c. 194; 1925, c. 37; 1929, cc. 82, 91; 1933, c. 134, s. 8; 1941, c. 97; C. S. 1068.)

§ 62-123. Rates established deemed just and reasonable.—The rates or charges established by the commission shall be deemed just and reasonable, and any rate or charge made by any corporation, company, copartnership or individual engaged in the businesses enumerated in the preceding section other than those so established shall be deemed unjust and unreasonable. Provided, however, that this may be petitioned by any shipper or receiver of freight, and a hearing thereon, if the commission shall find the rates or charges collected to be unjust, unreasonable, discriminatory or preferential, the commission may enter an order awarding such petitioner a sum equal to the difference between such unjust, unreasonable, discriminatory or preferential rates or charges and the rates or charges found by the commission to be just and reasonable, nondiscriminatory and nonpreferential upon all shipments made or received by said petitioner within two years prior to the filing of such petition; provided, however, that this shall only apply to charges assessed and collected on and/or after March 19, 1929. (1913, c. 134, s. 8; 1929, cc. 1, 441, 342; 1933, c. 134, s. 8; 1941, c. 97; C. S. 1067.)

Editor's Note.—This section was amended twice by Public Laws of 1929. Chapter 241 inserted the first proviso and Chapter 342 added the other.

Burden of Proof.—The rates or charges, established by the Commission, shall be deemed just and reasonable. The burden was therefore upon the appellant to offer evidence sufficient for the jury to find upon appeal and under the instruction that the schedule of rates established by the Commission, in this case, was not just and reasonable to both petitioner and respondent. Corporation Comm. v. Henderson Water Co., 190 N. C. 70, 72, 128 S. E. 495.

Rates Other Than Those Fixed Deemed Unjust.—Including public-service corporations furnishing their customers electricity for power, etc., the Commission is authorized by statute to fix just and reasonable rates. The burden of proof was on the Commission that these rates are so fixed, other or lower rates are to be deemed unjust and unreasonable. State v. Cannon Mfg. Co., 185 N. C. 17, 116 S. E. 178.

Deemed Reasonable Until Modified.—Under the provisions of our statute, § 62-20, any party affected by the order of the Commission as to rates or charges for passengers by direct rail or steamboat lines, or to the courts from such order, and the charges so fixed are to be considered just and reasonable charges for the services rendered, unless and until they shall be changed or modified on appeal or by the further action of the commission.
§ 62-124. How maximum rates fixed.—In fixing any maximum rate or charge, or tariff of rates or charges for any common carrier, person or corporation subject to the provisions of this chapter, the commission shall take into consideration if proved, or may require proof of, the value of the property of such carrier, person or corporation used for the public in the consideration of such rate or charge or the fair value of the service rendered in determining the value of the property so being used for the convenience of the public. It shall furthermore consider the original cost of construction thereof and the amount expended in permanent improvements thereon and the present compared with the original cost of construction of all its property within the state; the probable earning capacity of such property under the particular rates proposed and the sum required to meet the operating expenses of such carrier, person or corporation, and all other facts that will enable it to determine what are reasonable and just rates, charges and taxes. (Rev., s. 138; 1939, c. 164, s. 2, subsec. 1; 1935, c. 134, s. 8; 1941, c. 97; C. S. 1068.)

Editor’s Note.—See 12 N. C. L. Rev. 289, 298, for comment on this section.

Section Controls.—In establishing rates the Commission is governed and controlled by the provisions of this section, Southern R. Co. v. McNeill, 155 Fed. 755, 760.

Word “Maximum” Explained.—The word “maximum,” used in an order of the Commission for fixing the rates of charges allowed to a petitioning public-service corporation, was not intended to mean that a descending rate therefrom was to be allowed under the contract set up by the customer or users, but to distinguish it from the word “minimum,” which also was used in reference to the subject. State v. Cannon Mfg. Co., 185 N. C. 17, 116 S. E. 178.

Manner of Arriving at Rate. — Under the provisions of this section, which is a valid statute, the Commission, in fixing a reasonable and just rate of charges for public-service corporations, may make a fair estimated value of the property presently used, and in relation thereto consider the taxes, and all other charges, and operating expenses of the applicant. State v. Cannon Mfg. Co., 185 N. C. 17, 116 S. E. 178.

§ 62-125. Hearing before utilities commission upon request for change of rates, etc.—Whenever there shall be filed with the utilities commission any schedule stating an increase in any new individual or joint rate, fare, charge, or classification for the transportation of passengers or property by a public carrier or carriers by railroad, or express, or highway, or water, or any rule, regulation, or practice affecting such rate, fare, or charge, or the value of the service thereunder, the commission is hereby authorized and empowered upon complaint of any interested party or upon its own initiative at once and, if so ordered without answer or formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, or charge, or such rule, regulation, or practice, and pending such hearing and the decision thereon the commission, by filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing and its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, fare, or charge, or such rule, regulation, or practice, for a period of ninety days, and if the proceeding has not been concluded and a final order made within such period, the commission may, from time to time, extend the period of suspension by order, but not for a longer period in the aggregate than one hundred and eighty days beyond the time when it would otherwise go into effect; and after hearing, whether completed before or after the rate, fare, charge, classification, rule, regulation, or practice goes into effect, the commission may make such order with reference thereto as would be proper in a proceeding instituted after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, or charge, or classification, rule, regulation, or practice, may take effect, at the end of such period. At any hearing involving a rate, fare, charge, or classification, increased or sought to be increased, or involving a rule, regulation, or practice, resulting in an increase, the burden of proof shall be upon the carrier to show that the increased rate, fare, charge, or classification, rule, regulation, or practice, the proposed increased rate, fare, charge, or classification, or the proposed rule, regulation, or practice, is just and reasonable. (1939, c. 365, s. 3; 1941, c. 97.)

§ 62-126. Notice required for increase in rates, etc.—No increase shall be made in any rate, fare, charge, or classification, nor shall any change be made in any rule, regulation, or practice, the result of which will be an increase, which has been published and filed by any of the transportation companies named in the preceding section, except upon not less than thirty days’ notice to the commission and the public: Provided, that the commission may, in its discretion, and for good cause shown, authorize the publication and filing of increased rates, fares, charges, or classification, or rules, regulations, or practices, upon not less than thirty days’ notice. (1939, c. 365, s. 4; 1941, c. 97.)

§ 62-127. Revision of rates. —The commission shall from time to time, and as often as circumstances may require, change and revise or cause to be changed or revised any schedules of rates fixed by the commission, or allowed to be charged by any carrier of freight, passengers, or express, or by any telegraph or telephone company. The powers of the commission, under this section, shall be exercised with respect to railroad freight and passenger rates under the limitations prescribed by article 8 of this chapter and article 12 of the chapter entitled Railroads. (Rev., s. 1106; 1899, c. 164, s. 7; 1933, c. 134, s. 8; 1941, c. 97; C. S. 1071.)

Cross Reference.—As to limitation of powers of utilities commission over railroad passenger rates, see § 60-93.

Limitation on Rate Fixing Authority. —Article 8 herein referred to is chapter 20, Laws Extra Session 1913, and it limited the authority of the Commission as to increasing the maximum rates for freight carriers. Corporation Comm. v. Atlantic Coast Line R. Co., 187 N. C. 424, 429, 121 S. E. 767.

Joint Rate between Lumber Road and Connecting Carrier. —When a lumber road is of standard gauge and of sufficient equipment and extensiveness to affect the interest of the public, the Commission may make a valid order establishing a joint rate of transportation between it and a connecting common carrier by rail to points beyond the initial road. Corporation Comm. v. Atlantic Coast Line R. Co., 187 N. C. 424, 121 S. E. 767.

§ 62-128. Long and short hauls. —It shall be unlawful for any common carrier to charge or re-
receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property under substantially similar circumstances and conditions for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier within the terms of this chapter to charge and receive as great compensation for a shorter as for a longer distance: Provided, however, that upon application to the commission, such common carrier may in special cases be authorized to charge less for longer than for shorter distances for the transportation of passengers or property; and the commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section: Provided, that nothing in this chapter contained shall be taken as in any manner abridging or controlling the rates of freight charged by any railroad in this State for conveying freight which comes from or goes beyond the boundaries of the state and on which freight less than local rates on any railroad conveying the same are charged by such railroads. (Rev., s. 1107; 1899, c. 164, s. 14; Ex. Sess. 1913, c. 20, s. 9; 1915, c. 17, s. 1; 1933, c. 134, s. 8; 1941, c. 97; C. S. 1072.)

§ 62-129. Contracts as to rates.—All contracts and agreements between railroad companies as to rates of freight and passenger tariffs shall be submitted to the commission for inspection and correction, that it may be seen whether or not they are a violation of law or the rules and regulations of said commission, and all arrangements and agreements whatever as to the division of earnings of any kind by competing railroad companies shall be submitted to the commission for inspection and approval in so far as they affect the rules and regulations made by the commission to secure to all persons doing business with such companies just and reasonable rates of freight and passenger tariffs, and the commission may make such rules and regulations as to such contracts and agreements as may then be deemed necessary and proper, and any such agreements not approved by the commission, or by virtue of which rates shall be charged exceeding the rates fixed for freight and passengers, shall be deemed, held and taken to be violations of this chapter and shall be illegal and void. (Rev., s. 1108; 1899, c. 164, s. 8; 1933, c. 134, s. 8; 1941, c. 97; C. S. 1073.)

§ 62-130. Rates to be published.—All carriers shall, whenever required by the commission, file with it a schedule of the rates for charges for freight and passengers, and the commission is authorized and required to publish the rates, or a summary thereof, in some convenient form for the information of the public, and quarterly thereafter the changes made in such schedules, if it deems it advisable. (Rev., s. 1109; 1899, c. 164, s. 7; 1907, c. 217, s. 5; 1933, c. 134, s. 8; 1941, c. 97; C. S. 1074.)

Interstate Commerce.—In Virginia-Carolina Peanut Co. v. Atlantic Coast Line Co., 166 N. C. 63, 82 S. E. 1, it was much the same position of interstate freight rates, required by a provision of the Interstate Commerce Commission, was not necessary to the effectiveness of the schedule of rates, such provision being merely for the convenience of the pub-
§ 62-134. Free carriage.—Nothing in this chapter shall prevent or prohibit—

1. The carriage, storage, or handling of property free or at reduced rates for the United States, state or municipal governments, or for charitable or educational purposes; or for any corporation or association incorporated for the preservation and adornment of any historic spot, or to the employees or officers of such company or association while traveling in the performance of their duties, provided they shall not travel further than ten miles one way on any one trip free of charge or to or from fairs or exhibitions for exhibition thereof.

2. The free carriage of destitute or homeless persons transported by charitable societies, and the necessary agents employed in such transportation; or the free transportation of persons traveling in the interest of orphan asylums or homes for the aged, or infant, or any department thereof, or traveling secretaries of Railroad Young Men's Christian Associations, or ex-Confederate soldiers attending annual reunions.

3. The use of mileage or excursion or commutation passenger tickets.

4. Common carriers from giving reduced rates to ministers of religion, or to municipal governments for the transportation of indigent persons, or to inmates of national homes or state homes for disabled volunteer soldiers, and of soldiers' and sailors' orphan homes, including those about to enter and those returning home after discharge, under arrangements with the boards of managers of said homes.

5. Common carriers from giving free carriage to their own officers and employees and members of their families, or furloughed, pensioned, and supernumerated employees, persons who have become disabled or infirm in the service of such common carrier, and the remains of a person killed in the employment of a common carrier, and employees traveling for the purpose of entering the service of such common carrier, and the families of those persons named; also the families of persons killed, and the widows during widowhood, and minor children during minority of persons who died while in the service of such common carrier.

6. The principal officers of any common carrier from exchanging passes, franks or tickets with other common carriers for their officers or employees, and members of their families.

7. Transportation companies from contracting with newspapers for advertising space in exchange for transportation over their lines to such an extent as may be agreed upon between the parties for said consideration.

8. Transportation companies, if they so desire, from furnishing transportation to such agricultural extension and demonstration workers as are engaged in work in the field in efforts to increase production on the farm and to improve the farm home, when such workers are actually engaged in the performance of duties requiring travel.

9. Any common carrier that is operating under lease a railroad in this state, in which the state owns a majority of the capital stock, from giving free carriage, according to the contract of lease, to the officers and their families and the committees of the corporation owning such leased railroad, nor prevent such operating committee from issuing annually free transportation to employees of such lessor owning companies and their families in compliance with the contract of lease entered into by them or according to and for such period of time as may have been prescribed by any by-law of the lessor which was in force at the time such lease was made. (Rev., s. 1105; 1899, c. 164, s. 22; 1899, c. 642; 1901, c. 679, s. 2; 1901, c. 652; 1905, c. 313; 1911, cc. 49, 148; 1913, c. 100; 1915, c. 215; 1917, cc. 56, 160; C. S. 1070.)

Cross References.—As to free transportation by motor carriers, see § 62-115. As to accepting or giving free transportation illegally, see § 62-92.

Unlawful Transportation.—The transportation, by a common carrier, of any person except of the classes specified without charge, is unlawful the offense being the actual free transportation and not the issuance of the free pass. State v. Southern R. Co., 122 N. C. 1052, 30 S. E. 133.

A gratuitous passenger is not in pari delito with the common carrier. McNeill v. Railroad Co., 135 N. C. 682, 47 S. E. 765.

Injured while Riding on Pass Illegally Issued. — The right, privileges and protection attaching to the relation of passenger and common carrier is dependent upon consideration of the public policy, independent of contract, and arise from the nature of their public employment. Hence, one injured while riding on a pass illegally issued may recover from the railroad. McNeill v. Railroad Co., 135 N. C. 682, 47 S. E. 765.

Construction of Penal Statute.—In construing a penal statute prohibiting discrimination between passengers, the construction placed on it by common carriers generally, and by private individuals and officials, will not be considered. State v. Southern R. Co., 122 N. C. 1052, 30 S. E. 133.

Art. 8. Railroad Freight Rates.

§ 62-135. Charging or receiving greater rates forbidden.—No railroad company being engaged in the business of common carrier of property within the state of North Carolina shall charge, take, or receive any sum for carrying property entirely within the state of North Carolina between initial and terminal points which are within the state, greater than the amount specified by the utilities commission for the respective classes and commodities, and for the respective distances except in the manner and to the extent and on the conditions mentioned in this article. (Ex. Sess. 1913, c. 20, s. 5; C. S. 1083.)

Cross References.—As to penalty for discrimination in rates, see §§ 60-5 and 60-6. As to charge in excess of printed tariffs, see § 60-110.

§ 62-136. Application for investigation of rates; appeal; rates pending appeal. — The utilities commission, or such commission or body upon which jurisdiction and power may be conferred to fix rates for the transportation of property to be charged by the railroads doing business in North Carolina, may, and upon request of any person directly interested in such charge shall, under rules and regulations fixed by law or prescribed and established by such commission, hear evidence as to the reasonableness of the maximum rates fixed by law, or by such commission or body, and establish such rates, in the manner prescribed and allowed by law, as may, in the judgment of said commission, be just, subject to the limitations fixed by this article; and from such an order of such commission any
shipper or railroad company directly affected by such order may, under rules and regulations prescribed by such commission, appeal to the superior court of North Carolina: Provided, that pending the appeal of any railroad company from an order of such commission fixing the rate fixed by such order shall be no suspension of such order of such commission.

All incorporated cities and towns in the state are deemed to be directly interested in the rates charged for the transportation of property by railroads and other common carriers operating into and out of such municipalities and in any discrimination in such rates and services as between municipalities; and, their welfare being thereby affected, any incorporated city or town in North Carolina is authorized and empowered to file its petition with the utilities commission for investigation and determination of all matters affecting rates for the transportation of property by railroads and other common carriers to or from such municipality, to prevent or remove any unreasonable difference or discrimination, to its prejudice or disadvantage, between the rates or the services at, in or to another such municipality within the state; and such municipality shall have the right, as a party in interest, to be represented and appear before, and to appeal from any decision which may be rendered thereon by the utilities commission, in the manner provided by § 62-20. (Ex. Sess. 1913, c. 20, s. 7; 1933, c. 134, s. 8; 1937, c. 401; 1941, c. 97; C. S. 1903.)

Editor's Note.—The 1937 amendment added the second paragraph of this section.

The authority given to municipalities to appear before the utilities commissioner and to appeal from his decisions relates to intrastate rates only, as the commissioner has no authority over interstate rates. 15 N. C. Law Rev. 366.

Commission to Investigate Rates upon Request.—This section expressly confers authority upon the Commission to investigate rates upon the request of any person directly interested. It permits that body to hear evidence as to the reasonableness of the maximum rates fixed by law or by the Commission, and to establish such rates as it may deem just. The authority conferred upon the Commission is plainly legislative. Atlantic Exp. Comm. v. Atlantic Coast Line R. Co., 187 N. C. 424, 429, 121 S. E. 767.

§ 62-137. Rates between points connected by more than one route.—When there is more than one railroad route between given points in North Carolina, and freight is routed or directed by the shipper or consignee to be transported over a shorter route, and it is in fact shipped by a longer route between such points, the rate fixed by law or by such commission for the shorter route shall be the maximum rate which may be charged, and it shall be unlawful to charge more for transporting such freight over the longer route than the lawful charge for the shorter route. (Ex. Sess. 1913, c. 20, s. 11; 1933, c. 134, s. 8; 1941, c. 97; C. S. 1085.)

§ 62-138. Action for double amount of overcharge; penalty.—Any railroad company in the state of North Carolina which shall charge a rate for transporting property wholly within the state of North Carolina, between terminals within the state, in excess of that fixed by law or by the lawful order of such commission or board, and which shall omit to refund the same within thirty days after written notice and demand of the person or corporation overcharged, shall be liable to an action for double the amount of such overcharge, and to a penalty of ten dollars per day for each day's delay after thirty days from such notice, in case of shipments of less than carload lots, and to a penalty of twenty dollars per day in the event of shipments of carload lots. (Ex. Sess. 1919, c. 80, s. 12; 1933, c. 134, s. 8; 1941, c. 97; C. S. 1085.)

Cross References.—As to overcharge and penalty therefor, see also § 62-110 and § 62-145.

§ 62-139. Double penalty.—Any railroad company so doing business in the state of North Carolina that shall knowingly charge a rate in excess of that fixed by law or by such board or commission for shipments wholly within the state, shall be subject to a penalty and shall pay double the penalty above prescribed. (Ex. Sess. 1913, c. 20, s. 13; 1933, c. 134, s. 8; 1941, c. 97; C. S. 1087.)

§ 62-140. Persons to receive penalties; accounts and receipts kept separate.—The penalties herein provided for shall be payable to the person or corporation who pays the freight or against whom the freight is charged, and such person or corporation may sue such railroad company and recover such penalty and the amount of such overcharge. The commission shall require the railroad companies, and may require all other public-service companies as are mentioned in this chapter, to keep separate the cost of doing interstate and intrastate business in North Carolina, and to keep separate receipts from the respective classes, and to direct the manner of keeping the accounts, and to enforce, by penalties, contempt, or otherwise as the law provides, obedience to its orders. (Ex. Sess. 1913, c. 20, s. 14; 1933, c. 194, s. 8; 1941, c. 97; C. S. 1088.)

Art. 9. Penalties and Actions.

§ 62-141. For violating rules.—If any railroad company doing business in this state by its agents or employees shall be guilty of the violation of the rules and regulations provided and prescribed by the commission, and if after due notice of such violation given to the principal officer thereof, if residing in the state, or, if not, to the manager or superintendent or secretary or treasurer if residing in the state, or, if not, to any local agent thereof, ample and full remuneration for the wrong or injury done thereby to any person or corporation as may be directed by the commission shall not be made within thirty days from the time of such notice, such company shall incur a penalty for each offense of five hundred dollars. (Rev. s. 1086; 1899, c. 164, s. 15; 1933, c. 134, s. 8; 1941, c. 97; C. S. 1105.)

Section Is Valid.—The section giving authority to the Commission after notice for failure of any railroad company to make full and ample remuneration for the violation of such rules and regulations to proceed in the courts, to enforce the penalties to be prescribed herein for such violation is valid without providing in detail the methods of procedure. Atlantic Exp. Co. v. Wilmington, etc., Railroad, 111 N. C. 463, 16 S. E. 393.

Duty to Enforce Rules and Orders.—While the Commission has no power to render a judgment for the payment of money, etc., it is their duty to enforce their rules and orders, and the power to do so is given by this section. Smith v. Southern R. Co., 147 N. C. 536, 71 S. E. 398.

Right to Investigate Complaint.—Under this section the Commission had the undoubted right and it was eminently proper for them to institute an inquiry and inform them...
selves as to whether a complaint was grounded in truth. They were not required to institute an action for the penalty simply because a citizen feeling himself aggrieved had made a complaint before them. They did right to investigate the matter for themselves, but the end of such investigation was simply to afford them information and enable them to act intelligently in determining whether they would sue for the penalty of $500 given by the statute.


§ 62-142. Refusing to obey orders of commission.—Any railroad or other corporation which violates any of the provisions of this chapter or refuses to conform to or obey any rule, order or regulation of the utilities commission shall, in addition to the other penalties imposed by this chapter, forfeit and pay the sum of five hundred dollars for each offense, to be recovered in an action to be instituted in the superior court of Wake County, in the name of the state of North Carolina on the relation of the utilities commission; and each day such company continues to violate any provision of this chapter or continues to refuse to obey or perform any rule, order or regulation prescribed by the utilities commission shall be a separate offense. (Rev., s. 1087; 1899, c. 164, s. 23; 1933, c. 134, s. 8; 1941, c. 97; C. S. 1106.)

§ 62-143. Discrimination between connecting lines.—All common carriers subject to the provisions of this chapter shall according to their powers afford all reasonable, proper and equal facilities for the interchange of traffic between their respective lines and for the forwarding and delivering of passengers and freight to and from their several lines and those connecting therewith, and shall not discriminate in their rates, routes and charges against such connecting lines, and shall be required to make as close connection as practicable for the convenience of the traveling public. And common carriers shall obey all rules and regulations made by the commission relating to trackage. (Rev., s. 1088; 1899, c. 164, s. 21; 1933, c. 134, s. 8; 1935, c. 258; 1941, c. 97; C. S. 1107.)

Cross Reference.—See also, § 60-7.

Editor's Note.—The amendment of 1935 inserted the word "routes" making the section applicable to discrimination in routes.

As to the practice of specifying in published tariffs particular routes formed with connecting carriers, see foot note, 13 N. C. L. Rev. 364.

Declaratory of Common Law.—A similar section in the act creating the Railroad Commission was held, in Atlantic Exp. Co. v. Wilmington, etc., 111 N. C. 463, 16 S. E. 393, to be merely declaratory of the common law, and not to enlarge its scope.

May Require Trains to Make Connection.—The commission has power to require a railroad company to have a train arrive at a certain station on its road at a certain schedule time, so as to connect with the train of another company. Corp. Comm. v. Railroad, 137 N. C. 1, 49 S. E. 191.

Express Facilities.—A railroad company is not compelled to furnish express facilities to another to conduct an express business over its road the same as it provides for it—self or affords to any other express company. Atlantic Exp. Co. v. Wilmington, etc., Railroad, 111 N. C. 463, 16 S. E. 393.

§ 62-144. Failure to make reports.—Every officer, agent or employee of any railroad company, express or telegraphic company, who shall wilfully neglect or refuse to make and furnish any report required by the commission for the purposes of this chapter, or who shall wilfully or unlawfully hinder, delay or obstruct the commission in the discharge of the duties hereby imposed upon it, shall forfeit and pay the sum of five hundred dollars for each offense, to be recovered in an action in the name of the state. A delay of ten days to make and furnish such report is conclusive of the presumption that the same was willful. (Rev., s. 1089; 1899, c. 164, s. 18; 1933, c. 134, s. 8; 1941, c. 97; C. S. 1108.)

Construction of Similar Statutes.—In construing a statute (Code of 1883, s. 160) which provided a similar penalty against corporations for failure to make the returns into the court, in State v. Marietta, etc., Railroad, 108 N. C. 647, 10 S. E. 79, it was held, that it could only be recovered in an action brought by the state. A private relator could not maintain the action.

§ 62-145. Offenses by railroads, not otherwise provided for.—If any railroad company shall violate the provisions of this chapter not otherwise provided for, such railroad company shall incur a penalty of one hundred dollars for each violation, to be recovered by the party injured. (Rev., s. 1090; 1899, c. 164, s. 17; C. S. 1109.)

Action Ex Contractu.—It would seem that an action for the penalty hereunder is an action ex contractu for breach of an implied contract to perform a statutory duty. State v. Wilmington, etc., Railroad, 126 N. C. 434, 36 S. E. 14.

Construction of Penal Statute.—The rule that a penal statute must be strictly construed, means no more than that the court, in ascertaining the meaning of such a statute, cannot go beyond the plain meaning of the words and phraseology employed in search of an intention not certainly implied by them, and where there is reasonable doubt as to the meaning of the words used in the statute, the court will not give them such an interpretation as to impose the penalty, nor will the purpose of the statute be extended by implication, so as to embrace cases not clearly within its meaning. Hines v Wilmington, etc., Railroad, 35 N. C. 454.

§ 62-146. Violation of rules, causing injury; damages; limitation.—If any railroad company doing business in this state shall, in violation of any rule or regulation provided by the commission, inflict any wrong or injury on any person, such person shall have a right of action and recovery for such wrong or injury, in any court having jurisdiction thereof, and the damages to be recovered shall be the same as in an action between individuals, except that in case of willful violation of law such railroad company shall be liable to exemplary damages: Provided, that all suits under this chapter shall be brought within one year after the commission of the alleged wrong or injury. (Rev., s. 1091; 1899, c. 164, s. 16; 1933, c. 134, s. 8; 1941, c. 97; C. S. 1110.)

There is no requirement at common law, and no statute in the state, obliging railroad companies to fence their tracks. Jones v. Western North Carolina Railroad, 95 N. C. 328.

§ 62-147. Action for penalty; when and how brought.—An action for the recovery of any penalty under this chapter shall be instituted in the court in which the penalty has been incurred, and shall be instituted in the name of the state of North Carolina on the relation of the utilities commission against the company incurring such penalty; or whenever such action is upon the complaint of any injured person or corporation, it shall be instituted in the name of the state of North Carolina on the relation of the utilities commission against the company incurring such penalty. Such action shall be instituted and prosecuted by the attorney-general or the solicitor of the judicial district in which such penalty has been incurred. The procedure in such actions, the
right of appeal and the rules regulating appeals shall be the same as are now provided by law in other civil actions. (Rev., s. 1092; 1899, c. 164, s. 15; 1933, c. 134, s. 8; 1941, c. 97; C. S. 1111.)

§ 62-148. Remedies, cumulative.—The remedies given by this chapter to persons injured shall be regarded as cumulative to the remedies now given or which may be given by law against railroad corporations, and this chapter shall not be construed as repealing any statute giving such remedies. (Rev., s. 1093; 1899, c. 164, s. 26; C. S. 1112.)

### Division XI. Police Regulations.

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Chapter 63.

Art. 1. Municipal Airports.

§ 63-1. Definition.—Airport or landing field for the purposes of this article is defined as any plot of land or water formally set aside, and designated as a place where aircraft may land or take off. (1929, c. 87, s. 1.)


§ 63-2. Cities and towns authorized to establish airports.—The governing body of any city or town in this state is hereby authorized to acquire, establish, construct, own, control, lease, equip, improve, maintain, operate, and regulate airports or landing fields for the use of airplanes and other aircraft, either within or without the limits of such cities and towns and may use for such purpose or purposes any property suitable therefor that is now or may at any time hereafter be owned or controlled by such city or town. (1929, c. 87, s. 2.)

Cross References.—As to power of eminent domain, see §§ 63-5 and 63-6. As to adoption of airport zoning regulations, see §§ 63-31 et seq.

§ 63-3. Counties authorized to establish airports.—The governing body of any county in this state is hereby authorized to acquire, establish, construct, own, control, lease, equip, improve, maintain, operate, and regulate airports or landing fields for the use of airplanes and other aircraft within or without the limits of such counties, and may use for such purpose or purposes any property suitable therefor that is now or may at any time hereafter be owned or controlled by such county. (1929, c. 87, s. 3.)

§ 63-4. Joint airports established by cities and towns and counties.—The governing bodies of any city, town and county in this state are hereby authorized to jointly acquire, establish, construct, own, control, lease, equip, improve, maintain, operate, and regulate airports or landing fields for the use of airplanes and other aircraft within or without the limits of such cities, towns and counties, and may use for such purpose or purposes any property suitable therefor that is now or may at any time hereafter be jointly owned or controlled by such city, town and county. (1929, c. 87, s. 4.)

§ 63-5. Airport declared public purpose; eminent domain.—Any lands acquired, owned, controlled, or occupied by such cities, towns, and/or counties, for the purposes enumerated in §§ 63-2, 63-3 and 63-4, shall and are hereby declared to be acquired, owned, controlled and occupied for a public purpose, and such cities, towns and/or counties shall have the right to acquire property for such purpose or purposes under the power of eminent domain as and for a public purpose. (1929, c. 87, s. 5.)

§ 63-6. Acquisition of sites; appropriation of moneys.—Private property needed by a city, town and/or county for an airport or landing field may be acquired by gift or devise or shall be acquired by purchase if the city town and/or county is or are able to agree with the owners on the terms thereof, and otherwise by condemnation, in the manner provided by law under which the city, town and/or county is or are authorized to acquire real property for public purposes, other than street purposes, or if there be no such law, in the manner provided for and subject to the provisions of the condemnation law. The purchase price, or award for property acquired for an airport or landing field may be paid for by appropriation...
of moneys available therefor, or wholly or partly from the proceeds of the sale of bonds of the city, town and/or county, as the governing body and/or bodies of such city, town and/or county shall determine. (1929, c. 87, s. 6.)

Cross References.—As to proceedings for eminent domain, see §§ 40-11 et seq. As to zoning regulations and acquisition of air rights, see §§ 63-31, 63-32 and 63-36.

§ 63-7. Airports already established declared public charge; regulations and fees for use of.—The governing body or bodies of a city, town and/or county which has or has established an airport or landing field, and acquired, leased, or set apart real property for such purpose, may construct, improve, equip, maintain, and operate the same. The expenses of such construction, improvement, maintenance, and operation shall be a city, town and/or county charge as the case may be. The governing body or bodies of a city, town and/or county may adopt regulations and establish fees or charges for the use of such airport or landing field. (1929, c. 87, s. 7.)

§ 63-8. Appropriations.—The governing body or bodies of a city, town and/or county to which this article is applicable, having power to appropriate, individually or jointly, money therein, are hereby authorized to annually appropriate and cause to be raised by taxation in such city, town and/or county or to use from the net proceeds derived from the operation, by such city, town or county, of any public utility a sum sufficient to carry out the provisions of this article in such proportion and upon such pro-rata basis as may be determined upon by a joint board to be appointed by and from the governing body or bodies of the city, town and/or the county individually as the case may be. Provided, nothing herein shall be construed to permit the governing bodies of any county, city or town to issue bonds under the provisions of this article without a vote of the people. (1929, c. 87, s. 8.)

§ 63-9. Partial invalidity.—If any part or parts of this article shall be held to be unconstitutional, such unconstitutionality shall not affect the validity of the remaining parts of this article. The General Assembly expressly declares that it would have passed the remaining parts of this article, if it had known that such part or parts thereof would be declared unconstitutional. (1929, c. 87, s. 9.)

Art. 2. State Regulation.

§ 63-10. Definition of terms.—In this article “aircraft” includes balloon, airplane, hydroplane, and every other vehicle used for navigation through the air. A hydroplane while at rest on water and while being operated on or immediately above water shall be governed by the rules regarding water navigation; while being operated through the air otherwise than immediately above water, it shall be treated as an aircraft. “Aeronaut” and “airman” includes aviator, pilot, balloonist, and every other person having any part in the operation of aircraft while in flight. “Passenger” includes any person riding in an aircraft but having no part in its operation. (1929, c. 190, s. 1.)

§ 63-11. Sovereignty in space. — Sovereignty in space above the lands and waters of this State is declared to rest in the State, except where granted to and assumed by the United States. (1929, c. 190, s. 2.)

§ 63-12. Ownership of space.—The ownership of the space above the lands and waters of this State is declared to be vested in the several owners of the surface beneath, subject to the right of flight described in § 63-13. (1929, c. 190, s. 3.)

§ 63-13. Lawfulness of flight.—Flight in aircraft over the lands and waters of this State is lawful, unless at such a low altitude as to interfere with the then existing use to which the land or water, or the space over the land or water, is put by the owner, or unless so conducted as to be imminently dangerous to persons or property lawfully on the land or water beneath. The lawfulness of an aircraft in the lands or waters of another, without his consent, is unlawful, except in the case of a forced landing. For damages caused by a forced landing, however, the owner or lessee of the aircraft or the aeronaut shall be liable as provided in § 63-14. (1929, c. 190, s. 4.)

§ 63-14. Damage on land. — The owner of every aircraft which is operated over the lands or waters of this State is absolutely liable for injuries to persons or property on the land or water beneath, caused by the ascent, descent, or flight of the aircraft, or the dropping or falling of any object therefrom, whether such owner was negligent or not, unless the injury is caused in whole or in part by the negligence of the person injured, or of the owner or bailee of the property injured. If the aircraft is leased at the time of the injury to person or property, both owner and lessee shall be liable, and they may be sued jointly, or either or both of them may be sued separately. An aeronaut who is not the owner or lessee shall be liable only for the consequences of his own negligence. The injured person, or owner or bailee of the injured property, shall have a lien on the aircraft causing the injury to the extent of the damage caused by the aircraft or objects falling from it. (1929, c. 190, s. 5.)

§ 63-15. Collision of aircraft.—The liability of the owner of one aircraft, to the owner of another aircraft, or to aeronauts or passengers on either aircraft, for damage caused by collision on land or in the air shall be determined by the rules of law applicable to torts on land. (1929, c. 190, s. 6.)

§ 63-16. Jurisdiction over crimes and torts. — All crimes, torts, and other wrongs committed by or against an aeronaut or passenger while in flight over this State shall be governed by the laws of this State and the question whether damage occasioned by or to an aircraft while in flight over this State constitutes a tort, crime or other wrong by or against the owner of such aircraft shall be determined by the laws of this State. (1929, c. 190, s. 7.)

Cross References.—See also, § 63-24. As to criminal jurisdiction generally, see §§ 7-63 and 7-64.

§ 63-17. Jurisdiction over contracts.—All contractual and other legal relations entered into by aeronauts or passengers while in flight over this State shall have the same effect as if entered into on the land or water beneath. (1929, c. 190, s. 8.)
§ 63-18. Dangerous flying a misdemeanor.—Any aeronaut or passenger who, while in flight over a thickly inhabited area or over a public gathering within this State, shall engage in trick or acrobatic flying, or in any acrobatic feat, or shall except while in landing or taking off, fly at such a low level as to endanger the persons on the surface beneath, or drop any object except loose water or loose sand ballast, shall be guilty of a misdemeanor and punishable by a fine of not more than five hundred dollars ($500.00) or imprisonment for not more than one year, or both. (1929, c. 190, s. 9.)

§ 63-19: Repealed by Session Laws 1943, c. 543.

§ 63-20. Qualifications of operator; federal license.—The public safety requiring, and the advantages of uniform regulation making it desirable, in the interest of aeronautical progress, that a person engaging within this State in operating aircraft, in any form of aerial navigation for which a license to operate aircraft issued by the United States Government would then be required if such aerial navigation were interstate, should have the qualifications necessary for obtaining and holding such a license, it shall be unlawful for any person to engage in operating aircraft within the State, in any such form of aerial navigation, unless he have such Federal license. (1929, c. 190, s. 11.)

§ 63-21. Possession and exhibition of license certificate.—The certificate of the license, herein required, shall be kept in the personal possession of the licensee when he is operating aircraft within this State and must be presented for inspection upon the demand of any passenger, any peace officer of this State, or any official, manager or person in charge of any airport or landing field in this State upon which he shall land. (1929, c. 190, s. 12.)

§ 63-22. Aircraft; construction, design and airworthiness; federal registration.—The public safety requiring, and the advantages of uniform regulation making it desirable, in the interest of aeronautical progress, that aircraft to be operated within this State should conform, with respect to aeronautical progress, that aircraft to be operated within this State and must be presented for inspection upon the demand of any passenger, any peace officer of this State, or any official, manager or person in charge of any airport or landing field in this State upon which he shall land. (1929, c. 190, s. 12.)

§ 63-23. Penalties.—A person who violates any provision of §§ 63-20, 63-21 or 63-22 of this article shall be guilty of a misdemeanor and punishable by a fine of not more than one hundred dollars ($100.00), or by imprisonment for not more than ninety days, or both; provided, however, that acts or omissions made unlawful by §§ 63-20, 63-21 or 63-22 of this article shall not be deemed to include any act or omission which violates the laws or lawful regulations of the United States. (1929, c. 190, s. 14.)

§ 63-24. Jurisdiction of state over crimes and

Art. 3. Stealing, Tampering with, or Operating While Intoxicated.

§ 63-25. Taking of aircraft made crime of larceny.—Any person who, under circumstances not constituting larceny shall, without the consent of the owner, take, use or operate or cause to be taken, used or operated, an airplane or other aircraft or its equipment, for his own profit, purpose or pleasure, steals the same, is guilty of larceny and is punishable accordingly. (1929, c. 90, s. 1.)

Cross References.—As to larceny generally, see §§ 14-70 et seq. As to punishment, see § 14-2.

§ 63-26. Tampering with aircraft made crime.—Any person who shall without the consent of the owner, go upon or enter, tamper with or in any way damage or injure any airplane or other aircraft shall be guilty of a misdemeanor and shall be punishable by fine of not more than one hundred ($100.00) dollars or imprisonment of not more than sixty days, or both, in the discretion of the court and it shall not be necessary to conviction hereunder to show wilful or malicious intent. (1929, c. 90, s. 2.)

Cross References.—As to punishment, see § 14-2.

§ 63-27. Operation of aircraft while intoxicated made crime.—Any person who operates an airplane or other aircraft, whether on the ground or in the air while in an intoxicated condition, shall be guilty of a misdemeanor and punishable by fine not to exceed one hundred dollars or by imprisonment not to exceed sixty days, or both, in the discretion of the court. (1929, c. 90, s. 3.)

Cross References.—As to punishment, see § 14-2.

§ 63-28. Infliction of serious bodily injury by operation of aircraft while intoxicated made felony.—Any person who, operating an airplane or other aircraft whether on the ground or in the air while in an intoxicated condition, does serious bodily injury to another shall be guilty of a felony. (1929, c. 90, s. 4.)


§ 63-29. Definitions.—As used in this article, unless the context otherwise requires:

(1) "Airport" means any area of land or water designed for the landing and taking off of aircraft and utilized or to be utilized by the public as a point of arrival or departure by air.

(2) "Airport hazard" means any overhead power line, not constructed, operated and maintained according to standard engineering practices in general use, which interferes with radio communication between a publicly owned airport and aircraft approaching or leaving same, or any structure or tree which obstructs the aerial approaches of such an airport or is otherwise hazardous to its use for landing or taking off.

(3) "Political subdivision" means any municipality, city, county, or town.
§ 63-30. Airport hazards not in public interest.—It is hereby found and declared that an airport hazard endangers the lives and property of users of the airport and of occupants of land in its vicinity, and also, if of the obstruction type, in effect reduces the size of the area available for the landing, taking off and maneuvering of aircraft, thus tending to destroy or impair the utility of the airport and the public investment therein, and is therefore not in the interest of the public health, public safety, or general welfare. (1941, c. 250, s. 1.)

§ 63-31. Adoption of airport zoning regulations.—(1) Every political subdivision may adopt, administer, and enforce, under the police power and in the manner and upon the conditions hereinafter prescribed, airport zoning regulations, which regulations shall divide the area surrounding any airport within the jurisdiction of said political subdivision into zones, and, within such zones, specify the land uses permitted, and regulate and restrict the height to which structures and trees may be erected or allowed to grow. In adopting or revising any such zoning regulations, the political subdivision shall consider, among other things, the character of the flying operations expected to be conducted at the airport, the nature of the terrain, the height of existing structures and trees above the level of the airport, the possibility of lowering or removing existing obstructions, and the views of the agency of the federal government charged with the fostering of civil aeronautics, as to the aerial approaches necessary to safe flying operations at the airport.

(2) In the event that a political subdivision has adopted, or hereafter adopts, a general zoning ordinance regulating, among other things, the height of buildings, any airport zoning regulations adopted for the same area or portion thereof under this article, may be incorporated in and made a part of such general zoning regulations, and be administered and enforced in connection therewith, but such general zoning regulations shall not limit the effectiveness or scope of the regulations adopted pursuant to this article.

(3) Any two or more political subdivisions may agree, by ordinance duly adopted, to create a joint board and delegate to said board the powers herein conferred to promulgate, administer and enforce airport zoning regulations to protect the aerial approaches of any airport located within the corporate limits of any one or more of said political subdivisions. Such joint boards shall have as members two representatives appointed by the chief executive officer of each political subdivision participating in the creation of said board and a chairman elected by a majority of the members so appointed.

(4) The jurisdiction of each political subdivision is hereby extended to the promulgating, administering and enforcement of airport zoning regulations to protect the approaches of any airport which is owned by said political subdivision but located outside the corporate limits of said political subdivision. In case of conflict with any airport zoning or other regulations promulgated by any other political subdivision, the regulations adopted pursuant to this section shall prevail.

(5) All airport zoning regulations adopted under this article shall be reasonable, and none shall require the removal, lowering, or other change or alteration of any structure or tree not conforming to the regulations when adopted or amended, or otherwise interfere with the continuance of any nonconforming use, except as provided in § 63-32, subsection (1).

(6) Nothing herein contained shall be construed to prevent trees existing at the time any zoning regulations are adopted to continue their natural growth. (1941, c. 950, s. 3.)

§ 63-32. Permits, new structures, etc., and variances.—(1) Permits.—Where advisable to facilitate the enforcement of zoning regulations adopted pursuant to this article, a system may be established by any political subdivision for the granting of permits to establish or construct new structures and other uses and to replace existing structures and other uses or make substantial changes therein or substantial repairs thereof. In any event, before any nonconforming structure or tree may be replaced, substantially altered or repaired, rebuilt, allowed to grow higher, or replanted, a permit must be secured from the administrative agency authorized to administer and enforce the regulations, authorizing such replacement, change or repair. No such permit shall be granted that would allow the structure or tree in question to be made higher or become a greater hazard to air navigation than it was when the applicable regulation was adopted; and whenever the administrative agency determines that a nonconforming structure or tree has been abandoned or more than eighty per cent torn down, destroyed, deteriorated, or decayed: (a) no permit shall be granted that would allow said structure or tree to exceed the applicable height limit or otherwise deviate from the zoning regulations; and (b) whether application is made for a permit under this paragraph or not, the said agency may by appropriate action compel the owner of the nonconforming structure or tree, at his own expense, to lower, remove, reconstruct, or equip such object as may be necessary to conform to the regulations or, if the owner of the nonconforming structure or tree shall neglect or refuse to comply with such order for ten days after notice thereof, the said agency may proceed to have the object so lowered, removed, reconstructed, or equipped. Except as indicated, all applications for permits for replacement, change or repair of nonconforming uses shall be granted.

(2) Variances.—Any person desiring to erect any structures, or increase the height of any structure, or permit the growth of any tree, or otherwise use his property, in violation of airport zoning regulations adopted under this article, may
apply to the board of appeals, as provided in § 63-33, subsection (3), for a variance from the zoning regulations in question. Such variances shall be allowed where a literal application or enforcement of the regulations would result in practical difficulty or unnecessary hardship and the relief granted would not be contrary to the public interest but do substantial justice and be in accordance with the spirit of the regulations and this article.

(3) Obstruction Marking and Lighting. — In granting any permit or variance under this section, the administrative agency or board of appeals may, if it deems such action advisable to effectuate the purposes of this article and reasonable in the circumstances, so condition such permit or variance as to require the owner of the structure or tree in question to permit the political subdivision, at its own expense, to install, operate, and maintain suitable obstruction markers and obstruction lights thereon. (1941, c. 250, s. 4.)

§ 63-33. Procedure. — (1) Adoption of Zoning Regulations. — No airport zoning regulations shall be adopted, amended, or changed under this article except by action of the legislative body of the political subdivision in question, or the joint board provided for in § 63-31, subsection (3), after a public hearing in relation thereto, at which parties in interest and citizens shall have an opportunity to be heard. At least fifteen days' notice of the hearing shall be published in an official paper, or a paper of general circulation, in the political subdivision or subdivisions in which the airport is located.

(2) Administration of Zoning Regulations—Administrative Agency. — The legislative body of any political subdivision adopting airport zoning regulations under this article may delegate the duty of administering and enforcing such regulations to any administrative agency under its jurisdiction, or may create a new administrative agency to perform such duty, but such administrative agency shall not be or include any member of the board of appeals. The duties of such administrative agency shall include that of hearing and deciding all permits under § 63-32, subsection (1), but such agency shall not have or exercise any of the powers delegated to the board of appeals.

(3) Administration of Airport Zoning Regulations—Board of Appeals. — Airport zoning regulations adopted under this article shall provide for a board of appeals to have and exercise the following powers:

(a) To hear and decide appeals from any order, requirement, decision, or determination made by the administrative agency in the enforcement of this article or of any ordinance adopted pursuant thereto;

(b) To hear and decide special exceptions to the terms of the ordinance upon which such board may be required to pass under such ordinance;

(c) To hear and decide specific variances under § 63-32, subsection (2). Where a zoning board of appeals or adjustment already exists, it may be appointed as the board of appeals. Otherwise, the board of appeals shall consist of five members, each to be appointed for a term of three years and to be removable for cause by the appointing authority upon written charges and after public hearing. The board shall adopt rules in accordance with the provisions of any ordinance adopted under this article. Meetings of the board shall be held at the call of the chairman and at such other times as the board may determine. The chairman, or in his absence the acting chairman, may administer oaths and compel the attendance of witnesses. All meetings of the board shall be public. The board shall keep minutes of its proceedings, showing the vote of each member upon each question, or, if absent or failing to vote, indicating such fact, and shall keep records of its examinations and other official actions, all of which shall immediately be filed in the office of the board and shall be a public record.

Appeals to the board may be taken by any person aggrieved, or by any officer, department, board, or bureau of the political subdivision affected, by any decision of the administrative agency. An appeal must be taken within a reasonable time, as provided by the rules of the board, by filing with the agency from which the appeal is taken and with the board, a notice of appeal specifying the grounds upon which the appeal is taken from which the appeal is taken shall forthwith transmit to the board all the papers constituting the record upon which the action appealed from was taken.

An appeal shall stay all proceedings in furtherance of the action appealed from, unless the agency from which the appeal is taken certifies to the board, after the notice of appeal has been filed with it, that by reason of the facts stated in the certificate a stay would, in its opinion, cause imminent peril to life or property. In such case proceedings shall not be stayed otherwise than by a restraining order which may be granted by the board or by a court of record on application on notice to the agency from which the appeal is taken and on due cause shown.

The board shall fix a reasonable time for the hearing of the appeal, give public notice and due notice to the parties in interest, and decide the same within a reasonable time. Upon the hearing any party may appear in person or by agent or by attorney.

The board may, in conformity with the provisions of this article, reverse or affirm, wholly or partly, or modify, the order, requirement, decision, or determination appealed from and may make such order, requirement, decision or determination as ought to be made, and to that end shall have all the powers of the administrative agency from which the appeal is taken.

The concurring vote of a majority of the members of the board shall be sufficient to reverse any order, requirement, decision, or determination of the administrative agency, or to decide in favor of the applicant on any matter upon which it is required to pass under any such ordinance, or to effect any variation in such ordinance. (1941, c. 250, s. 5.)

§ 63-34. Judicial review. — (1) Any person aggrieved by any decision of the board of appeals, or any taxpayer, or any officer, department, board, or bureau of the political subdivision, may present to the superior court a verified petition setting forth that the decision is illegal, in whole or in part, and specifying the grounds of the illegality. Such petition shall be presented to the court with-
§ 64-1. Rights as to real property.

Sec. 64-1. Rights as to real property.—It is lawful for aliens to take both by purchase and descent, or other operation of law, any lands, tenements or hereditaments, and to hold and convey the same as fully as citizens of this state can or may do, any law or usage to the contrary notwithstanding. (Rev., s. 182; Code, s. 7; 1870-1, c. 255; 1935, c. 243; 1939, c. 19; C. S. 192.)

Cross Reference.—As to rules of descent, see § 29-1.

Sec. 64-2. Contracts validated.

Editor's Note.—This section was inadvertently repealed by P. L. 1935, c. 260. See an article appearing in 13 N. C. Law Rev. 355. Public Laws 1939, c. 19, corrected the inadvertence.

§ 64-2. Contracts validated.—All contracts to purchase or sell real estate by or with aliens, heretofore made, shall be deemed and taken as valid to all intents and purposes. (Rev., s. 183; Code, s. 8; 1870-1, c. 255, s. 2; C. S. 193.)

Chapter 64. Aliens.
§ 65-1 CHAPTER 65. CEMETERIES—RURAL

Chapter 65. Cemeteries.

Sec. 65-1. County commissioners to provide list of public and abandoned cemeteries. It shall be the duty of the boards of county commissioners of the various counties in the state to prepare and keep on record in the office of the register of deeds a list of all public cemeteries in the counties outside the limits of incorporated towns and cities, and not established and maintained for the use of an incorporated town or city, together with the names and addresses of the persons in possession and control of the same. To such list shall be added a list of the public cemeteries in the rural districts of such counties which have been abandoned, and it shall be the duty of the boards of county commissioners to furnish to the division of publications in the office of the Secretary of State copies of the lists of such public and abandoned cemeteries, to the end that it may furnish to the boards, for the use of the persons in control of such cemeteries, suitable literature, suggesting methods of taking care of such places. (1917, c. 101, s. 1; 1939, c. 316; C. S. 5019.)

§ 65-2. Appropriations by county commissioners. To encourage the persons in possession and control of the public cemeteries referred to in § 65-1 to take proper care of and to beautify such cemeteries, to mark distinctly their boundary line with evergreen hedges or rows of suitable trees, and otherwise to lay out the grounds in an orderly manner, the board of county commissioners of any county, upon being notified that two-thirds of the expense necessary for so marking and beautifying any cemetery has been raised by the local governing body of the institution which owns the cemetery, and is actually in hand, is hereby required to appropriate from the general fund of the county one-third of the expense necessary to pay for such work, the amount appropriated by the board of commissioners in no case to exceed fifteen dollars for each cemetery. (1917, c. 101, s. 2; C. S. 5020.)

§ 65-3. County commissioners to have control of abandoned cemeteries. The county commissioners of the various counties are required to take possession and control of all abandoned public cemeteries in their respective counties, to see that the boundaries and lines are clearly laid out, defined, and marked, and to take proper steps to preserve them from encroachment, and they are hereby authorized to appropriate from the general fund of the county whatever sums may be necessary from time to time for the above purposes. (1917, c. 101, s. 3; C. S. 5021.)
§ 65-4

Art. 2. Care of Confederate Cemetery.

§ 65-4. State highway and public works commission to furnish labor.—The state highway and public works commission is hereby authorized and directed to furnish at such time, or times, as may be convenient, such prisoner's labor as may be available, to properly care for the Confederate Cemetery situated in the City of Raleigh, such services to be rendered by the State's prisoners without compensation. (1927, c. 224, s. 1; 1933, c. 172.)

Art. 3. Cemeteries for Inmates of County Homes.

§ 65-5. County commissioners may establish new cemeteries.—The boards of county commissioners of the various counties in the state are authorized and empowered to locate and establish new graveyards or cemeteries upon the lands of their respective counties for the burial of the inmates of the county homes. (1917, c. 151, s. 1; C. S. 5022.)

§ 65-6. Removal and reinterment of bodies.—Whenever the county commissioners have established new graveyards or cemeteries, they are authorized and empowered to remove to such graveyards or cemeteries all bodies of deceased inmates of the county homes. (1917, c. 151, s. 2; C. S. 5023.)

Art. 4. Trust Funds for the Care of Cemeteries.

§ 65-7. Money deposited with clerk of superior court.—For the maintenance and preservation of graves, burial plats, graveyards and cemeteries which may be neglected, any person, firm, or corporation may, by will or otherwise, place in the hands of the clerk of the superior court of any county in the state where such grave or lot is located any sum of money not less than one hundred dollars nor more than two thousand dollars, the income from which is to be used for keeping in good condition any grave, burial plat, graveyard, or cemetery in the county in which the money is placed, with specific instructions as to the use of the fund. (1917, c. 155, s. 1; C. S. 5024.)

§ 65-8. Separate record of accounts to be kept.—It shall be the duty of the clerk of the superior court to keep a separate record for keeping account of the money deposited as above provided, to keep a perpetual account of the same therein, and to record therein the specific instructions about the use of the income on such money. He shall see that the income is spent according to such specific instructions, and shall make report of the same from year to year in the same manner as if it were guardian funds. (1917, c. 155, s. 1; C. S. 5025.)

§ 65-9. Funds to be kept perpetually.—All money placed in the office of the superior court clerk in accordance with this article shall be held perpetually, and no one shall have authority to withdraw or change the direction of the income on same. (1917, c. 155, s. 2; C. S. 5026.)

§ 65-10. Investment of funds.—Such money shall be invested in the same manner as is provided by law for the investment of other trust funds by the clerk of the superior court. (1917, c. 155, s. 3; 1943, c. 97, s. 1; C. S. 5027.)

Editor's Note.—The 1943 amendment rewrote this section.

§ 65-11. Clerk's bond and fees; substitution of bank or trust company as trustee.—The official bond of the clerk of the superior court shall be liable for all such sums as shall be paid over to him on account of the provisions of this article. The clerk shall receive for his services and responsibilities a commission of ten per cent on the net income each year of such money; and the fees or commissions so received by him under this article shall not be taken into consideration as a part of his salary.

In lieu of the provisions of the first paragraph of this section, the clerk of the superior court may, with the consent and approval of the sheriff and register of deeds, appoint any bank or trust company authorized to do business in this state as trustee for the funds authorized to be paid into his office by virtue of this article; provided, that no bank or trust company shall be appointed as such trustee unless such bank or trust company is authorized and licensed to act as fiduciary under the laws of this state.

Before any clerk shall turn over such funds to the trustee so appointed, he shall require that the trustee so named qualify before him as such trustee in the same way and manner and to the same extent as guardians are by law required to so qualify. After such trustee has qualified as herein provided, all such funds coming into its hands may be invested by it only in the securities set out in § 5-55 and the income therefrom invested for the purposes and in the manner heretofore set out in this article. All trustees appointed under the provisions of this article shall render and file in the office of the clerk of the superior court all reports that are now required by law of guardians. (1917, c. 155, ss. 3, 4; 1939, c. 18; 1943, c. 97, s. 2; C. S. 5028.)

Editor's Note.—The 1939 amendment added the second and third paragraphs. The 1943 amendment rewrote the first sentence of this section.

§ 65-12. Funds exempt from taxation.—All money referred to in the preceding sections of this article shall be exempt from all state, county, township, town, and city taxes. (1917, c. 155, s. 4; C. S. 5029.)

Cross Reference.—See notes and sections referred to under § 65-11.

Art. 5. Removal of Graves.

§ 65-13. Removal to enlarge or erect churches, etc., or to establish hydro-electric reservoirs.—In those cases where any church authorities desire to enlarge a church building and/or erect a new church and/or parish house and/or parsonage and where it becomes necessary or expedient to remove certain graves in order to secure the necessary room for such enlargement, it shall be lawful for such church authorities after thirty days' notice to the relatives of deceased, if any are known, and if none are known, then after notice posted at the church door for a like time, to remove such graves to a suitable plat in the church cemetery, or in another cemetery, due care being taken to protect tombstones and replace them properly, so as to leave the graves in as good con-
§ 65-14. CH. 65. CEMETERIES—OPERATED FOR GAIN

Art. 6. Cemetery Associations.

§ 65-15. Land holdings.—All cemetery associations or corporations created by any local, private or special act or resolution before January tenth, one thousand nine hundred and seventeen are authorized and fully empowered to hold amounts of land in excess of the limitation provided in the local, private or special act or resolution incorporating or chartering such cemetery association or corporation. (1923, c. 76, s. 1; C. S. 5030(b).)

§ 65-16. Change of name of association or corporations.—Any corporation or association chartered or incorporated by any special act of the legislature, as set forth in § 65-15, is authorized and fully empowered to change the name of such association or corporation by a majority vote of its directors, and upon such change in name it shall be the duty of the officers of the board of directors of such corporation or association to file with the secretary of state, and in the case of any incorporated by any special act of the legislature, as set forth in § 65-15, to change the name, which resolution must show the act of the legislature creating or incorporating the same, and the reasons for the change thereof. (1923, c. 76, s. 2; C. S. 5030(c).)

§ 65-17. Words and phrases defined.—When used in this article, the term "cemetery," "public cemetery," or "owner or owners" of such cemetery, as used in this article, includes only such corporations, associations, partnerships, or individuals, as are engaged in the operation for private gain or profit of a public cemetery for the interment of the dead of the human race or the sale of grave space or interment rights therein, and who advertise or offer perpetual care of grave space in connection therewith.

§ 65-18. Cemeteries to which article applies.—This article shall apply only to public cemeteries which are privately owned and operated for private gain or profit which may hereafter be established for such purpose, and which may advertise or offer perpetual care of grave space in connection therewith. (1943, c. 644, s. 1.)

Local Modification.—Buncombe: 1943, c. 644, s. 20.

§ 65-19. Removal after abandonment of cemetery.—When any person, firm, or corporation, owns any land on which is situated any cemetery or burying ground, and where it becomes necessary and expedient in the opinion of the governing body of the county or town in which any such graves are situated to remove said graves, it shall be lawful for such person, firm or corporation, after thirty days' notice to the relatives of the deceased persons buried therein, if any are known, and if none are known, then after thirty days' notice printed in some newspaper published in said county where said property lies, and if no newspaper is published in said county, then by posting notice at the courthouse door of said county, to remove said graves to a suitable plot in some other cemetery, due care being taken to protect tombstones and replace them properly so as to leave the graves in as good condition as before removal: Provided, that all of said work shall be done under the supervision of the county health officer and the board of county commissioners: Provided, further, that the conveyance of the land without reservation of the burying ground shall itself be evidence of the abandonment of the same sufficient for the purposes of this section. (1927, c. 175, s. 1.)
The words "burial commissioner," "burial association commissioner," or "commissioner" used herein shall be deemed to refer to the burial association commissioner of North Carolina, and the words "sale" or "conveyance," as used herein, unless obviously used in some other sense, shall be deemed to refer to and authorize any form of contract by means of which cemetery transfers or agrees to transfer to purchaser title to or exclusive right of interim in a grave space or family burial plot. (1943, c. 644, s. 2.)

§ 65-20. Reports by cemeteries to burial association commissioner.—Every such public cemetery shall, on or before July first one thousand nine hundred and forty-three, and on or before February first, one thousand nine hundred and forty-four, and on February first of each year thereafter, file or cause to be filed with the burial association commissioner of North Carolina, in his office in Raleigh, on forms to be supplied by said commissioner, a report giving the name of the cemetery, name of all owners thereof, name of managing or directing head, including name of sales manager or agency handling sales, if any, and stating whether or not such cemetery offers, directly or indirectly, or advertises perpetual care of burial lots or spaces sold to the public, together with copy of all forms of agreements offered to prospective purchasers, and shall, with said first report, file a plat of such cemetery, showing, as of date of ratification of this article, number and location of all lots actually surveyed and permanently staked, together with such other information as may be required under § 65-25, and as may be required by burial association commissioner of North Carolina. (1943, c. 644, s. 3.)

§ 65-21. Information as to perpetual care fund to be reported.—If such cemetery shall report that it advertises or claims to provide the perpetual care of lots or grave spaces included in its property, such report shall state the amount of its perpetual care fund as of date of above required report, manner of computing same, how and by whom controlled, description of securities in which fund is invested, and copies of all agreements entered into by the cemetery relating thereto. (1943, c. 644, s. 4.)

§ 65-22. Requirements for advertising of perpetual care fund.—No such cemetery shall hereafter cause or permit advertising of perpetual care fund in connection with the sale or offer for sale of its property unless the amount deposited in said fund from all sales made subsequent to the passage of this article shall be equal to not less than four dollars per grave space, sold, said sum to be deposited in perpetual care fund as provided in § 65-23. (1943, c. 644, s. 5.)

§ 65-23. Trustee for perpetual care fund; irrevocable trust agreement; investments.—The perpetual care fund for any cemetery licensed hereunder, as hereinafter authorized, shall immediately be turned over to a reliable trustee, to be approved by the North Carolina burial association commissioner, under an irrevocable trust agreement for safekeeping and for investment only in such securities as may now or hereafter be approved for the investment by a domestic insurance company of its legal reserve. The trustee may, by permission of said burial association commissioner, be changed from time to time, but the trust shall be irrevocable, and the form and substance of the agreement relating thereto shall be approved by the burial association commissioner. (1943, c. 644, s. 6.)

§ 65-24. Amount set aside in perpetual care fund; use of income.—Such cemetery shall set aside in its perpetual care fund not less than four dollars per grave space hereafter sold. The income on or derived from the investment of such fund may be used to defray expense of development, upkeep and maintenance of such cemetery. (1943, c. 644, s. 7.)

§ 65-25. Sale of lots under "certificate plan"; certificate indemnity fund.—If such cemetery shall offer for sale and sell its said lots or grave spaces under plan or agreement evidenced by certificate (hereinafter referred to as "certificate plan") which may involve the transfer of family burial plot or grave spaces, or exclusive right of interim therein, to families, individuals, or their representatives, conditioned upon the continuance or cessation of human life or upon limited pay plan or plans where death of certificate holder prior to payment of all sums due to be paid thereunder may terminate his or her liability for further payment, such cemetery shall set aside and reserve unencumbered and shall keep unencumbered lots or grave spaces suitable for burial in sufficient number to enable the cemetery to comply with the terms of each certificate issued, and shall set aside and deposit with the trustee of its perpetual care fund an additional one dollar per grave space sold, same to be known as "certificate indemnity fund" and continue the making of such deposit until from such sales the total deposits to credit of said fund shall amount to five thousand dollars, same to be held and invested separate and apart from the perpetual care fund of such cemetery, as a fund to indemnify lot and grave space purchasers against loss by reason of the cemetery's failure to reserve, unencumbered, the identical grave space(s) selected by purchaser, if selection has been made, and if not, a sufficient number of grave spaces suitable for burial to enable the cemetery to comply with the terms of its certificate, such fund to be calculated, become due, be deposited and invested, and the cemetery to become liable therefor, only in like manner as for such cemetery's perpetual care fund, and shall be maintained and kept separate so long as there is outstanding any liability of cemetery to reserve grave space under a certificate issued on the above plan, but income therefrom shall be paid to cemetery for such use as income from its perpetual care fund may be used. When such liability no longer exists, said fund shall become a part of the perpetual care fund of such cemetery. Any certificate holder sustaining any loss due to failure of the cemetery to comply with all of the provisions of this section shall have a right of action therefor against said cemetery and upon obtaining a final judgment, such certificate holder shall be entitled to an order directing said trustee to pay the amount of said judgment. Every cemetery licensed under this article shall set aside for and deposit in its perpetual care fund not less
than four dollars per grave space agreed by cemetery to be reserved under certificate, or sold by cemetery under any other form of contract: Provided, purchaser is not in default in the payment of any premium or installment becoming due under such certificate or contract, such amount to become due to and be deposited in said fund as such payments are received by the cemetery: Provided, the total amount which said cemetery shall be required to pay into said fund annually shall be only such sum as may be equal to total amount of perpetual care deposit to become due under such certificate or contract, divided by the number of years required to purchase by the purchaser to qualify to receive conveyance agreed by cemetery to be made under such certificate or contract, or, if sale has been made under certificate providing for payment of premiums for life, division shall be by life expectancy of certificate holder, computed under American Men Table of Mortality: Provided, further, if purchaser shall pay off or otherwise discharge his or her obligations, as evidenced by certificate or contract, in advance of due date, the deposit of perpetual care shall be ratably increased. Perpetual care earned or deposited under contracts which are in default at time report to the burial association commissioner is required to be made hereunder, shall be deducted and shall not be considered in arriving at above total. The income only resulting from the investment of such fund may be used in the sole discretion of the cemetery for the purpose of defraying expense of developing and maintaining the cemetery. Detailed report of amount due to be deposited in such fund, showing the amount actually deposited therein, listed securities in which same is invested, and giving such other details as shall be required by the burial association commissioner, shall be made to said commissioner annually on the first day of February in each and every year, and more frequently if said commissioner, in his discretion, so requires. Upon compliance with the terms of this article, including the provisions contained in this section, such cemetery shall be licensed by burial association commissioner and may issue its contracts of sale of grave space or interment rights therein on the certificate plan and on any other plan not prohibited by law. A cemetery complying with all provisions of this article, excepting only those provisions authorizing the cemetery to operate under the certificate plan, shall be entitled to be licensed hereunder, but any cemetery failing to qualify to so operate shall not be entitled to issue or enter into a contract under such plan. (1943, c. 644, s. 8.)

§ 65-26. License and provision for perpetual care requisite for establishment of cemetery.—No corporation, association, partnership, or individual, shall, after the ratification of this article, be permitted to establish a public cemetery for private gain or profit without obtaining a license therefor, as provided in this article, and without providing for the perpetual care of such cemetery in accordance with the terms of this article, including the setting aside of an initial perpetual care fund of not less than five thousand dollars, and more frequently if said commissioner, in his discretion, so requires. Any such cemetery owner or manager who fails to comply with any of the provisions of this article shall be guilty of a misdemeanor and upon conviction thereof shall be fined two hundred dollars, or imprisoned for not exceeding thirty days. (1943, c. 644, s. 13.)

§ 65-27. Deposits in perpetual care fund when fund amounts to $100,000.00.—When the amount deposited in the perpetual care fund of such cemetery shall amount to one hundred thousand dollars, anything in this article to the contrary notwithstanding, the amount to be deposited in said fund thereafter shall be equal to not less than two dollars per grave space, instead of four dollars, said sum to be deposited in the perpetual care fund as provided in § 65-23. (1943, c. 644, s. 10.)

§ 65-28. Amount of deposits for perpetual care fund in certain instances.—Where such cemetery shall sell its lots for not exceeding thirteen dollars or less than eight dollars per grave space, as to such grave space so sold the amount to be deposited in the perpetual care fund shall be three dollars per grave space; if such lots shall be sold for not exceeding eight dollars per grave space, the amount deposited in the perpetual care fund shall be two dollars per grave space. (1943, c. 644, s. 11.)

§ 65-29. Agreements as to retention of perpetual care fund where cemetery property sold to municipality.—In event of the voluntary purchase by any city or town of a cemetery providing perpetual care of lots under this article, it shall be lawful for the cemetery to provide in its agreement with purchasers that in event of the voluntary purchase by such municipality of such cemetery property, such cemetery may retain for its own use any amount accumulated in such perpetual care fund on sale of lots made subsequent to the ratification of this article: Provided, such municipality purchasing and accepting a conveyance of said cemetery property shall, as part consideration for making by such cemetery of said conveyance, assume in writing all obligations of such cemetery in connection with the maintenance thereof. (1943, c. 644, s. 12.)

§ 65-30. Burial association commissioner to administer article; examinations.—This article shall be administered by the burial association commissioner of North Carolina, who shall make periodic examination of affairs of such cemeteries to ascertain whether they are in fact complying with the terms hereof. Examinations shall be made not less frequently than once a year and more frequently if by him deemed necessary. (1943, c. 644, s. 13.)

§ 65-31. Violation of article a misdemeanor.—Any such cemetery owner or manager who fails to comply with any of the provisions of this article shall be guilty of a misdemeanor and upon conviction thereof shall be fined two hundred dollars, or imprisoned for not exceeding thirty days. (1943, c. 644, s. 14.)

§ 65-32. Licenses for persons selling grave space; revocation.—All persons offering to sell grave space in any plan herein authorized shall be licensed by said commissioner without payment of any license fee, and such license, for good cause shown, may, in the discretion of the commissioner, be revoked. (1943, c. 644, s. 15.)

§ 65-33. Certain powers delegated to cemetery manager.—The superintendent, manager, and as-
sistant superintendent of such cemetery shall have all the powers of a deputy sheriff of the county in which such cemetery is located to enforce the law, maintain order, abate nuisances, and prevent vandalism in such cemetery. (1943, c. 644, s. 16.)

§ 65-34. Prosecution of violations; revocation and restoration of license; article part of contracts.—It shall be the duty of the burial commissioner to prosecute or cause to be prosecuted all violations of this article, and upon the conviction of the owner or manager of a public cemetery of such violation, and upon failure of such owner or manager to correct such violation within thirty days thereafter, then, in addition to such other penalties as may result from such conviction, the burial commissioner may, in his discretion, revoke the license of such cemetery. Said commissioner may, in his discretion, upon application by such cemetery, thereafter restore to it its license if such cemetery corrects the violation of this article, on account of which its owner or manager was convicted, as well as any other violations thereof known to the commissioner. This article shall be written into and become a part, where applicable, of all contracts and certificates issued hereunder. (1943, c. 644, s. 17.)

§ 65-35. Effect of certain other laws.—This article shall not be subject to any other laws respecting insurance companies of any class, nor shall same be subject to the laws affecting the sale of securities or laws affecting mutual burial or assessment insurance associations, excepting only as this article, or amendments hereof, shall expressly provide. (1943, c. 644, s. 18.)

§ 65-36. Article not to apply to certain counties or cemeteries.—This article, anything to the contrary notwithstanding, shall not apply to any county, which, according to the last United States census, had a population of less than twenty-five thousand, nor shall it apply to any existing cemetery which does not advertise or charge for perpetual care of lots offered for sale to the public. Such existing cemetery shall have the right to advertise and provide perpetual care of its lots and to be licensed hereunder upon depositing in a perpetual care fund the amount per grave space applicable under the terms hereof. (1943, c. 644, s. 19.)

Chapter 66. Commerce and Business.

Art. 1. Regulation and Inspection.

Sec. 66-1. County commissioners to appoint inspectors.
66-2. Vacancies in office of inspectors; assistants; principal liable.
66-3. Bond of inspector; fees.
66-4. Falsely acting as inspector.
66-5. Penalty for sale without inspection.
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66-7. Who to pay inspectors' fees; penalty for extortion.
66-9. Gas and electric light bills to show reading of meter.
66-10. Failure of junk dealers to keep record of purchases misdemeanor.
66-11. Dealing in certain metals regulated; purchasing from minors; violations of section misdemeanor.

Art. 2. Manufacture and Sale of Matches.

Sec. 66-12. Requirements for matches permitted to be sold.
66-13. Packages to be marked.
66-16. Violation of article a misdemeanor.

Art. 3. Candy and Similar Products.

Sec. 66-17. Sale, etc., of candy or other food not complying with health and pure food laws.
66-18. Manufacturer to pay tax upon products consigned to person, etc., other than licensed wholesale or retail merchant.
66-19. Regulations as to possession and sale.
66-20. Commissioner of revenue may require reports.
Art. 1. Regulation and Inspection.

§ 66-1. County commissioners to appoint inspectors.—The board of county commissioners may appoint for their county or any township thereof inspectors for any article of commerce the inspection of which is not otherwise provided for by law, who shall hold office for the term of five years after their employment. (Rev., ss. 4637, 4669; C. S. 5068.)

§ 66-2. Vacancies in office of inspectors; assistants; principal liable.—Whenever there shall be a vacancy in the office of inspector while the county commissioners are not in session, any three justices may appoint some other fit person until the next succeeding meeting of the board; or if any inspector shall be rendered incapable of performing his duty by sickness or other accident, he may, with the consent of three justices, appoint some other person as assistant during his sickness or other disability, which consent shall be certified under their hands and lodged with the clerk of the board of commissioners, and such assistant shall take the same oaths as inspectors; and the inspector shall be liable to the same fines and penalties for the assistant's misbehavior as for his own. (Rev., s. 4638; Code, s. 2989; R. C., c. 60, s. 9; 1784, c. 206, s. 3; 1793, c. 386; 1799, c. 539, s. 2; 1811, c. 807, s. 6; 1811, c. 812; C. S. 5069.)

§ 66-3. Bond of inspector; fees.—The said inspector shall enter into bond in the sum of five hundred dollars, payable to the state of North Carolina, conditioned for the faithful performance of the duties of his office, which bond the board shall take; and he shall be entitled to such fees as may be prescribed by the board. (Rev., s. 4671; Code, s. 3053; R. C., c. 60, s. 76; 1848, c. 43, s. 3; C. S. 5071.)

§ 66-4. Falsely acting as inspector.—If any person, who is not a legal or sworn inspector of lumber or other articles, presume to act as such, he shall forfeit and pay one hundred dollars, and be guilty of a misdemeanor. (Rev., s. 3580; Code, s. 3046; R. C., c. 60, s. 69; 1824, c. 1254, s. 3; C. S. 5072.)

§ 66-5. Penalty for sale without inspection.—If any person shall sell any article of forage or provision, of which inspection is required in accordance with this article, without the same having been inspected as required, he shall, for every offense, forfeit and pay one hundred dollars. (Rev., s. 4672; Code, s. 3054; R. C., c. 60, s. 77; 1850, c. 74, s. 2; C. S. 5073.)

§ 66-6. Penalty on master receiving without inspection.—No master or commander of any vessel shall take on board any cask or barrel or other commodity, liable to inspection as aforesaid, without its being inspected and branded as required, under the penalty of two hundred dollars for each offense. (Rev., s. 4673, 4658; Code, ss. 3036, 3037; R. C., c. 60, s. 59; 1784, c. 206, s. 6; C. S. 5074.)

Local Modification.—Town of New Bern: C. S. 3074.

§ 66-7. Who to pay inspectors' fees; penalty for extortion.—The fees of inspectors shall be paid by the purchaser or exporter of the articles inspected, and if any inspector shall receive any greater fees than are by law allowed, he shall forfeit and pay ten dollars for every offense to any person suing for the same. (Rev., s. 4673; Code, s. 3055; R. C., c. 60, s. 79; 1824, c. 1254, ss. 1, 2; C. S. 5075.)

§ 66-8. Firewood in towns.—All firewood sold in incorporated towns shall be sold by the cord and not otherwise; and each cord shall contain eight feet in length, four feet in height and four feet in breadth; and shall be cored by the seller, under the penalty of two dollars for each offense, to the use of the informer. (Rev., s. 4667; Code, s. 3049; R. C., c. 60, s. 72; 1784, c. 211; 1880, c. 401; C. S. 5081.)
§ 66-9. Gas and electric light bills to show reading of meter.—It shall be the duty of all gas companies and electric light companies selling gas and electricity to the public to show, among other things, on all statements or bills rendered to consumers, the reading of the meter at the end of the preceding month, and the reading of the meter at the end of the current month, and the amount of electricity, in kilowatt hours, and of gas, in feet, consumed for the current month.

Any gas or electric light company failing to render bills or statements, as provided for in this section, shall be subject to a penalty of ten dollars for each violation of this section or failure to render such statements, recoverable before a justice of the peace by any person suing for the same; but this section shall not apply to bills and accounts rendered customers on flat rate contracts. (1915, c. 859; C. S. 5082.)

§ 66-10. Failure of junk dealers to keep record of purchases misdemeanour.—Every person, firm, or corporation buying brass or copper, or any other metal, or any rubber, or leather and rubber belts and belting, as junk, shall keep a register and shall keep therein a true and accurate record of each purchase, showing the description of the article purchased, the name from whom purchased, the amount paid for the same, the date thereof, and also any and all marks or brands upon said metal, rubber, or leather and rubber belts and belting. The said register and the metal and rubber, and leather and rubber belts and belting purchased shall be at all times open to the inspection of the public. A failure to comply with these requirements or the making of a false entry concerning such metals, rubber, or leather, or rubber belts or belting shall constitute a misdemeanor. (1917, c. 46; C. S. 5090.)

Local Modification.—Anson, Buncombe, Caldwell, Davidson, Randolph, Robeson: C. S. 5090; Stanly: 1939, c. 154.

§ 66-11. Dealing in certain metals regulated; purchasing from minors; violations of section misdemeanour.—Every person, firm, or corporation buying railroad brasses or any composition metal specially used in the operation of trains, or brasses, composition metals, or copper of the kind or quality used by manufacturing or power plants, shall keep a register and shall keep therein a true and accurate record of each purchase, showing the name of the person from whom purchased, the amount paid for the same, the date thereof, and also any and all marks or brands upon said metal, rubber, or leather and rubber belts and belting purchased shall be at all times open to the inspection of the public. A failure to comply with these requirements or the making of a false entry concerning such metals, rubber, or leather, or rubber belts or belting shall constitute a misdemeanor. (1915, c. 109, s. 12, II; C. S. 5114.)

§ 66-12. Requirements for matches permitted to be sold.—No person, association, or corporation shall manufacture, store, offer for sale, sell or otherwise dispose of or distribute white phosphorous, single-dipped, strike-anywhere matches of the type popularly known as “parlor matches”; nor manufacture, store, sell, offer for sale, sell or otherwise dispose of, or distribute, white phosphorous, double-dipped, strike-anywhere matches or any other type of double-dipped matches, unless the bulb or first dip of such match is composed of a so-called safety or inert composition, non-ignitable on an abrasive surface; nor manufacture, store, sell, or offer for sale, otherwise dispose of or distribute matches which when packed in a carton of five hundred approximate capacity and placed in an oven maintained at a constant temperature of two hundred degrees F., will ignite in eight hours; nor manufacture, store, offer for sale, sell or otherwise dispose of, or distribute, blazer, or so-called white-matches, whether of the so-called safety or strike-anywhere type. (1915, c. 109, s. 12, I; C. S. 5113.)

§ 66-13. Packages to be marked.—No person, association, or corporation shall offer for sale, sell or otherwise dispose of, or distribute, any matches, unless the package or container in which such matches are packed bears, plainly marked on the outside thereof, the name of the manufacturer and the brand or trade-mark under which the matches are sold, disposed of, or distributed. (1915, c. 109, s. 12, II; C. S. 5114.)

§ 66-14. Storage and packing regulated.—No more than one case of each brand of matches of any type or manufacture shall be opened at any one time in the retail store where matches are sold or otherwise disposed of; nor shall loose boxes or paper-wrapped packages of matches be kept on shelves or stored in such retail stores at a height exceeding five feet from the floor; all matches when stored in warehouses must be kept only in properly secured cases, and not piled to a height exceeding ten feet from the floor; nor be stored within a horizontal distance of ten feet from any boiler, furnace, stove, or other like heating apparatus; nor within a horizontal distance of twenty-five feet from any explosive material kept or stored on the same floor. All matches shall be packed in boxes or suitable packages, containing not more than seven hundred matches in the two portions shall be placed in one box or package; provided, however, that when more than three hundred matches are packed in any one box or package the said matches shall be arranged in two nearly equal portions, the heads of the matches in the two portions shall be placed in opposite directions, and all boxes containing three hundred and fifty or more matches shall have placed over the matches a center-holding or protecting strip, made of chip board, not less than one and one-quarter inches wide; said strip shall be flanged down to hold the matches in position when the box is nested into the shock or withdrawn from it. (1915, c. 109, s. 12, II; C. S. 5115.)
§ 66-15. Shipping containers regulated. — All match boxes or packages shall be packed in a strong shipping containers or cases; maximum number of match boxes or packages contained in any one shipping container or case shall not exceed the following number:

<table>
<thead>
<tr>
<th>Number of Boxes</th>
<th>Nominal Number of Matches per Box</th>
</tr>
</thead>
<tbody>
<tr>
<td>½ gross</td>
<td>700</td>
</tr>
<tr>
<td>1 gross</td>
<td>500</td>
</tr>
<tr>
<td>2 gross</td>
<td>400</td>
</tr>
<tr>
<td>3 gross</td>
<td>300</td>
</tr>
<tr>
<td>5 gross</td>
<td>200</td>
</tr>
<tr>
<td>12 gross</td>
<td>100</td>
</tr>
<tr>
<td>20 gross over 50 and under</td>
<td>100</td>
</tr>
<tr>
<td>25 gross under</td>
<td>50</td>
</tr>
</tbody>
</table>

No shipping container or case constructed of fiber board, corrugated fiber board, or wood, nailed or wirebound, shall exceed a weight, including its contents, of seventy-five pounds; and no lock-cornered wooden case containing matches shall have a weight, including its contents, exceeding eighty-five pounds; nor shall any other article or commodity be packed with matches in any such container or case; and all such containers and cases in which matches are packed shall have plainly marked on the outside of the container or case the words “Strike-anywhere Matches” or “Strike-on-the-Box Matches.” (1915, c. 109, s. 12, III; C. S. 5116.)

§ 66-16. Violation of article a misdemeanor. — Any person, association, or corporation violating any of the provisions of this article shall be fined for the first offense not less than five dollars nor more than twenty-five dollars, and for each subsequent violation not less than twenty-five dollars. (1915, c. 109, s. 13, IV; C. S. 5117.)

Art. 3. Candy and Similar Products.

§ 66-17. Sale, etc., of candy or other food not complying with health and pure food laws.—It shall be unlawful for any person, firm or corporation, or agent of any person, firm or corporation, to consign, sell, possess or use any candy or other product within this state that does not comply with all federal and state health and pure food laws in force and effect in North Carolina. (1939, c. 323, s. 1.)

Editor’s Note.—For comment on this enactment, see 17 N. C. Law Rev. 384.

§ 66-18. Manufacturer to pay tax upon products consigned to person, etc., other than licensed wholesale or retail merchant.—Any manufacturer of candy or similar products, or the agent of such manufacturer, who consigns any such products to any person, firm or corporation, or from the agent of any such manufacturer, of the names and addresses of all consignors, other than licensed merchants, to whom consignment of such merchandise is made. (1939, c. 323, s. 4.)

§ 66-19. Regulations as to possession and sale.—It shall be unlawful for any person, firm or corporation other than a licensed wholesale or retail merchant in the state of North Carolina to consign, possess or use any article upon which the tax provided for in § 66-18 preceding is payable, or for any consignee to sell such product, unless the manufacturer thereof is registered with the commissioner of revenue of the state of North Carolina for payment of said tax. (1939, c. 323, s. 3.)

§ 66-20. Commissioner of revenue may require reports. — The commissioner of revenue shall have authority to require a report, at such times as he may require, from every person, firm or corporation manufacturing candy or similar products, or from the agent of any such manufacturer, of the names and addresses of all consignors, other than licensed merchants, to whom consignment of such merchandise is made. (1939, c. 323, s. 5.)

§ 66-21. Violators deprived of legal redress. —The consignor shall not have the right to sue in any court of law in this state for the collection of monies resulting from the sale of merchandise sold in violation of this article. (1939, c. 323, s. 5.)

§ 66-22. Violations made misdemeanor.—Any person convicted for the violation of this article shall be guilty of a misdemeanor and subject to a fine of not exceeding one hundred dollars ($100.00) or imprisonment for not exceeding thirty days or both fine and imprisonment in the discretion of the court. (1939, c. 323, s. 6.)

Art. 4. Electrical Materials, Devices, Appliances and Equipment.

§ 66-23. Sale of electrical goods regulated.—Every person, firm or corporation before selling, offering for sale or exposing for sale, at retail to the general public or disposing of by gift as premiums or in any similar manner any electrical material, devices, appliances or equipment shall first determine if such electrical materials, devices, appliances and equipment comply with the provision of this article. (1933, c. 555, s. 1.)

§ 66-24. Identification marks required. — All electrical materials, devices, appliances and equipment offered for sale, exposed for sale at retail to the general public, or disposed of by gift as premiums or in any similar manner shall have the maker’s name, trademark, or other identification symbol placed thereon, together with such other markings giving voltage, current, wattage, or other appropriate ratings as may be necessary to determine the character of the material, device, appliance or equipment and the use for which it is intended; and it shall be unlawful for any person, firm or corporation to remove, alter, change or deface the maker’s name, trademark or other identification symbol. (1933, c. 555, s. 2.)

§ 66-25. Acceptable listings as to safety of goods. —The electrical inspector shall accept, without further examination or test, the listings of Underwriters’ Laboratories, Inc., as evidence of safety of such materials, etc., so long as the listing continues in effect to his knowledge and, so long as information and experience have not demonstrated, in his judgment, that any specific listed materials, etc., are not safe.

The electrical inspector may accept as evidence of safety of such materials, etc., where not of
§ 66-26. Legal responsibility of proper installations unaffected.—This article shall not be construed to relieve from or to lessen the responsibility or liability of any party owning, operating, controlling or installing any electrical materials, devices, appliances or equipment for damages to persons or property caused by any defect therein, nor shall the electrical inspector be held as assuming any such liability by reason of the approval of any material, device, appliance or equipment authorized herein. (1933, c. 555, s. 3.)

§ 66-27. Violation made misdemeanor.—Any person, firm or corporation who shall violate any of the provisions of this article shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not more than five hundred ($500.00) dollars or imprisonment for not more than thirty days. (1933, c. 555, s. 5.)

Art. 5. Sale of Phonograph Records or Electrical Transcriptions.

§ 66-28. Prohibition of rights to further restrict or to collect royalties on commercial use.—When any phonograph record or electrical transcription, upon which musical performances are embodied, is sold in commerce for use within the state, all asserted common law rights to further restrict or to collect royalties on the commercial use made of such recorded performances by any person is hereby abrogated and expressly repealed. When such article or chattel has been sold in commerce, any asserted intangible rights shall be deemed to have passed to the purchaser upon the purchase of the chattel itself, and the right to further restrict the use made of phonograph records or electrical transcriptions, whose sole value is in their use, is hereby forbidden and abrogated.

Nothing in this section shall be deemed to deny the rights granted any person by the United States Copyright Laws. The sole intendment of this enactment is to abolish any common law rights attaching to phonograph records and electrical transcriptions, whose sole value is in their use, and to forbid further restrictions of the collection of subsequent fees and royalties on phonograph records and electrical transcriptions by performers who were paid for the initial performance at the recording thereof. (1939, c. 113.)


§ 66-29. Agreements for spraying, pruning, etc. —Every person, firm or corporation, who shall sell, barter or exchange any nursery stock in the state of North Carolina, who shall promise or agree, either in the written contract of sale, orally or otherwise, that such person, firm or corporation, selling, exchanging or bartering such nursery stock, will spray, prune or otherwise look after or service such nursery stock for any period of time after the said sale is made, shall before engaging in such business in the state of North Carolina post with the commissioner of agriculture a good and sufficient bond in the sum of one thousand dollars ($1,000.00) payable to the state of North Carolina, and conditioned that such person or corporation, shall well and truly comply with the contract of sale containing such promise and agreements either written or oral.

This regulation shall apply to any agent or employee of any person, firm or corporation engaging in such business in the state of North Carolina, but one bond given by the principal shall be sufficient for all agents representing such principal. (1939, c. 189.)

Art. 7. Tagging Secondhand Watches.

§ 66-30. Definitions.—The following terms as used in this article are hereby defined as follows:

(a) "Person" means a person, firm, partnership or corporation, but shall not include a receiver, trustee in bankruptcy, trustee under a mortgage deed of trust or contract securing any indebtedness, and executor or administrator while acting as such, or any person acting under an order of court or as a licensed pawnbroker.

(b) "Consumer" means an individual, firm, partnership, association or corporation, who buys for their own use or for the use of another, but not for resale.

(c) "Secondhand watch" means a watch as a whole, or any part thereof, which has previously been sold to a consumer, or a watch whose case or movement, serial numbers or other distinguishing numbers or identification marks have been erased, defaced, removed, altered or covered, or a watch any part of which has been replaced by parts from another make or model watch. (1941, c. 244, s. 1.)

§ 66-31. Tags required; "sell" defined.—Any person, or agent or employee thereof, who sells a secondhand watch, as herein defined, shall affix and keep affixed to the same a tag with the words
"secondhand" legibly written or printed thereon in the English language. For the purpose of this subsection, "sell" includes an offer to sell or exchange, expose for sale or exchange, possess with intent to sell or exchange and to sell or exchange.

(1941, c. 244, s. 2.)

§ 66-32. Invoices delivered to purchasers; duplicate invoices, open to inspection.—Any person, or an agent or employee thereof, who sells a secondhand watch, shall deliver to the purchaser a written invoice or bill of sale, setting forth the name and address of the seller, the name and address of the purchaser, the date of the sale, and a full description of the secondhand watch so sold, with the serial numbers, if any, or other distinguishing numbers or identification marks on its case and movements. A duplicate of such invoice or bill of sale shall be kept on file by the vendor for at least one year from the date of such sale, and such duplicate shall be open to inspection during all business hours by any peace officer or by any person authorized by any such peace officer to make an investigation regarding same. (1941, c. 244, s. 3.)

§ 66-33. Advertisements.—Any person advertising in any manner secondhand watches for sale shall state in such advertising that the watches so advertised are secondhand watches. (1941, c. 244, s. 4.)

§ 66-34. Violation of article made misdemeanor.—Any person violating any of the provisions of this article shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than fifty ($50.00) dollars, or by imprisonment for not more than thirty (30) days, or both. (1941, c. 244, s. 5.)


§ 66-35. Who may become public warehousemen.—Any person or any corporation organized under the laws of this state whose charter authorizes it to engage in the business of a warehouseman may become a public warehouseman and authorized to keep and maintain public warehouses for the storage of cotton, goods, wares, and other merchandise as hereinafter prescribed upon giving the bond hereinafter required. (Rev., s. 3029; 1901, c. 678; 1919, c. 212; C. S. 5118.)

Cited in Champion Shoe Machinery Co. v. Sellers, 197 N. C. 30, 147 S. E. 674.

§ 66-36. Bond required.—Every person or every corporation organized under § 66-35, to become a public warehouseman, except such as shall have a capital stock of not less than five thousand dollars, shall give bond in a reliable bonding or surety company, or an individual bond with sufficient sureties, payable to the state of North Carolina, in an amount not less than ten thousand dollars, to be approved, filed with and recorded by the clerk of the superior court of the county in which the warehouse is located, for the faithful performance of the duties of a public warehouseman; but if such person or corporation has a capital stock of not less than five thousand dollars, then it shall not be required to give the bond mentioned in this section. (Rev., s. 3030; 1901, c. 678, s. 2; 1905, c. 540; 1908, c. 56; 1919, c. 212; C. S. 5119.)

§ 66-37. Person injured may sue on bond.—Whenever such warehouseman fails to perform any duty or violates any of the provisions of this article, any person injured by such failure or violation may bring an action in his name and to his own use in any court of competent jurisdiction on the bond of said warehouseman. (Rev., s. 3030; 1901, c. 678, s. 2.)

Carrier's Liability as Warehouseman.—The liability of a common carrier continues until notice is given consignee of arrival of shipment of goods at destination and a reasonable time given to remove it. Thereafter the carrier's liability is that of a warehouseman. Poythress v. Durham & Southern R. Co., 148 N. C. 391, 62 S. E. 515.

Cited in Champion Shoe Machinery Co. v. Sellers, 197 N. C. 30, 147 S. E. 674.

§ 66-38. When insurance required; storage receipts.—Every such warehouseman shall, when requested thereto in writing by a party placing property with it on storage, cause such property to be insured; every such warehouseman shall give to each person depositing property with it for storage a receipt therefor. (Rev., s. 3032; 1901, c. 678, s. 4; 1905, c. 540, s. 2; C. S. 5121.)

Cross Reference.—As to Uniform Warehouse Receipts Act, see §§ 27-1 et seq.

§ 66-39. Books of account kept; open to inspection.—Every such warehouseman shall keep a book in which shall be entered an account of all its transactions relating to warehousing, storing, and insuring cotton, goods, wares, and merchandise, and to the issuing of receipts therefor, which books shall be open to the inspection of any person actually interested in the property to which such entry relates. (Rev., s. 3035; 1901, c. 678, s. 7; C. S. 5122.)

§ 66-40. Unlawful disposition of property stored.—If any person unlawfully sells, pledges, lends, or in any other way disposes of or permits or is a party to the unlawful selling, pledging, lending, or other disposition of any goods, wares, merchandise, or any property in a public warehouse, without the authority of the party who deposited the same, he shall be punished by a fine not to exceed two thousand dollars and by imprisonment in the state's prison for not more than three years; but no officer, manager, or agent of such public warehouse shall be liable to the penalties provided in this section unless, with the in-
tent to injure or defraud any person, he so sells, pledges, lends, or in any other way disposes of the same, or is a party to the selling, pledging, lending, or other disposition of any goods, wares, merchandise, article, or thing so deposited.

(Rev., s. 3831; 1901, c. 678, s. 11; C. S. 5123.)

Cross Reference.—As to warehouse receipts, see §§ 27-1 et seq.


§ 66-41. Permit from Insurance Commissioner.

—Any person, firm or corporation within the State of North Carolina engaging in the collection of accounts for a percentage consideration of the account collected, or upon any other basis than regular employment, shall, before engaging in such business within the State of North Carolina, apply to and receive from the Insurance Commissioner, a permit to engage in such business, which permit shall at all times be prominently displayed in the main office of the person, firm, or corporation to whom or to which the permit is issued, and the number of said permit shall be printed in bold type upon all letterheads, stationery and forms used by the person, firm or corporation holding said permit. (1931, c. 217, s. 1.)

Editor's Note.—The title of the Act from which this section was taken includes detective agencies, but the body of the act makes no reference to such agencies.

§ 66-42. Application to Commissioner for permit.—The person, firm, or corporation desiring to secure a permit as provided in § 66-41, make application to the Insurance Commissioner upon such form as the Commissioner may provide, and shall submit with such application any and all information which the Commissioner may require to assist him in determining the financial condition, business integrity, method of operation and protection to the public officered by the person, firm or corporation filing the application. All information submitted shall be sworn to by the responsible officer, member of the firm, or individual, as in each case necessary, and the Commissioner shall have the right to require any and all additional information which, in his judgment, might assist him in determining whether or not the applicant is entitled to the permit sought. (1931, c. 217, s. 2.)

§ 66-43. Hearing granted applicant if application declined; appeal.—If, for any reason, upon the application made and upon the consideration of the data submitted with the application or items, the Commissioner shall be of the opinion that a permit should not be issued to the applicant, he shall decline the same, giving notice of his action to the applicant. Following notice, the applicant shall have ten days within which to submit additional information in support of his application, and if, upon further hearing upon the application and additional information, the Commissioner shall again decline to issue the permit, the applicant shall have the right to appeal to the Superior Court and his appeal shall stand for hearing in the Superior Court of the Wake County of Wake, and the evidence, data and information submitted to the Commissioner shall constitute the record in the Superior Court, and the same shall be heard by the Judge of the Superior Court to determine whether or not the Commissioner had evidence sufficient to justify his action. (1931, c. 217, s. 3.)

§ 66-44. Application fee; issuance of permit; contents and duration.—Upon the filing of the application and information hereinafter required, the commissioner may require the applicant to pay a fee of $50.00, and no permit may be issued until this fee is paid. The commissioner may issue a permit if he finds it proper, and in that case no part of the $50.00 shall be returned. If the application is denied, the commissioner shall retain $5.00 of the application fee and return the remainder to the applicant. The $5.00 so retained upon applications not granted, and the full fee of $50.00 upon applications granted, shall be used in paying the expenses incurred in connection with the consideration of such applications and the issuance of such permits.

Each permit shall state the name of the applicant, his place of business, and the nature and kind of business he is engaged in. The commissioner shall assign to the permit a serial number for each year beginning with July first, one thousand nine hundred and thirty-one. Each permit shall be for a period of one year, beginning with July first and ending with June thirtieth of the following year. (1931, c. 217, s. 4.)

§ 66-45. Revocation of permit.—If the Commissioner shall have issued any permit to any person, firm, or corporation as herein provided, and shall have information that the holder of the permit is not conducting his business in a business-like way, he shall notify the holder of the permit of a date for a hearing, which notice shall name a time and place for the hearing, and at which hearing any and all evidence as to the conduct of the business may be heard by the Commissioner. If, upon the hearing of the evidence, the Commissioner shall be of the opinion that the applicant is not entitled to the permit, the Commissioner shall cancel said permit, after which time it shall be unlawful for the person, firm or corporation whose permit is cancelled to engage in the business covered by the permit. If the permit be cancelled upon hearing, either the holder of the permit or the complaining party shall have the right to appeal as hereinbefore provided in case the application is denied, and the record of the hearing before the Commissioner shall be the record in the Superior Court upon which the Judge shall determine whether or not the Commissioner had sufficient evidence upon which to base his action. (1931, c. 217, s. 5.)

Editor's Note.—Though "business-like way," as used in this section, is an exceedingly indefinite standard of conduct, the statute is probably valid, in view of the right of appeal to the courts. 9 N. C. Law Rev. 390.

§ 66-46. Rules and regulations; schedule of fees.—The Commissioner shall have the right to make any rules or regulations necessary to enforce the provisions of this article and may approve schedules of fees and methods of collecting the same, or make any other rule or regulation necessary to secure the proper conduct of the business referred to in this article. (1931, c. 217, s. 6.)

§ 66-47. Violation of article a misdemeanor.

—Any person, firm or corporation who shall engage in the business referred to in this article
without first receiving a permit, or who shall fail to secure a renewal of his permit upon the expiration of the license year, or shall engage in the business herein referred to after the permit has been canceled as herein provided, or who shall fail or refuse to furnish the information required of the Commissioner, or who shall fail to observe the rules and regulations made by the Commissioner pursuant to this article, shall, upon conviction, be guilty of a misdemeanor punishable in the discretion of the court. (1931, c. 217, s. 7.)

§ 66-48. Disposition of fees.—All fees collected hereunder shall be credited to the account of the Insurance Commissioner for the specific purpose of providing the personnel, equipment and supplies necessary to enforce this article, but the Director of the Budget shall have the right to budget the revenues received in accordance with the requirements of the Commissioner for the purposes herein required, and at the end of the fiscal year, if any sum whatever shall remain to the credit of the Commissioner, derived from the sources herein referred to, the same shall revert to the General Treasury of the State to be appropriated as other funds. (1931, c. 217, s. 8.)

§ 66-49. Attorneys at law and local county agencies excepted.—Nothing in this article shall be construed to apply to legally licensed attorneys at law engaged in the practice of the profession of law unless, however, such attorneys shall engage in the business herein referred to under a trade name or as a corporation, nor shall this article apply or be construed to apply to any person, firm or corporation whose business of collecting accounts is limited to the collection of such accounts against debtors having residence in the county of the residence of such person or firm, or the principal office of such corporations so engaged in such business. (1931, c. 217, s. 9.)

Art. 10. Fair Trade.

§ 66-50. Title of article.—This article may be known and cited as the “Fair Trade Act.” (1937, c. 350, s. 10.)

§ 66-51. Definitions.—The following terms, as used in this article, are hereby defined as follows: (a) “Commodity” means any subject of commerce. (b) “Producer” means any grower, baker, maker, manufacturer, bottler, packer, converter, processor or publisher. (c) “Wholesaler” means any person selling a commodity other than a producer or retailer. (d) “Retailer” means any person selling a commodity to consumers for use. (e) “Person” means an individual, a corporation, a partnership, an association, a joint-stock company, a business trust or any unincorporated organization. “Person” shall not include the state of North Carolina or any of its political subdivisions. (1937, c. 350, s. 1.)

Editor’s Note.—For a discussion of the act from which this article was codified, see 15 N. C. Rev., No. 4, p. 357.

§ 66-52. Authorized contracts relating to sale or resale of commodities bearing trademark, brand or name.—No contract relating to the sale or resale of a commodity which bears, or the label or container of which bears, the trade-mark, brand, or name of the producer or distributor of such commodity and which commodity is in free and open competition with commodities of the same general class produced or distributed by others, shall be deemed in violation of any law of the state of North Carolina by reason of any of the following provisions which may be contained in such contract: (a) That the buyer will not resell such commodity at less than the minimum price stipulated by the seller. (b) The buyer will agree to resell any article of such commodity to consumers for use at not less than the stipulated minimum price. (c) That the seller will not sell such commodity: (1) To any wholesaler, unless such wholesaler agrees not to resell the same to any retailer unless the retailer will agree not to resell the same except to consumers for use and at not less than the stipulated minimum price, and such wholesaler will likewise agree not to resell the same to any other wholesaler unless such other wholesaler will make the same agreement with any wholesaler or retailer to whom he may resell; or (2) To any retailer, unless the retailer agrees not to resell the same except to consumers for use and at not less than the stipulated minimum price. (1937, c. 350, s. 2.)

Article Is Constitutional.—The North Carolina Fair Trade Act, permitting the manufacturer or distributor of trade-marked goods to establish the minimum retail sale price of such goods by contract with wholesalers and retailers, and providing that sale by retailers not parties to the contracts at prices less than those stipulated in the contracts should be deemed unfair competition, is not void as creating or tending to create monopolies in contravention of Art. I, § 31, of the state Constitution, since the restrictions imposed by the act are limited and apply solely to trade-marked goods in their vertical distribution from manufacturer or distributor through the wholesalers and retailers to the consumer, which goods are sold by the retailer in competition with goods of the same general class of other manufacturers or, in the case of patented goods, in competition with comparable products of other manufacturers, and therefore the act does not create or tend to create a monopoly by horizontal agreements between persons in the same business in competition with each other. Lilly & Co. v. Saunders, 216 N. C. 163, 4 S. E. (2d) 528, 125 A. L. R. 130 (1936).

The North Carolina Fair Trade Act, permitting the establishment of minimum retail prices on trade-marked goods by agreement, does not deprive a retailer not a party to a contract with the manufacturer or distributor of any property right in preventing such retailer from selling the trade-marked article at a price less than that stipulated by contract, since such retailer acquires title with knowledge and subject to the stipulations relative to the minimum retail price permitted by the law. Lilly & Co. v. Saunders, 216 N. C. 163, 4 S. E. (2d) 528, 125 A. L. R. 130 (1936).

Nor is it a special act regulating trade in contravention of Constitution, Art. II, § 29. (1937, c. 350, s. 10.)

§ 66-53. Certain evasions of resale price restrictions, prohibited.—For the purpose of preventing evasion of the resale price restrictions imposed in respect of any commodity by any contract entered into pursuant to the provisions of this article (except to the extent authorized by the said contract): (a) The offering or giving of any article of

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value in connection with the sale of such commodity;
(b) The offering or the making of any concession of any kind whatsoever (whether by the giving of coupons or otherwise) in connection with any such sale;
(c) The sale or offering for sale of such commodity in combination with any other commodity shall be deemed a violation of such resale prices restriction, for which the remedies prescribed by § 66-56 shall be available. (1937, c. 350, s. 3.)

§ 66-54. Contracts with persons other than the owner of the brand, etc., not authorized.—No minimum resale price shall be established for any commodity, under any contract entered into pursuant to the provisions of this article, by any person other than the owner of the trade-mark, brand or name used in connection with such commodity or a distributor specifically authorized to establish said price by the owner of such trade-mark, brand or name. (1937, c. 350, s. 4.)

§ 66-55. Resales not precluded by contract.—No contract containing any of the provisions enumerated in § 66-53 shall be deemed to preclude the resale of any commodity covered thereby without reference to such contract in the following cases:
(a) In closing out the owner’s stock for the bona fide purpose of discontinuing dealing in any such commodity and when plain notice of the fact is given to the public: Provided, the owner of such stock shall give to the producer or distributor of such commodity prompt and reasonable notice in writing of his intention to close out said stock, and an opportunity to purchase such stock at the original invoice price;
(b) When the trade-mark, brand or name is removed or wholly obliterated from the commodity and is not used or directly or indirectly referred to in the advertisement or sale thereof;
(c) When the goods are altered, second-hand, damaged or deteriorated and plain notice of the fact is given to the public in the advertisement and sale thereof, such notice to be conspicuously displayed in all advertisements and to be affixed to the commodity;
(d) By any officer acting under an order of court.
(e) When any commodity is sold to a religious, charitable or educational organization or institution, provided such commodity is for the use of such organization or institution and not for resale. (1937, c. 350, s. 5.)

§ 66-56. Violation of contract declared unfair competition.—Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of this article, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby. (1937, c. 350, s. 6.)

Retailer Deemed to Contract in Contemplation of Article.—The fact that a manufacturer or distributor of trade-marked commodities permits the sale of such commodities to a noncontracting retailer does not preclude the manufacturer or distributor from maintaining a suit against such retailer under this article, since the manufacturer or distributor has the option to obtain a contract or rely upon the statute, and since the sale to the noncontracting retailer does not confer upon him the right to violate the statute with reference to which he is deemed to have contracted in making the purchase. Lilly & Co. v. Saunders, 216 N. C. 163, 4 S. E. (2d) 528, 125 A. L. R. 1308.

Permanently Injunction Authorized.—This section authorizes a suit by a manufacturer or distributor protected by the act against a noncontracting retailer to permanently enjoin such retailer from selling trade-marked commodities of the manufacturer or distributor in violation of the act upon allegations of accrued and prospective irreparable damages. Lilly & Co. v. Saunders, 216 N. C. 163, 4 S. E. (2d) 528, 125 A. L. R. 1308.

Reasonable Profit Is No Defense.—The fact that a retailer makes a reasonable profit upon trade-marked articles is no defense in a suit against such retailer for selling such articles at a price below that allowed by this article, since the standard of the statute is one of retail price and not of reasonable profit. Lilly & Co. v. Saunders, 216 N. C. 163, 4 S. E. (2d) 528, 125 A. L. R. 1308.

§ 66-57. Exemptions.—This article shall not apply to any contract or agreement between or among producers or distributors or, except as provided in sub-division (c) of § 66-52, between or among wholesalers, or between or among retailers, as to sale or resale prices. This article shall not apply to any prices offered in connection with or contracts or purchases made by the state of North Carolina or any of its agencies, or any of the political subdivisions of the said state. (1937, c. 350, s. 7.)


§ 66-58. Sale of merchandise by governmental units.—It shall be unlawful for any unit or agency of the state government or any individual employee or employees of any such unit or agency in his, or her, or their capacity as employee or employees of said unit or agency to purchase for or sell to any person, firm or corporation any article of merchandise in competition with citizens of the state: Provided, however, that as regards educational institutions, the provisions of this section shall not apply to articles produced incident to the operation of an instructional, department, or incident to educational research, or articles of merchandise incident to classroom work, meals, books and/or other articles of merchandise not exceeding fifteen cents in value when sold to members of the educational staff, or staff auxiliary to education, or sold to duly enrolled students, or to members of charitable institutions, or on occasion to immediate members of the families of members of the educational staff or of duly enrolled students: Provided further, that the provisions of this section shall not apply to the sale of meals, or merchandise aforesaid, to persons attending meetings or conventions at state institutions as invited guests of such institutions, or to the products of experiment stations at any state institution: Provided further, that the provisions of this section shall not apply to the sale of learned journals or books, or to the business operation of endowment funds established for the purpose of producing income for educational purposes: Provided further, that the provisions of this section shall not apply to counties and municipalities, to the state board of health, to the division of purchase and contract, to the state highway and public works commission, to state hospitals for the insane, to the state commission for the blind, to the North Carolina school for the blind at Raleigh, to the North Carolina school for the deaf at Morganton, to Appalachian State Teachers College at
Boone, to Western Carolina Teachers College at Cullowhee, or to any state correctional institutions or agencies, or to farm, dairy, livestock, or poultry products of any state institution or agency; provided that nothing in this section shall apply to Highlands School in Macon county; provided further, that this section shall not be construed to apply to any high school or public school. Provided further, that this section shall not apply to child-caring institutions or orphanages receiving state aid.

Any person knowingly or willfully violating the provisions of this section shall be subject to a fine of ten dollars for each such violation. (1939, c. 122.)


§ 66-59. Title of article.—The title of this article shall be “An Act to Prevent the Perpetration of Certain Fraudulent Practices by Photographers within the State of North Carolina.” (1943, c. 25, s. 1.)

§ 66-60. Definitions.—The term “photographer” as used herein shall mean any individual, firm, partnership, association, corporation, or other group or combination acting as a unit.

The term “coupon” as used herein shall mean any coupon, certificate, receipt or similar device, by whatever name called.

The term “solicitor” as used herein shall mean any agent, salesman, employee, solicitor, canvasser, or any other person acting for or on behalf of a photographer. (1943, c. 25, s. 2.)

§ 66-61. Coupons redeemable in products of photography prohibited unless bond given.—No photographer or solicitor shall sell or issue any coupon, whether for a consideration or otherwise, purporting to be exchangeable, redeemable, or payable, in whole or in part, for any product of photography, including photographs, coloring, tinting, frames, mounts, folders, copying or the reproduction of photographs, and all other products of photography, unless the principal for which said business is conducted shall first file with the clerk of the superior court in each and every county in which said business is to be conducted a good and sufficient bond in the principal sum of two thousand dollars ($2,000.00), the condition of such bond being that the principal shall well and truly discharge all contracts, representations and other obligations made by said principal and all contracts, representations and other obligations made by any solicitor of such principal. (1943, c. 25, s. 3.)

§ 66-62. Method of withdrawing bond.—The coupons, as above defined, issued in any county shall be serially numbered, and before any bond, herein required to be filed, can be withdrawn, the principal on said bond shall file a sworn statement with the clerk of the superior court, in a form approved by said clerk, showing the lowest and highest serial number of the coupon, the total number issued, and the total number that has been redeemed. On the unredeemed coupons, the said principal shall show the name and address of the person to whom the said coupon was issued; that each of said persons have been notified, in writing, at the address shown, at least thirty (30) days prior thereto, to redeem said coupons, or otherwise that said coupon would become void on a day certain stated in said notice. (1943, c. 25, s. 4.)

§ 66-63. Remedies for loss sustained through non-performance of obligation in connection with sale of coupons.—Any person sustaining any loss or damage by reason of any photographer or solicitor failing to fully perform and discharge any contract, representation or other obligation in connection with the sale of any coupon purporting to be exchangeable, redeemable or payable, in whole or in part, for any product of photography, whether such contract, promise or representation be made by the photographer or solicitor, may recover in any court of competent jurisdiction against the principal and his, her or its surety, the sum of twenty-five dollars ($25.00), in addition to any actual loss or damage sustained, and any amount so recovered shall be a specific lien on the bond filed as herein required. (1943, c. 25, s. 5.)

§ 66-64. Violation a misdemeanor.—Any person violating the provisions of this article, including the make of any false statement in the affidavit required under § 66-62, shall be guilty of a misdemeanor and, upon conviction, be fined or imprisoned, or both, in the discretion of the court. (1943, c. 25, s. 6.)


§ 66-65. Indemnity bonds required of agents, etc., to state maximum liability and period of liability.—Wherever any person, firm, or corporation, engaged in the business of merchandising any articles whatsoever, shall require of its agents, solicitors, salesmen, representatives, consignees, or peddlers, or other persons selling or handling its merchandise, as a condition precedent to selling or handling any of the merchandise of said person, firm, or corporation, that such agents, solicitors, salesmen, representatives, consignees, or peddlers should furnish and provide a bond or guaranty or indemnity contract guaranteeing the full and faithful accounting of moneys collected from such merchandise, such bond or indemnity contract shall state specifically therein the maximum amount of money or other liability which the principal and the sureties or guarantors thereof undertake thereby to pay in event of default of said bond or indemnity or guaranty contract; and said bond or indemnity or guaranty contract shall also state specifically the period of time during which liability may be incurred on account of any default in said bond or indemnity or guaranty contract.

Any bond or indemnity or guaranty contract which does not comply with the provisions of this section shall be null and void and no action may be maintained against the surety or guarantor to recover any sum due thereon in any court of this state. (1943, c. 604, ss. 1, 2.)

§ 66-66. Manufacture or sale of anti-freeze solutions compounded with inorganic salts or petroleum distillates prohibited.—The manufacture or sale of anti-freeze solutions which are designated, intended, advertised, or recommended by the manufacturer or seller for use in the cooling systems of motor vehicles or gasoline combustion engines, and which are compounded with calcium
Art. 1. Owner's Liability.

§ 67-1. Liability for injury to livestock or fowls.

If any dog, not being at the time on the premises of the owner or person having charge thereof, shall kill or injure any livestock or fowls, the owner or person having such dog in charge shall be liable for damages sustained by the injury, killing, or maiming of any livestock, and costs of suit. (1911, c. 3, s. 1; C. S. 1669.)

Cross References.—As to dog-fighting, a misdemeanor, see § 14-362. As to admittance of dogs to bedrooms by innkeeper or guest, a misdemeanor, see § 72-7; but see also provision for "seeing-eye" dogs, § 67-29.

Editor's Note.—By the ancient common law dogs were considered as of too base a nature to be the subject of larceny. But now they are deemed property for which an action will lie for wrongful injury. As to liability for wrongfully killing a dog, see Beasley v. Byrum, 163 N. C. 3, 79 S. E. 270; State v. Smith, 156 N. C. 628, 72 S. E. 321.

The property in dogs therefore, is not of the same character as that of ordinary domestic animals, in which the right of property is absolute, but it is of an imperfect or qualified nature. Sentell v. New Orleans, etc., R. Co., 166 U. S. 698, 701, 17 S. Ct. 693, 41 L. Ed. 1169.

The law authorizes the killing of a dog found on a man's premises in the act of attempting to destroy his sheep, calves, cows in a warren, deer in a park or other reclaimed animals used for human food and unable to defend themselves. Parrott v. Hartsfield, 20 N. C. 242; State v. Smith, 156 N. C. 628, 72 S. E. 321.

As to owner's liability for injury by his dog to other persons, see Harris v. Fisher, 115 N. C. 318, 20 S. E. 461.

Chapter 67. Dogs.

Art. 2. License Taxes on Dogs.

67-5. Amount of tax.
67-6. License tags; optional with county commissioners.
67-7. Dogs to be listed; penalty for failure to list.
67-8. When tax is due.
67-10. Tax listsers to make inquiry, compile reports; compensation.
67-11. Purchasers to ascertain listing.
67-12. Permitting dogs to run at large at night; penalty; liability for damage.
67-13. Proceeds of tax to school fund; proviso, payment of damages; reimbursement by owner.
67-14. Mad dogs, dogs killing sheep, etc., may be killed.
67-15. Dogs, when listed, personal property; larceny of dog a misdemeanor.

Art. 3. Special License Tax on Dogs.

67-16. Failure to discharge duties imposed under this article.
67-17. [Deleted.]


67-29. Accompanying blind persons in public conveyances, etc.

Perry v. Phipps, 32 N. C. 259. See also, 1 Enc. Dig. 347 et seq.

§ 67-4. Failing to kill mad dog.—If the owner of any dog shall know, or have good reason to believe, that his dog, or an animal belonging to any person under his control, has been bitten by a mad dog, and shall neglect or refuse immediately
to kill the same, he shall forfeit and pay the sum of fifty dollars to him who will sue therefor; and the offender shall be liable to pay all damages which may be sustained by any one, in his property or person, by the bite of any such dog, and shall be guilty of a misdemeanor, and, finally, not more than fifty dollars or imprisoned not more than thirty days. (Rev. s. 3305; Code, s. 2499; R. C. c. 67; C. S. 1672.)

Cross References.—As to killing mad dogs, see §§ 67-14, 67-27. As to rabies, vaccination, etc., generally, see §§ 106-370 et seq.

Actual Knowledge Unnecessary.—In an action under this section it is not necessary to prove that the biting dog was in fact mad. The words "good reason to believe" apply both to the condition of the biting dog and to the fact that the dog was bitten by a mad dog. Wallace v. Douglas, 32 N. C. 79.

Dog Can Be Destroyed.—If owner refuses to destroy a dog, which is mad or is bitten by a mad dog, he subjects himself to the possibility of a fine and imprisonment and the dog can be destroyed by order of the justice issuing the warrant under this section. Beasley v. Byrum, 153 N. C. 3, 4, 79 S. E. 270.

For the effect of contributory negligence on the part of the person bitten by a mad dog, see Holton v. Moore, 165 N. C. 549, 61 S. E. 779.

Art. 2. License Taxes on Dogs.

§ 67-5. Amount of tax.—Any person owning or keeping about him any open female dog of the age of six months or older shall pay annually a license or privilege tax of two dollars. Any person owning or keeping any male dog, or female dog other than an open female dog of the age of six months or older, shall pay annually on each dog so owned or kept a license or privilege tax of one dollar. (1919, c. 116, ss. 1, 2; C. S. 1673.)

Local Modification.—Cherokee: 1933, c. 90; Clay: 1933, c. 301; Graham: 1931, c. 35; Macon: 1933, c. 301; Swain: 1933, c. 149.

Cross Reference.—As to credit of vaccination fee on dog tax, see § 106-92.

Constitutional Exercise of Police Power.—A statute imposing a specified tax upon all persons owning or keeping a dog within a certain county is for the privilege of keeping the dog therein and comes under the police regulations of the state. It is therefore constitutional and valid and will not be restrained. Newall v. Green, 169 N. C. 423, 66 S. E. 299; McAlister v. Vance County, 212 N. C. 208, 193 S. E. 141.

§ 67-6. License tags; optional with county commissioners.—To every person paying the license or privilege tax prescribed in § 67-5 there shall be issued by the sheriff a metal tag bearing county name, a serial number, and expiration date, which shall be attached by owner to a collar to always be worn by any dog when not on premises of the owner or when engaged in hunting. The superintendent of public instruction shall at all times keep on hand a supply of tags to be furnished the sheriffs of the several counties. Provided, that the county commissioners of each county shall, by order duly made in regular session, make an order determining whether the collar and tag shall be applied to that county. (1919, c. 116, s. 25; Ex. Sess. 1920, c. 37; C. S. 1674.)

Editor's Note.—This section was amended by ch. 37, Ex. Sess. 1920 by having the metal tags kept by the superintendent of public instruction. They were formerly kept by the commissioner of agriculture.

§ 67-7. Dogs to be listed; penalty for failure to list.—It shall be the duty of every owner or keeper of a dog to list the same for taxes at the same time and place that other personal property is listed, and the various tax lists in the state shall have proper abstracts furnished them for listing dogs for taxation, and any person failing or refusing to list such dog or dogs shall be guilty of a misdemeanor and upon conviction shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days. The owner of the home or residence of such owner shall be responsible for listing of any dog belonging to any member of his family. (1919, c. 116, s. 3; C. S. 1675.)

Local Modification.—Mitchell: Pub. Loc. 1925, c. 265. (See § 67-12.)

§ 67-8. When tax is due.—The license or privilege tax herein imposed shall be due and payable on the first day of October of each and every year. (1919, c. 116, s. 3; 1943, c. 119; C. S. 1676.)

Editor's Note.—The 1943 amendment omitted a provision as to penalty for failure to pay tax.

§ 67-9. Receipt for tax a license.—Upon the payment to the sheriff or tax collector of the license or privilege tax aforesaid, such sheriff or tax collector shall give the owner or keeper of such dog or dogs a receipt for the same which shall constitute a license under the provisions of this article. (1919, c. 116, s. 3; C. S. 1677.)

§ 67-10. Tax listers to make inquiry, compile reports; compensation.—The tax listers for each township, town, and city in this state shall annually, at the time of listing property as required by law, make diligent inquiry as to the number of dogs owned, harbored, or kept by any person subject to taxation. The list-takers shall, on or before the first day of July in each year, make a complete report to the sheriff or tax collector on a blank form furnished them by the proper authority, setting forth the name of every owner of any dog or dogs, how many of each and the sex owned or kept by such person. The county commissioners may pay the tax listers for such services such amounts as may be just out of the money arising under this article. (1919, c. 116, ss. 4, 6; C. S. 1678.)

§ 67-11. Purchasers to ascertain listing.—Any person coming in possession of any dog or dogs after listing time shall immediately ascertain whether such dog or dogs have been listed for taxes or not, and if not so listed, it is hereby made the duty of such owner or keeper of such dog or dogs to go to the sheriff or tax collector of his county and list such dog or dogs for taxes, and it is made the duty of the owner or keeper of such dog or dogs to pay the privilege or license tax as is herein provided for in other cases. (1919, c. 116, s. 4; C. S. 1679.)

§ 67-12. Permitting dogs to run at large at night; penalty; liability for damage.—No person shall allow his dog over six months old to run at large in the night time unaccompanied by the owner or when engaged in hunting. The superintendent of public instruction shall at all times keep on hand a supply of tags to be furnished the sheriffs of the several counties. Provided, that the county commissioners of each county shall, by order duly made in regular session, make an order determining whether the collar and tag shall be applied to that county. (1919, c. 116, s. 25; Ex. Sess. 1920, c. 37; C. S. 1674.)
§ 67-13. Proceeds of tax to school fund; pro-
viso, payment of damages; reimbursement by owner.—The money arising under the provisions of this article shall be applied to the school funds of the county in which said tax is collected. Pro-
vided, it shall be the duty of the county commis-
sioners, upon complaint made to them of injury to person or injury to or destruction of property by any dog, upon satisfactory proof of such injury or de-
struction, to appoint three freeholders to ascer-
tain the amount of damages done, including neces-
sary treatment, if any, and all reasonable expenses incurred, and upon the coming in of the report of such jury of the damage as aforesaid, the said county commissioners shall order the same paid out of any moneys arising from the tax on dogs as provided for in this article. And in cases where the owner of such dog or dogs is known or can be ascertained, he shall reimburse the county to the owner of such dog or dogs is known or can be ascertained, he shall reimburse the county to

§ 67-19. Nothing in this article abrogated by

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§ 67-20. Special dog tax submitted to voters on petition. — Upon the written application of one-third of the qualified voters of any county in this state made to the board of commissioners of such county, asking that an election be held in said county to adopt the provisions of this article for levying and collecting a special dog tax in said county, it shall be the duty of said board of commissioners from time to time to submit the question of "special dog tax" or "no special dog tax" to the qualified voters of said county; and if at any such election a majority of the votes cast shall be in favor of said special dog tax, then the provisions of this article shall be in full force and effect over the whole of said county, and the special dog tax hereinafter provided for shall be levied and collected in said county; but if a majority of the votes cast at such election shall be against said special dog tax, then the provisions of this article shall not apply to any part of said county. (1917, c. 206, s. 1; C. S. 1686.)

§ 67-21. Conduct of elections.—Every election held under the provisions of this article shall be held and conducted under the same rules and regulations and according to the same penalties provided by law for the election of members of the general assembly: Provided, that no such election shall be held in any county oftener than once in two years. (1917, c. 206, s. 3; C. S. 1687.)

§ 67-22. Commissioners to provide for registration; ballots and machinery. — The board of commissioners of any county in this state in which an election is to be held under the provisions of this article may provide for a new registration of voters in said county if they deem necessary, or they may provide for the use of the registration of voters in effect at the general election for county officers in said county next preceding the holding of the election hereunder, and they shall appoint such officers as may be necessary to properly hold such election and shall designate the time and places for holding such elections, and make all rules, regulations, and do all other things necessary to carry into effect the provisions of this article. (1917, c. 206, s. 4; C. S. 1688.)

§ 67-23. Canvass of votes and returns.—At the close of said election the officers holding same shall canvass the vote and certify the returns to the said board of commissioners of said county, and the said board of commissioners shall canvass the said returns and declare the results of said election in the manner now provided by law for holding special-tax school elections. (1917, c. 206, s. 4; C. S. 1689.)

§ 67-24. Contents and record of petition; notice of election. — The qualified voters of any county who shall make written application to the board of commissioners of said county asking that an election be held under the provisions of this article shall designate and insert in said application the amount of special dog tax to be levied and collected in said county, which tax shall not exceed the sum of five dollars nor be less than the sum of one dollar for each dog, whether male or female, and the board of commissioners shall have said written application, specifying the amount of said special dog tax to be voted for in said county, recorded in the records of their proceedings, and shall cause to be published in some newspaper published or circulated in said county, and posted at the courthouse door and five other public places in said county, a notice of the time and places for holding said election and specifying the amount of tax to be voted for in said county. (1917, c. 206, s. 5; C. S. 1690.)

§ 67-25. License tax.—Any person or persons, firm or corporation, owning or keeping any dog or dogs, whether male or female, in any county which shall adopt the provisions of this article for the levy and collection of said special dog tax shall pay annually a license or privilege tax on each dog, whether male or female, such sum or sums as may be designated and inserted in the written application of the qualified voters of said county asking for said election and as recorded in the proceedings of the board of county commissioners of said county, which shall not exceed the sum of five dollars nor be less than the sum of one dollar for each dog: Provided, the tax voted for and levied on female dogs may be greater than the tax on male dogs, but in no event shall said special tax exceed the sum of five dollars, nor be less than the sum of one dollar for any dog, whether male or female. (1917, c. 206, s. 6; C. S. 1691.)

Local Tax Valid.—The Legislature may empower the authorities of any city or town to regulate the manner in which dogs may be kept in the said town. Hence a tax levied under this authority is constitutional and valid. Mowery v. Salisbury, 82 N. C. 175.

§ 67-26. Collection and application of tax.—The special dog tax voted for under the provisions of this article shall be due and collectible at the same time and in the same manner as provided by law for the collection of taxes on other personal property in said county, and shall be collected by the collector of other taxes in said county in the same manner and under the same penalties provided by law for collection of taxes on other personal property in said county, and shall be applied to the road fund, or school fund, of said county, as may be directed by the board of commissioners of said county. (1917, c. 206, s. 8; C. S. 1692.)

Cross Reference.—As to application of the proceeds of the general dog tax, see § 67-13.

§ 67-27. Listed dogs protected; exceptions.—Any person who shall steal any dog which has been listed for taxation as herein provided shall be guilty of a misdemeanor and fined or imprisoned, in the discretion of the court; and any person who shall kill any dog the property of another, after the same has been listed as herein
provided, shall be liable to the owner in damages for the value of such dog. Nothing in this article shall prevent the killing of a mad dog, sheep-killing dog, or egg-sucking dog on sight, when off the premises of its owner, and the owner shall not recover any damages for the loss of such dog. (1917, c. 206, s. 9; C. S. 1693.)

Cross References.—As to listed dogs as personal property, see § 67-15. As to larceny of taxed dogs, a misdemeanor, see § 14-84.

§ 67-28. Application of article to counties having dog tax.—Any county in this state which now has a local law taxing dogs may, by election in the manner herein provided for, accept the provisions of this article, and if adopted by a majority of the qualified voters of said county at such election, the local law taxing dogs in such county shall thereby be repealed and annulled, and the provisions of this article shall be in full force and effect in such county. (1917, c. 206, s. 10; C. S. 1694.)


§ 67-29. Accompanying blind persons in public conveyances, etc.—Any blind person accompanied by a dog described as a “seeing-eye dog,” or any dog educated by a recognized training agency or school, which is used as a leader or guide, is entitled with his dog to the full and equal accommodations, advantages, facilities and privileges of all public conveyances, and all places of public accommodation, subject only to the conditions and limitations applicable to all persons not so accompanied. (1943, c. 111.)

Chapter 68. Fences and Stock Law.

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Art. 1. Lawful Fences.

§ 68-1. Fences to be five feet high.—Every planter shall make a sufficient fence about his cleared ground under cultivation, at least five feet high, unless otherwise provided in this chapter, unless there shall be some navigable stream or deep watercourse that shall be sufficient, instead of such fence, and unless his lands shall be situated within the limits of a county, township or district wherein the stock law may be in force. (Rev., s. 1660; Code, s. 2790; R. C., c. 48, s. 1; 1777, c. 121, s. 2; 1791, c. 354, s. 1; C. S. 1827.)


Requirements Mandatory.—Proof that plaintiff’s fence is a “good ordinary one” such as the neighbors have, does not dispense with the obligation imposed by this section. Runyan v. Patterson, 87 N. C. 343.

A pasture field is not “ground under cultivation,” within the meaning of this section, irrespective of whether it is woods pasture or cleared pasture. State v. Perry, 64 N. C. 305, 306.

The word “planter” as used in this section does not include hirelings, laborers or employees who have no discretion as to the plans for fencing. State v. Taylor, 69 N. C. 547.

Effect of Failure to Comply with Section.—If the statu-
jury requirement is not complied with one cannot recover damages caused by animals of another, although the animal may be vicious and the fences are “good ordinary ones” such as the plaintiff’s neighbors have. Runyan v. Patterson, 67 N. C. 341.


§ 68-2. Local: Four and a half feet in certain counties.—A fence four and one half feet high is a lawful fence in the counties of Alleghany, Bladen, Brunswick, Burke, Caldwell, Cherokee, Craven, Cumberland, Currituck, Davie, Davidson, Duplin, Harnett, Henderson, Jackson, Lenoir, Perquimans, Randolph, Richmond, Robeson, Rutherford, Sampson, Tyrrell, Yancey, Wake, Washington and Wilkes. This section does not apply to stock-law fences. (Rev., s. 1661; 1889, c. 175; 1891, c. 55; 1905, c. 333; 1909, cc. 55, 94; P. L. 1911, c. 15; C. S. 1828.)

Local Modification.—Tyrrell: C. S. 1828.

§ 68-3. Watercourse made lawful fence by county commissioners.—Any five electors, residents of the same county, may apply to the board of commissioners of the county, at any regular meeting of the same, by written petition praying that any watercourse, or any part of any watercourse, in the county, may be made a lawful fence. Notice of such petition shall be posted forty days at the courthouse door, by the clerk of the board, before such petition shall be acted upon. Upon the hearing of such petition, the board of county commissioners is authorized to declare any watercourse, or any part of any watercourse, to which the petition applies, a lawful fence. And the several acts of the general assembly, declaring certain watercourses, in part or in whole, lawful fences, are so far repealed as to enable the board of commissioners of any county to declare any of such acts, or parts thereof, to be null and void in said county. Any order made under this section shall be of record and made under this section shall be of record and signed by the chairman, and may be rescinded by the board of commissioners at any regular meeting. (Rev., s. 1662; Code, ss. 2808, 2809, 2810; 1872-3, c. 98; C. S. 1830.)

§ 68-4. Injury to wire fence forbidden.—If any person shall willfully destroy, cut or injure any part of a wire fence or a fence composed partly of wire and partly of wood situated on the land of another, he shall be guilty of a misdemeanor, and upon conviction shall be imprisoned not exceeding thirty days or fined not exceeding fifty dollars. (Rev., s. 3413; 1889, c. 516; C. S. 1891.)

Purpose of Section.—This section is not in conflict with section 14-144, as that section was meant to protect the inclosure of whether or not they enclosed any field. State v. Biggers, 109 N. C. 760, 12 S. E. 1034.

§ 68-5. Local: Building ungualled barbed-wire fences along public highways.—If any person shall erect or maintain a barbed-wire fence along any public road, or and within ten yards thereof, without putting a railing or plank at the top of such fence not less than three inches in width, he shall be guilty of a misdemeanor and shall be fined or imprisoned at the discretion of the court. This section shall apply to the counties of Rowan, Swain, Catawba, Greene, Richmond, Stokes, Rutherford, Forsyth, Yadkin, Brunswick, Durham, Wilkes, Stanly, Cumberland, Iredell, Macon and Mitchell: Provided, that in Rutherford county only a railing or plank shall be used at the top of such fence. (Rev., s. 3769; 1893, c. 65; 1899, c. 43; 1899, c. 225; 1903, c. 220; 1909, cc. 318, 604, 628, 810; C. S. 4423.)

Art. 2. Division Fences.

§ 68-6. Division fences maintainable jointly.—Where two or more persons have lands adjoining, which are either cultivated or used as a pasture for stock, the respective owners of each piece of land shall make and maintain one-half of the fence upon the dividing line. (Rev., s. 1664; Code, s. 2800; 1868-9, c. 275, s. 1; C. S. 1832.)

§ 68-7. Remedy against delinquent owner.—If any person who is liable to build or keep up a part of any division fence fails at any time to do so, the owner of the adjoining land, after notice, may build or repair the whole, and recover of the delinquent one-half of the cost before any court having jurisdiction. (Rev., s. 1670; Code, s. 2807; 1868-9, c. 275, s. 7; C. S. 1833.)

Only Civil Liability.—A violation of this section does not subject the wrongdoer to indictment. His liability is civil only. State v. Watson, 86 N. C. 636.

§ 68-8. Fence erected because of changed use of land.—If the owner of a tract of land, who chooses neither to cultivate it, to use it as a pasture, nor to permit his stock to run on it, afterwards uses it in either of these ways and does not so enclose his stock that they cannot enter on the lands of an adjoining owner, he shall refund to such owner one-half the value of any fence erected by the latter on the dividing line. (Rev., s. 1665; Code, s. 3801; 1868-9, c. 275, s. 2; C. S. 1834.)

§ 68-9. When owner may remove his part of division fence.—If any owner of land liable to contribute for the keeping up of a division fence determines neither to cultivate his land nor permit his stock to run thereon, he may give the adjoining owner three months notice of his determination; and in that case, at any time after the expiration of such notice and between the first day of January and the first day of March, but at no other time, he may remove the half of the fence kept up by himself, and shall be no longer liable to keep up the same. (Rev., s. 1671; Code, s. 2802; 1903, c. 20; 1868-9, c. 375, s. 8; 1883, c. 111; C. S. 1835.)

Counties Not Subject to Stock Law.—In counties where the “stock law” is applicable, this section will not be applied and a division fence may be dispensed with at any time without notice. State v. Edmonds, 121 N. C. 679, 28 S. E. 154.

Liability for Violating.—A violation of this section will not subject one to indictment. State v. Watson, 86 N. C. 636.

§ 68-10. Proceeding to value division fence.—The value of such fence shall be ascertained as follows: Either owner may summon the other to appear before any justice of the peace of the township in which the dividing line is situated; or if it be situate in more than one township, then before any justice of the peace of any township in which any part of it is situate. In his summons he shall name a certain day, not less than five days after the summons, for the appearance of the defendant; he shall also state the purpose of the summons to be the adjustment of all matters in controversy respecting the dividing fence.
between the parties. The justice shall hear the complaint and defense. If the facts be found such as entitle either party to demand contribution of the other, the justice shall call on the complainant to name an indifferent person, qualified to act as a juror of the township, and if the complainant refuses the justice shall name one for him. The justice shall then call on the defendant to name an indifferent person, qualified to act as a juror of the township, and if the defendant refuses the justice shall name one for him. The justice shall then name a third indifferent person. These three persons, or any two of them, shall view the premises and decide all matters in controversy between the parties, relating to a fence on the dividing line. They shall make a written report to the justice, who shall give judgment thereon, and for the costs, which shall be paid by the owners of the several pieces of land equally. The jurors shall each receive one dollar per day. The fees of the justice and constable shall be as in other cases. Either party may appeal as provided in other cases of justices' judgments. (Rev., s. 1666; Code, s. 2803; 1868-9, c. 275, s. 3; C. S. 1836.)

§ 68-11. Contents of jurors' report.—The report of the jurors shall also state the kind of fence which ought to be kept up, and assign to each owner, in such manner as that it may be identified, the part which he shall keep up. (Rev., s. 1667; Code, s. 2804; 1868-9, c. 275, s. 4; C. S. 1837.)

§ 68-12. Register to record report.—The justice shall return the report, together with a transcript of the proceedings, to the register of deeds of his county for registration. The justice shall collect from the parties the fees of the register, and pay the same to him. (Rev., s. 1668; Code, s. 2805; 1868-9, c. 275, s. 5; C. S. 1838.)

§ 68-13. Final judgment on report; effect.—The final judgment upon the report of the jurors shall be binding on the owners of the respective lands and their assigns, so long as such ownership shall continue, or until the same shall be set aside, modified or reversed. (Rev., s. 1669; Code, s. 2806; 1868-9, c. 275, s. 6; C. S. 1839.)

§ 68-14. Removal of common fence misdemeanor.—If any person owning, occupying, cultivating or being in possession of any lands under a common fence protecting the lands, crops or property of others, shall remove such fence or any part thereof during the time in which any crops are growing or being actually cultivated thereon, or property is protected by such fence, and before such crops are harvested, without the consent and permission of such person or persons whose crop or property is protected by such common fence, he shall be guilty of a misdemeanor and upon conviction shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days: Provided, that the provisions of this section shall not apply when ninety days notice of such removal shall have been given to all persons owning, cultivating or in possession of lands surrounding by such common fence, or having property protected thereby, and when thereafter such fence shall be removed between the first day of January and the first day of March following such notice of intended removal. (Rev., s. 3412; Code, s. 2820; 1903, c. 20; C. S. 1840.)

Editor's Note.—When a fence is altogether on the land of a person, although used as a common fence he has the right to move it and he is not subject to criminal prosecution, but a civil right might arise under sec. 68-9. State v. White, 86 N. C. 625. Neither will an indictment lie for removing a fence when the party removing the fence has possession of the land on both sides of the fence although title may be in the prosecutor, and the defendant is only a tenant by curtesy. State v. Williams, 44 N. C. 197.

Cited in State v. Dunn, 95 N. C. 697.

Art. 3. Stock Law.

§ 68-15. Term "stock" defined.—The word "stock" in this chapter shall be construed to mean horses, mules, colts, cows, calves, sheep, goats, jennets, and all neat cattle, swine and geese. (Rev., s. 1681; Code, s. 2822; C. S. 1841.)

Local Modification.—Currituck: 1937, c. 389; Dare: 1915, c. 263; 1937, c. 213; Onslow: 1915, c. 151; 1937, c. 356; Robeson: 1917, c. 662.

Dogs.—A dog is not "stock" within the meaning of the section, but is nevertheless subject to larceny. Meekins v. Simpson, 176 N. C. 130, 96 S. E. 894.

§ 68-16. County elections.—Upon the written application of one-fifth of the qualified voters of any county made to the board of commissioners thereof, it shall be the duty of the commissioners from time to time to submit the question of "stock law" or "no stock law" to the qualified voters of said county. And if at any such election a majority of the votes cast is in favor of "stock law," then the provisions of this chapter relating to the stock law shall be in force over the whole of said county. (Rev., s. 1672; Code, s. 2812; C. S. 1842.)

Cross Reference.—As to "majority of qualified voters," see N. C. Const., Art. VII, sec. 7.

In General.—In a county where only a part of the towns have stock laws, an election covering the whole county is held valid, and it does not interfere with the principles of local self-government. Smalley v. Board, 122 N. C. 607, 29 S. E. 904; Perry v. Board, 130 N. C. 558, 41 S. E. 787.

Mandamus to Compel Election.—When a petition duly signed by the required number of voters is filed with the commissioners, and they refuse to call an election, mandamus may be brought to compel them to grant the petition. Perry v. Board, 130 N. C. 558, 41 S. E. 787.

§ 68-17. Township elections.—Upon the written application of one-fifth of the qualified voters in any township, made to the board of commissioners of the county wherein the township is situated, it shall be the duty of the commissioners to submit the question of "stock law" or "no stock law" to the qualified voters of the township; and if at any such township election a majority of the votes cast is in favor of "stock law," then the stock law shall be in force in said township. (Rev., s. 1673; Code, s. 2813; C. S. 1843.)

In General.—The fact that a township has "stock laws" does not bar the voters in that township from voting in a county election. Smalley v. Board, 122 N. C. 607, 29 S. E. 904.

§ 68-18. District elections.—Upon the written application of one-fifth of the qualified voters of any district or territory, whether the boundaries of said district follow township lines or not, made to the board of county commissioners, at any time, and setting for the welded boundaries of the district, it shall be the duty of the commissioners to submit the question of "stock law" or "no stock law" to the qualified voters of the district, and if at any such election a majority

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of the votes cast is in favor of "stock law," then the stock law shall be in force over the whole of said district. (Rev. s. 1674; Code, s. 2814; C. S. 1844.)

"Well Defined Boundaries."—The words are not too in- definite to denote the boundaries, when the beginning is "at a certain tract of land," and the difficulty as to the uncertainty of the point of beginning is removed where there is a call for the boundaries of lands of such a nature as to require a certain point. Newsom v. Earnheart, 86 N. C. 391.

Right to Join Districts.—The commissioners have no power when several districts adjoin each other to unite them into one territory, provide for the construction of one bound- ary fence, and assess a uniform tax on all the real property in the several districts so united to meet the expense of the fence. Bradshaw v. Board, 92 N. C. 278.

§ 68-19. Local: How territory released from stock law.—Upon the written application of a majority of the qualified voters in any district, territory or well defined boundary, made to the board of county commissioners, at any time, set- ting forth that the citizens of said district, territory or boundary are within the stock-law bound- ary, and are desirous of being released from the laws governing stock-law territory, it shall be the duty of the commissioners to submit the question of "no stock law" or "stock law" to the qualified voters of said district or territory, and if at any such election a majority of the votes cast is against stock law, then the said district or territory shall be released and free from the operation of the stock law: Provided, the expense incurred in changing the fence in such boundary, district or territory so released be paid by the property holders in such boundary, district or territory, and that the commissioner of the county levy the tax to pay the same on the property holders of such boundary, district or territory so released, but they shall not be further liable for keeping up said stock-law fence: Provided, that in any territory where stock law now prevails no election against stock law shall be held in less than two years from the date of the election adopting stock law in said territory: Provided further, that if "no stock law" should carry, it shall not take effect until six months from the date of its ratification: Provided still further, that neither "stock law" nor "no stock law" shall take effect during crop season.

This section applies only to the counties of Cher- okee, Clay, Graham, Jackson, Macon, Mitchell, Pender, Randolph, Swain, and to Hogback Town- ship in Transylvania County. (Rev. s. 1675; 1895, c. 33; 1897, cc. 461, 516; 1903, c. 60; 1907, c. 874, s. 3; P. L. 1911, cc. 265, 469; P. L. 1915, c. 379; P. L. 1917, c. 662; C. S. 1845.)

Local Modification.—Currituck: 1937, c. 389; Dare: 1933, c. 263; 1937, c. 213.

Editor's Note.—It was at one time the public policy of the State to allow stock to run at large. Jones v. Wither- spoon, 52 N. C. 555. A land holder was required to in- close his fields to protect his crops. But this policy has now been changed and except in cases of a petition and majority vote by the residents of a county or district for "no stock-law" the stock must be kept within the close of the owner.

When "no stock-law" is duly passed, before the stock can be turned out to run at large the district or county pass- ing such law must be inclosed so that the stock will not range out of "no stock-law" territory and the crops of others, not in the "no stock-law" territory. Marshall v. Jones, 176 N. C. 516, 97 S. E. 422.

This section provides that the expense incurred in build- ing such a fence shall be paid by a tax on the property holders of the district or county. This certainly does not authorize a tax solely upon the real estate in the county or district. Hawes v. Commissioners, 175 N. C. 268, 95 S. E. 422. The county refuses to raise this fund an election must be held and authority granted by the majority of the voters. Marshburn v. Jones, 176 N. C. 516, 97 S. E. 422.

Section 68-21 provides for a tax on the real property of a district or county, but that section is applicable only to districts or counties that pass the "stock-law" and cannot be applied to those passing "no stock-law."

§ 68-20. How election conducted.—Every elec- tion under this chapter shall be held and con- ducted under the same rules and regulations and according to the same penalties provided by law for the election of members of the general assembly: Provided, no such county, township or district election shall be held oftener than once in any one year, although the boundaries of such district may not be the same. (Rev. s. 1677; Code, s. 2815; C. S. 1846.)

§ 68-21. Powers and duties of county commis- sioners.—The board of commissioners of the county may provide for a new registration of owners, designating places for holding elections, make all regulations, and do all other things neces- sary to carry into effect the provisions of this chapter relating to the stock law. (Rev. s. 1677; Code, s. 2826; C. S. 1847.)

Building and Repairing Fences.—County commissioners are not required by the stock-law to personally superintend the fence around the no fence territory; they discharge their duty under the statute when they levy the necessary taxes, appoint the committees, etc., to keep the fence in repair. State v. Commissioners, 97 N. C. 388, 1 S. E. 641.

But an owner of stock, however, who resides outside of such territory, is not liable to have his stock impounded within such territory, unless the county commissioners have kept the fence in good repair. In such case the presumption is that the fence is in good condition, and the burden is on the contrary on the party alleging it. Coor v. Rogers, 97 N. C. 143, 1 S. E. 613.

§ 68-22. Admission of lands adjoining stock-law territory.—Any person, or any number of persons, owning land in a county, district or township which shall not adopt the stock law, or adjoining any county, township or district where a stock law prevails, may have his or their lands enclosed within any fence built in pursuance of this chapter. All such adjacent lands, when so enclosed, shall be subject to all the provisions of law with respect to livestock running at large within the original district so enclosed, as if it were a part of the township, county or district with which it is hereby authorized to be enclosed. Any number of landowners, whose lands are con- tiguous, may at any time build a common fence around all their lands, with gates across all public highways; and no livestock shall run at large within any such enclosure, under the pains and penalties prescribed in this chapter. (Rev. s. 1678; Code, s. 2821; C. S. 1848.)


§ 68-23. Allowing stock at large in stock-law territory forbidden.—If any person shall allow his livestock to run at large within the limits of any county, township or district in which a stock law prevails or shall prevail pursuant to law, he shall be guilty of a misdemeanor, and fined not exceeding fifty dollars or imprisoned not exceeding thirty days. (Rev., s. 3319; Code, s. 2811; 1889, c. 504; C. S. 1849.)

Editor's Note.—For act declaring Nash county to be stock law territory, see Session Laws 1943, c. 45.

This section implies knowledge, consent or willingness on
§ 68-24. Impounding stock at large in territory.
—Any person may take up any livestock running at large within any township or district wherein the stock law shall be in force and impound the same; and such impounder may demand fifty cents for each animal so taken up, and twenty-five cents for each animal for every day such stock is kept impounded, and may retain the stock until all legal charges for impounding said stock and for damages caused by the same are paid, the damages to be ascertained by two disinterested freeholders, to be selected by the owner and the impounder, the freeholders to select an umpire, if they cannot agree, and their decision to be final. (Rev., s. 1679; Code, s. 2816; C. S. 1850.)


Constitutionality.—This and the following sections are constitutional, Hogan v. Brown, 125 N. C. 251, 34 S. E. 138. And resident owners may be required to pay a higher penalty than non-resident owners. Broadfoot v. Fayetteville, 121 N. C. 418, 28 S. E. 315. See also, sec. 14-366.

$§ 68-25. Owner notified; sale of stock; application of proceeds.—If the owner of such stock be known to the impounder he shall immediately inform the owner where his stock is impounded, and if the owner shall for two days after such notice willfully refuse or neglect to redeem his stock, then the impounder, after ten days written notice posted at three or more public places within the township where the stock is impounded, and describing the stock and stating place, day and hour of sale, or if the owner be unknown, after twenty days notice in the same manner, and also at the courthouse door, shall sell the stock at public auction, and apply the proceeds in accordance with the provisions of this article, and the balance he shall turn over to the owner if known, and if the owner be not known, to the county commissioners for the use of the school fund of the district wherein said stock was taken up and impounded, subject in their hands for six months to the call of the legally entitled owner. (Rev., s. 1680; Code, s. 2817; C. S. 1851.)

Cross-Reference.—As to constitutionality, see notes to preceding section.

§§ 68-26. Impounding unlawfully misdemeanor.—If any person shall willfully and unlawfully toll, drive, or in any way move any other person's horse, mule, ass, neat cattle, sheep, hog, goat, or dog, from the range or elsewhere, into any stock-law district, or into the limits of any city or town having the right to impound or destroy the same, with intent to secure the poundage or other penalty, or with intent to injure the owner of such animal, or to require him to pay any poundage or penalty on account of such animal, or for hire or reward, he shall be guilty of a misdemeanor. If any person shall unlawfully and willfully remove any animal above named from any lawful inclosure, with intent to injure the owner, he shall be guilty of a misdemeanor. (Rev., s. 3309; 1895, c. 141, s. 1; C. S. 1883.)

§§ 68-27. Illegally releasing or receiving impounded stock misdemeanor.—If any person unlawfully receives or releases any impounded stock, or unlawfully attempts to do so, he shall be guilty of a misdemeanor, and shall be fined not more than fifty dollars or imprisoned not more than thirty days. (Rev., s. 3310; Code, s. 2819; 1899, c. 504; C. S. 1853.)

§§ 68-28. Impounded stock to be fed and watered.—If any person shall impound, or cause to be impounded in any pound or other place, any animal, and shall fail to supply the same with necessary food and water, he shall be guilty of a misdemeanor, and upon conviction shall be fined not more than fifty dollars or imprisoned not more than thirty days. (Rev., s. 3311; Code, s. 2484; 1891, c. 65; 1881, c. 368, s. 3; C. S. 1854.)

§§ 68-29. Right to feed impounded stock; owner liable.—In case any animal is at any time impounded as aforesaid, and shall continue to be without necessary food and water for more than twelve successive hours, it shall be lawful for any person from time to time, and as often as it shall be necessary, to enter into and upon any such pound or other place in which any animal shall so be confined, and to supply it with necessary food and water so long as it shall remain so confined. Such person shall not be liable to any action for such entry, and the reasonable cost of such food and water may be collected by him of the owner of such animal. (Rev., s. 1682; Code, s. 2485; 1881, c. 368, s. 4; C. S. 1855.)

In General.—The law recognizes the difference between an impounding fee and a charge for food; for sec. 68-24 prescribes the impounding fees for taking up stock running at large, and this section prescribes for payment of feeding such stock when taken up. The former fees go to the
§ 68-30. Injuring lands in stock-law territory by riding or driving.—If any person, by riding or driving upon the lands of another without permission, or while driving livestock along any roadway, public or private, shall willfully, deliberately or recklessly do or permit to be done any actual injury to said land, or to the crops or other property growing or being thereon, he shall be guilty of a misdemeanor, and upon conviction shall be fined not more than fifty dollars or imprisoned not more than thirty days. But no such offender shall be proceeded against unless the party injured, or some one in his behalf, shall cause a warrant to be issued or an indictment to be found against the party offending within fifteen days after the commission of the offense. (Rev., s. 3321; Code, s. 2888; 1889, c. 118; C. S. 1856.)

§ 68-31. Owner in stock-law territory allowing stock outside.—If any person having stock within the limits of a stock-law territory shall allow the same to run at large beyond the boundaries of said territory, he shall be guilty of a misdemeanor, and on conviction thereof shall be fined not more than fifty dollars or imprisoned not more than thirty days: Provided, That a person owning or renting land outside of the stock-law territory may turn his stock upon the said land outside of the stock-law district. (Rev., s. 3322; Code, s. 2887; 1889, c. 266; 1885, c. 371; C. S. 1857.)

§ 68-32. Stock-law territory to be fenced around.—The stock-law authorized by this chapter shall not be enforced until a fence has been erected around any territory proposed to be enclosed, with gates on all the public roads passing into and going out of said territory: Provided, all streams which are or may be declared to be lawful fences shall be sufficient boundaries, in lieu of fences: Provided further, no fence shall be erected along the boundary lines of any county, township or district where a stock law prevails. (Rev., s. 1683; Code, s. 2883; C. S. 1858.)

§ 68-33. Commissioners may declare natural barrier sufficient fence.—In any county in the state in which or in any portion of which the stock law is now in force or may hereafter be adopted, the county commissioners of said county in their discretion may declare any watercourse, mountain, mountain range or parts of same, and also other natural and sufficient obstruction along the line of said stock-law territory to be and constitute a sufficient stock-law fence, and in that event such watercourse, mountain, mountain range or part thereof so authorized by a said commissioner shall be and constitute a lawful fence to all intents and purposes. (Rev., s. 1684; 1901, c. 542; C. S. 1859.)

In General.—It is competent for the county commissioners to forbid stock from running at large within the county, and declare a mountain range, a creek, or other natural line, a fence as the limits of the law, and it is not a valid defense that no fence had been built on the line to prevent the stock from the adjoining county to run at large on his side of the line when one is prosecuting for allowing his stock to run at large. State v. Mathis, 149 N. C. 545, 63 S. E. 99.

§ 68-34. Assessment of landowners for fence.—For the purpose of building stock-law fences, the board of commissioners of the county may levy and collect a special assessment upon all real property, taxable by the county, within the county, township or district which may adopt the stock law, but no such assessment shall be greater than one-fourth of one per centum on the value of said property. (Rev., s. 1865; Code, s. 2824; C. S. 1860.)

Cross Reference.—As to tax for no stock-law fence, see notes to sec. 68-19.

In General.—In Busbee v. Commissioners, 93 N. C. 143, Smith, C. J., says: "But these local assessments are not uniform, although the general principle is to be applied, and it is no rule for them to stand upon a different footing and rest upon the equitable and just consideration that lands rendered more valuable by the improvements ought to contribute to the expense of making the improvements, and that these expenses ought not to fall upon the entire body of the taxpayers. The advantage is to the land, and to the persons only as owners of the land."

This section does not authorize the imposition of the assessment on the real estate of a township withdrawn from the benefit of the stock law by express legislative enactment for the purpose of raising money to replace the money withdrawn from the general fund to pay the expenses of fences erected by the commissioners. Harper v. Commissioners, 133 N. C. 216, 45 S. E. 527.

Constitutionality.—This section does not come within the prohibition of the State Constitution providing for uniform tax, as this is not of the nature of a tax, but is an assessment to defray expenses of local improvements, although called a tax by the Legislature. Shuford v. Commissioners, 86 N. C. 552; Calm v. Commissioners, 86 N. C. 671.

When Applicable.—The provisions of this section apply both to the cases where the adoption of the stock law is dependent on a popular vote, and where it is made absolute by an act of the General Assembly, Busbee v. Commissioners, 93 N. C. 141.

District in Two Counties.—If the district organized lies in two counties the assessment shall be as if it was all in one county. Commissioners v. Commissioners, 93 N. C. 180.

Railroad's Liability.—The roadbed and right of way of a railroad are liable to an assessment for local improvements. Commissioners v. Seaboard Air Line R. Co., 133 N. C. 216, 45 S. E. 566.

Assessment Must be for Stock-Law Fences Only.—An assessment by a county upon the real estate to build a fence for the purpose of keeping the stock in anti-stock-law territory from running at large, is not a stock-law fence, and the money withdrawn from the general fund to pay the expenses of the fence is not a stock-law assessment, but is an assessment on the real estate of a township withdrawn from the benefit of the stock law by express legislative enactment, and is not a tax, but a fee for the privilege of using the roadbed and right of way of the railroad. Hawes v. Commissioners, 175 N. C. 268, 95 S. E. 482.

§ 68-35. Condemnation of land for fence.—If the owner of any land objects to the building of any fence herein allowed, his land, not exceeding twenty feet in width, shall be condemned for the fenceway in accordance with the procedure specified in the article Condemnation Proceedings under the chapter Eminent Domain. (Rev., s. 1866; Code, s. 2825; C. S. 1861.)

§ 68-36. Injury to stock-law fences misdemeanor in stock-law territory.—If any person willfully tears down, or in any manner breaks a fence, or gate, or leaves open a gate erected around a stock-law territory, or willfully breaks any enclosure within any township, district or county where a stock law is in force, and wherein any stock is confined, so that the same may escape therefrom, he shall be guilty of a misdemeanor, and shall be fined not more than fifty dollars or imprisoned not more than thirty days. (Rev., s. 3411; Code, s. 2820; 1889, c. 504; C. S. 1862.)

Cited in State v. Dunn, 93 N. C. 697, 698.

§ 68-37. Impounder violating stock law misdemeanor.—If any impounder willfully misappropriates money that he may receive from sale of stock impounded, or in any manner willfully vio-
lates any provisions of the law in regard thereto, he shall be guilty of a misdemeanor, and on conviction shall be fined not more than fifty dollars or imprisoned not more than thirty days. (Rev., s. 3312; Code, s. 2820; 1889, c. 504; C. S. 1863.)

Cited in State v. Dunn, 95 N. C. 697, 698.

§ 68-38. Local: Depredations of domestic fowls in certain counties.—In the counties and parts of counties hereinafter enumerated, where the stock law prevails, it shall be unlawful for any person to permit any turkeys, geese, chickens, ducks or other domestic fowls to run at large, after being notified as provided in this section, on the lands or other premises of any other person while such lands are under cultivation in any kind of grain or feedstuff, or while being used for gardens or ornamental purposes.

Any person so permitting his fowls to run at large, after having been notified to keep them up, shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding five dollars or imprisoned not exceeding five days, or if it shall appear to any justice of the peace that after two days notice any person persists in allowing his fowls to run at large and fails or refuses to keep them upon his own premises, then the said justice of the peace may, in his discretion, order any sheriff, constable or other officer to kill said fowls when so depredating. (C. S. 1864.)

Alamance, 1901, c. 645.
Avery, 1935, c. 77.
Beaufort, Pub. Loc. 1927, c. 316.
Bladen, 1901, c. 645.
Brunswick, 1907, c. 508.
Burke, 1907, c. 508.
Cabarrus, 1901, c. 645.
Caldwell, Pub. Loc. 1911, c. 244.
Caswell, 1943, c. 64.
Clay, 1935, c. 51.
Cleveland, 1901, c. 645.
Columbus, 1933, c. 308.
Currituck, 1901, c. 645.
Davidson, Pub. Loc. 1911, c. 244.
Duplin, Ex. Sess. 1908, c. 73; 1933, c. 186.
Edgecombe, 1901, c. 645.
Gates, 1935, c. 77.
Graham, 1901, c. 645.
Grande, Pub. Loc. 1911, c. 244.
Guilford, 1901, c. 645.
Harnett, 1931, c. 443.
Henderson, Pub. Loc. 1911, c. 636.
Iredell, 1935, c. 170.
Jackson, Pub. Loc. 1919, c. 31.
Johnston, 1935, c. 78.
Lee, Pub. Loc. 1913, c. 725.
Lenoir, Pub. Loc. 1911, c. 244.
Macon, Pub. Loc. 1919, c. 31.
Martin, 1935, c. 77.
Mecklenburg, 1901, c. 645.
Moore, 1935, c. 77.
Onslow, Pub. Loc. 1911, c. 244.
Orange, 1903, c. 115.
Pasquotank, 1901, c. 645.
Richmond, Pub. Loc. 1927, c. 72.
Rockingham, Ex. Sess. 1924, c. 205; 1931, c. 434.
Rowan, 1909, c. 847.
Sampson, 1935, c. 196.
Stokes, 1931, c. 22.
Surry, 1901, c. 645.
Swain, Pub. Loc. 1911, c. 244.
Transylvania, Pub. Loc. 1911, c. 244.
Tyrrell, Ex. Sess. 1921, c. 41.
Union, 1935, c. 77.
Vance, 1909, c. 748.
Wayne, Pub. Loc. 1911, c. 244.
Wilson, 1937, c. 122.


§ 68-39. Eastern North Carolina, territory placed under stock law. — From and after January first, one thousand nine hundred and twenty-two, all of that part of eastern North Carolina lying east of that branch of the Atlantic Coast Line Railroad running from Wilmington, North Carolina, northerly to the Virginia line and passing through Goldsboro, Wilson, and Weldon (formerly known as the Wilmington and Weldon Railroad), shall be and is hereby declared to be "stock law territory," and shall be subject to all of the provisions of §§ 68-15 to 68-38, inclusive: Provided, that that portion of North Carolina which borders the Atlantic Ocean and which is separated from the mainland by a body of water such as an inlet or sound, shall not be considered to fall within the provisions of this law. (1921, c. 50, s. 1; C. S. 1864(a).)

Local Modification.—Carrington: 1935, c. 299; Dare: 1935, c. 238; Duplin: 1935, c. 238; Edgecombe: 1937, c. 191; Harnett: 1937, c. 122.

§ 68-40. Counties divided by railroad. — Wherever the railroad referred to in § 68-39 shall divide a county so that a part of the county lies east and a part west of the said railroad, then the whole of said county shall be "stock law territory," and under the provisions of this article from and after January first, one thousand nine hundred and twenty-two. (1921, c. 50, s. 2; C. S. 1864(b).)

§ 68-41. Repeal of local laws or regulations. —Sections 68-39 and 68-40 shall not be construed to repeal or change local laws or regulations regarding the subject-matter covered by those sections except so far as said local laws and regulations actually conflict with the provisions thereof and prevent the proper enforcement of said provisions, and the said local laws, rules, and regulations on the subject-matter similar to that covered by said sections shall remain in full force and effect as they do exist until they do actually interfere with the enforcement of the said provisions. (1921, c. 230; C. S. 1864(c).)
Chapter 69. Fire Protection.

Art. 1. Investigation of Fires and Inspection of Premises.

Sec. 69-1. Fires investigated; reports; records.
69-2. Insurance commissioner to make examination; arrests and prosecution.
69-4. Inspection of premises; dangerous material removed.
69-5. Deputy investigators.
69-6. Reports of insurance commissioner.
69-7. Fire prevention and fire prevention day.

Art. 2. Fire-Escapes.
69-10. Doors in certain buildings to open outwardly.
69-11. Fire-escapes to be provided.
69-12. Ways of escape provided.

Art. 3. State Volunteer Fire Department.

Sec. 69-14. Purpose of article.
69-17. Acceptance by municipalities.
69-20. No authority in state volunteer fire department to render assistance to non-accepting counties.
69-22. Municipalities not to be left unprotected.
69-23. Rights and privileges of firemen; liability of municipality.
69-24. Relief in case of injury or death.
69-25. Sums from contingent fund of state made available for administration of article.

§ 69-3. Powers of commissioner in investigations.—The insurance commissioner, or his deputy appointed to conduct such examination, has the powers of a trial justice for the purpose of summoning and compelling the attendance of witnesses to testify in relation to any matter which is by provisions of this article a subject of inquiry and investigation, and may administer oaths and affirmations to persons appearing as witnesses before them. False swearing in any such matter or proceeding is perjury and shall be punished as such. The commissioner or his
§ 69-4. Inspection of premises; dangerous material removed.—The insurance commissioner, or the chief of fire department or chief of police where there is no chief of fire department, or local inspector of buildings in municipalities where such officer is elected or appointed, has the right at all reasonable hours, for the purpose of examination, to enter into and upon all buildings and premises in their jurisdiction. It is the duty of the insurance commissioner to require in all municipalities of the state that such officers make in their respective municipalities annual inspection of the buildings therein and quarterly inspection of all premises within the fire limits, and report in detail the results of their inspection to the insurance commissioner upon blanks furnished by him. When any of such officers find in any building or upon any premises combustible material or inflammable conditions dangerous to the safety of such building or premises they shall order the same to be removed or remedied, and this order shall be forthwith complied with by the owner or occupant of such building or premises. The owner or occupant may, within twenty-four hours, appeal to the insurance commissioner from the order, and the cause of the complaint shall be at once investigated by his direction, and unless by his authority the order of the officer above named is revoked it remains in force and must be forthwith complied with by the owner or occupant. The insurance commissioner, fire chief, or fire committee shall make an immediate investigation as to the presence of combustible material or the existence of inflammable conditions in any building or upon any premises under their jurisdiction upon complaint of any person having an interest in such building or premises. The commissioner may, in person or by deputy, visit any municipality and make such inspections alone or in company with the local officer. The local inspector shall be paid by the municipality a reasonable salary or proper fees to be fixed by its governing board. (Rev., s. 4821; 1899, c. 38, s. 4; 1901, c. 387, s. 4; 1903, c. 719; C. S. 6077.)

Cross Reference.—As to regulation of buildings by municipalities, see §§ 160-115 et seq.

§ 69-5. Deputy investigators.—It shall be the duty of the insurance commissioner to appoint two or more persons as deputies, whose particular duty it shall be to investigate forest fires and endeavor to ascertain the persons guilty of setting such fires and cause prosecution to be instituted against those who, as a result of such investigation, are deemed guilty. (Rev., s. 4823; 1899, c. 58, s. 6; 1901, c. 387, s. 6; 1903, c. 719, s. 2; 1915, c. 109, s. 2; 1919, c. 186, s. 7; Ex. Sess. 1924, c. 119; C. S. 6078.)

Editor's Note.—The provision as to the appointment of deputies to investigate forest fires, and the prosecution of guilty persons, was inserted by the amendment of 1924.

Cited in O'Neal v. Wake County, 196 N. C. 184, 189, 145 S. E. 28.

§ 69-6. Reports of insurance commissioner.—The insurance commissioner shall submit annually, as early as consistent with full and accurate preparation, and not later than the first day of June, a detailed report of his official action under this article, and it shall be embodied in his report to the general assembly. He shall, in his annual report, make a statement of the fires investigated, the value of property destroyed, the amount of insurance, if any, the origin of the fire, when ascertained, and the location of the property damaged or destroyed, whether in town, city, or country. (Rev., s. 4842; 1899, c. 58, s. 7; 1901, c. 387, s. 7; 1915, c. 109, s. 1; C. S. 6079.)

§ 69-7. Fire prevention and fire prevention day.—It is the duty of the insurance commissioner and superintendent of public instruction, as far as practicable, to provide, except to schools taught in one-story houses, pamphlets containing printed instructions for properly conducting fire drills in schools, and the superintendent or principal of every public school in this State, except schools taught in one-story houses, shall conduct at least one fire drill every month during the regular school session, such fire drills to include all children and teachers and the use of all ways of egress, and the Insurance Commission and Superintendent of Public Instruction shall further provide for the teaching of “Fire Prevention" in the colleges and schools of the state, and to arrange for a text-book adapted to such use. The ninth day of October of every year shall be set aside and designated as “Fire Prevention Day," and the governor shall issue a proclamation urging the people to a proper observance of the day, and the insurance commissioner shall bring the day and its observance to the attention of the officials of the municipalities of the state, and especially to the firemen, and where possible arrange suitable programs to be followed in its observance. (1915, c. 166, s. 5; 1925, c. 130; C. S. 6080.)

Editor's Note.—The provision requiring the commissioner to provide for a pamphlet of fire drill instructions, and the provision making it a duty of the superintendent or principal of every public school to conduct monthly fire drills, are new with the amendment of 1925.

Art. 2. Fire-Escapes.

§ 69-8. Construction of buildings regulated.—All hotels, lodging houses, school dormitories, hospitals, sanitariums, apartment houses, flats, tenement houses and all buildings other than private dwellings not over three stories in height, in which rooms are to be rented or leased or let or offered for rent, let or leased for living or sleeping purposes, hereafter constructed in this state shall be constructed so that the occupants of all rooms above the first floor shall have unobstructed access to two separate and distinct ways
of egress extending from the uppermost floor to the ground, such ways of egress to be so arranged in reference to rooms that in case of fire on one stairway the other stairway can be reached by the occupant without his or her having to pass the stairway involved. Entrance to all stairways mentioned in this section shall be from corridors or stairways not less than three feet in width, and in no case shall entrance to such ways of egress be through a room or closet, and where such building is in the opinion of the insurance commissioner of sufficient size to require more than two ways of egress the “National Fire Protection Association” standard governing corridors and stair areas shall be adhered to. Every hotel, lodging house, school dormitory, hospital, sanatorium, apartment house, flat, tenement or other building, other than a private dwelling not over three stories in height, in which rooms are rented, leased, let or offered for rent, shall, at the owner’s expense, be provided with additional ways of egress as the insurance commissioner shall deem practicable in order that the object of this article may be accomplished and that existing dangers may not be perpetuated. (1909, c. 657, s. 1; 1923, c. 149, s. 4; C. S. 6081.)

Editor’s Note.—Although the general subject matter of this section remains unaltered, its substance and provisions have been so altered by the amendment of 1923 as to leave no basis of comparison between the old and the new sections. For the provisions of the old section therefore, that section should be consulted.

“Nonsuit Held Proper.”—These actions to recover for personal injuries and for wrongful death resulting from a fire in defendants’ building, the third floor of which was rented for sleeping quarters, were founded on this section, upon allegations that defendants failed to have two exits from the sleeping quarters in case of fire. All the evidence tended for sleeping quarters, were founded on this section, upon

Editor’s Note.—The number of employees which would bring certain buildings enumerated near the beginning of the section within the operation of this section was reduced from twenty to ten, by the amendment of 1923. The provision, in the latter part of the section, that the plans of buildings to be erected shall be submitted to and approved by the insurance commissioner before work is begun, is also new with the amendment of 1923.

§ 69-11. Fire-escapes to be provided.—All factories, manufacturing establishments or workshops of three or more stories in height, in which ten or more people are employed above the first floor thereof, shall be provided with one or (if the proper officials shall deem necessary) more outside fire-escapes, not less than six feet in length and three feet in width, properly and safely constructed, guarded by iron railings not less than three feet in length and taking in at least one door and one window or two windows at each story and connected with the interior by easily accessible and unobstructed openings; and the fire escapes shall connect by iron stairs not less than twenty-four inches wide, the steps to be not less than six inches tread, placed at not more than an angle of forty-five degrees slant, and protected by a well secured hand-rail on both sides, with a twelve-inch wide drop ladder from the lowest platform reaching to the ground. Each story of all factories, manufacturing establishments or workshops of three or more stories in height shall be amply supplied with means for extinguishing fires. All the main doors, both inside and outside, in factories, except fire doors, shall open outwardly, when the proper official shall so direct, and no outside or inside door of any building wherein operatives are employed shall be locked, bolted, or otherwise fastened during the hours of labor so as to prevent egress. (1909, c. 637, s. 4; 1923, c. 149, s. 2; C. S. 6084.)

Editor’s Note.—The number of employees which would
bringing certain buildings enumerated near the beginning of the section within the operation of this section was reduced from thirty to ten, by the amendment of 1923.

§ 69-12. Ways of escape provided.—Every building now or hereafter used, in whole or in part, as a public building, public or private institution, schoolhouse, church, theater, public hall, place of assembly or place of public resort, and every building in which twenty or more persons are employed, allowed or accustomed to assemble, or accommodated above the second story in a factory, workshop, office building or mercantile or other establishment, when the owner or agent of the owner of the buildings is notified in writing by the insurance commissioner or one of his deputies, shall be provided with proper ways of egress or other means of escape from fire sufficient for the use of all persons accommodated, assembled, employed, lodging or residing in such building or buildings, and such ways of egress and means of escape shall be kept free from obstructions, in good repair, and ready for use. Every room above the second story in any such building in which twenty or more persons are employed shall be provided with more than one way of egress by a means of egress on the inside or outside of the building. All doors in any building subject to the provisions of this article shall open outwardly, if the insurance commissioner or one of his deputies shall so direct in writing. (1909, c. 637, s. 5; 1923, c. 119, s. 3; 1927, c. 55, s. 1; C. S. 6085.)

Editor's Note.—By the amendment of 1923, buildings where people are "allowed or accustomed to assemble or accommodated," and by the amendment of 1927, office buildings where people are employed, are brought within the operation of this section.

§ 69-13. Enforcement by insurance commissioner.—The insurance commissioner is charged with the execution of this article, and he or the chief of the fire department is vested with all privileges, duties, and obligations placed upon them in this chapter, in regard to the inspection of buildings, for the purpose of enforcing the provisions of this article in regard to the buildings and requirements herein. Any owner or occupant of premises failing to comply with the provisions of this article, in accordance with the orders of the authorities above specified, shall be guilty of a misdemeanor and punished by a fine not less than ten dollars nor more than fifty dollars for each day's neglect. If any owner or lessee of any building referred to in this article shall deem himself aggrieved by any ruling or order of any chief of fire department or local inspector, he may within twenty-four hours appeal to the insurance commissioner, and the cause of complaint shall at once be investigated by the direction of the commissioner, and unless by his authority the order or ruling is revoked it shall remain in full force and effect and be forthwith complied with by the owner or lessee. (1909, c. 637, s. 6; C. S. 6086.)

Art. 3. State Volunteer Fire Department.

§ 69-14. Purpose of article.—The purpose of this article shall be the creation of a state volunteer fire department to provide protection for property lying outside the boundaries of municipalities, and to render assistance anywhere within the state of North Carolina, in municipalities or counties, in emergencies caused by fire, floods, tornadoes, or otherwise, in the manner and subject to the conditions provided in this article. (1939, c. 364, s. 1.)

§ 69-15. Personnel. — The personnel of the North Carolina state volunteer fire department shall consist of all active members of the organized fire departments, who are members of the North Carolina state firemen's association, of municipalities whereof the governing bodies shall subscribe to and endorse this article. (1939, c. 364, s. 2.)

§ 69-16. Organization. — The North Carolina state fire marshal shall be chief of the state volunteer fire department; regular municipal fire chiefs shall be assistant chiefs; assistant chiefs shall be deputy chiefs; battalion chiefs, captains; lieutenants and privates shall hold the same positions that they occupy in their municipal companies. When engaged in rendering assistance at the scene of any emergency, the ranking officer of the first department arriving at the scene of the emergency shall have complete charge of all operations until the arrival of a superior officer. All subordinate officers and men shall act under the direction of such ranking officer. Whenever present at the scene of an emergency, the chief shall have full and complete control and authority over operations of all members of the department. (1939, c. 364, s. 3.)

§ 69-17. Acceptance by municipalities. — Any municipality having an organized fire department and desiring to participate in the establishment of the state volunteer fire department, may do so by a resolution of the governing body accepting and endorsing the provisions of this article: Provided, that acceptance shall not be compulsory. (1939, c. 364, s. 4.)

§ 69-18. Withdrawal.—Any municipality which has accepted the provisions of this article may withdraw its fire departments from membership in the state volunteer fire department by resolution of the governing body thereof. Notice of such withdrawal shall be given to the state fire marshal and withdrawal shall not become effective until sixty (60) days after his receipt thereof. (1939, c. 364, s. 5.)

§ 69-19. Dispatching firemen and apparatus from municipalities. — Municipalities endorsing this article shall retain full and complete control and authority in sending or permitting firemen and apparatus to go beyond the limits of the municipality. The governing bodies of such municipalities shall state and authorize a person, and at least two alternates, who shall have authority to grant or deny permission to firemen and apparatus to leave the municipality in all cases where request is made for assistance beyond its corporate limits, and the municipality shall, through the office of its municipal fire chief, furnish to the office of the state insurance commissioner, and to the secretary of the North Carolina state firemen's association, a list of the persons so authorized by the municipality. The secretary of the state firemen's association shall furnish to all municipalities and counties accepting this article a list of all such persons so designated.
in all municipalities within the state. (1939, c. 364, s. 6.)

§ 69-20. No authority in state volunteer fire department to render assistance to non-accepting counties.—The state volunteer fire department shall not have authority to render assistance in any emergency occurring within a county which has not accepted the terms and conditions of this article by resolution of the board of county commissioners: Provided, that nothing in this article shall be construed to prevent any municipality from voluntarily permitting its fire department to render assistance in any emergency, notwithstanding that it may arise in a county which has failed to accept this article. (1939, c. 364, s. 7.)

§ 69-21. Acceptance by counties.—Any county desiring to accept the benefits of this article may do so by resolution of the board of county commissioners. The board may make the necessary appropriation therefor and levy annually taxes for payment of the same as a special purpose, in addition to any tax allowed by any special statute for the purposes enumerated in § 153-9, and in addition to the rate allowed by the constitution. Any such county may thereupon make agreements and enter into contracts with respect to payment for services rendered by the state volunteer fire department within its boundaries in the following manner:

The county may contract with any municipality which has accepted the terms of this article, whether within or without said county, to pay to such municipality an annual fee as a consideration for the municipality providing equipment and carrying compensation insurance which will enable it to respond to calls from within the county so contracting, and to pay an additional sum per truck for each mile traveled from the station house to the scene of the emergency, and to pay an additional sum per truck per hour or fraction thereof for the use of its water or chemical pumping equipment. Said sums shall be paid to the city within thirty (30) days after such services have been performed: Provided, that nothing in this section shall be construed to prevent the county and municipality from adopting a different schedule of fees in cases where those provided above shall be considered excessive or inadequate: Provided, that if the emergency shall occur within the limits of another city or town, such city or town and not the county wherein it lies shall be responsible for the payments and shall assume all liabilities as provided in this section. (1939, c. 364, s. 8.)

§ 69-22. Municipalities not to be left unpro-
Chapter 70. Indian Antiquities.

§ 70-1. Private landowners urged to refrain from destruction.

§ 70-2. Possessors of relics urged to commit them to custody of state agencies.

§ 70-3. Preservation of relics on public lands.

§ 70-4. Destruction or sale of relic from public lands made misdemeanor.

Chapter 71. Indians.

§ 71-1. Cherokee Indians of Robeson County; rights and privileges.

§ 71-2. Separate privileges in schools and institutions.

§ 71-3. Chapter not applicable to certain bands of Cherokees.
other act relating to said "Cherokee Indians of Robeson County" shall be construed so as to impose on said Indians any powers, privileges, rights, or immunities, or any limitations on their power to contract, heretofore enacted with reference to the eastern band of Cherokee Indians residing in Cherokee, Graham, Swain, Jackson, and other adjoining counties in North Carolina, or any other band or tribe of Cherokee Indians other than those now residing, or who have since the Revolutionary War resided, in Robeson county, nor shall said "Cherokee Indians of Robeson County," as herein designated, be subject to the limitations provided in the chapter Contracts Requiring Writing, in § 22-3, entitled Contracts with Cherokee Indians. (1913, c. 123, s. 5; C. S. 6259.)

Chapter 72. Inns, Hotels and Restaurants.

Art. 1. Innkeepers.


Art. 1. Innkeepers. § 72-1. Must furnish accommodations.—Every innkeeper shall at all times provide suitable food, rooms, beds and bedding for strangers and travelers whom he may accept as guests in his inn or hotel. (Rev., s. 1909; 1903, c. 563; C. S. 2249.)

Cross References.—As to innkeeper's lien on baggage, see §§ 44-30 to 44-32. As to obtaining entertainment at hotels and boarding houses without paying therefor, see § 14-110. For distinctions between "boarder" and "guest," see notes under the following section.

What Constitutes an Inn Generally.—A public inn hotel is a public house of entertainment for all who choose to visit it, and where all transient persons who may choose to come will be received as guests, for compensation; and it does not lose its character as such by reason of its being located at a summer resort or a watering place, or by taking some as boarders by a special contract or for a definite time. Holstein v. Phillips, 146 N. C. 366, 59 S. E. 1037.

Sleeping Car Not an Inn.—Though a "sleeping car" is a place for the reception of travelers, it is not an "inn." Garrett v. Southern R. Co., 172 N. C. 727, 90 S. E. 903.

Boarding House.—A boarding house is as well known and as distinguishable from every other house in every city, village, and the country as an inn or tavern. It is a house where the business of keeping boarders generally oris carried on, and which is held out by the owner or
keeper as a place where boarders are kept. State v. McRae, 170 N. C. 712, 713, 66 S. E. 1039.

Boarder and Guest Distinguished.—In 16 A. & E. Eq. 299, it is said: "The essential difference between the keeper of a boarding house and a guest at an inn is that a boarding house is maintained for the purpose of selling newspapers or books, or of soliciting employment as barbers, and, in order to render his business more lucrative, he may establish a laundry or a livery stable in connection with his hotel, or an innkeeper may contract with the proprietor of a livery stable in the vicinity to secure for the latter, as far as he legitimately can, the patronage of his guests in that line for a consideration. And a guest and not a boarder and guest at an inn lies in the character in which the party comes—that is, whether he is a transient person or not, and, accordingly, one who stops at an inn for the purposes of his journey. The proprietor is held for the safety of the latter's goods, chattels, and money, when placed infra hospitum and with him has for the purposes of his journey. The proprietor is held to be an insurer to the extent that he must make good to the guest all loss or damage arising from any cause except the act of God or the public enemy, or the fault of the guest himself or his agents or servants. Quinton v. Courtney, 2 N. C. 40; Neal v. Wilcox, 49 N. C. 476. Holstein v. Phillips, 146 N. C. 366, 369, 59 S. E. 1037.

Ordinary Care Now Required.—Even at a public inn or hotel, one who holds the position as a regular boarder or lodger can not maintain an action for negligence in the exercise of ordinary, proper and reasonable care in the custody of such baggage and property; and in case of such loss, damage or destruction resulting from the negligence and want of care of the said innkeeper he shall be liable to the owner of the said baggage and property to an amount not exceeding one hundred dollars. Any guest may, however, at any time before a loss, damage or destruction of his property, notify the innkeeper in writing of the value the said sum of one hundred dollars, and shall upon demand of the innkeeper furnish him a list or schedule of the same, with the value thereof, in which case the innkeeper shall be liable for the loss, damage or destruction of said property because of any negligence on his part for the full value of the same. Proof of the loss of any such baggage, except in case of damage or destruction by fire, shall be prima facie evidence of the negligence of said hotel or innkeeper. (Rev., s. 1910; 1903, c. 563, s. 2; C. S. 2250.)

What Constitutes Boarding House Keeper.—The keeper of a boarding house or room is one who receives compensation for his, either by taking boarders, or only occasionally, although he receives compensation for it, not an innkeeper. State v. Mathews, 19 N. C. 424.

Boarder and Guest Distinguished.—In 16 A. and E. Eq. (299), it is said: "The essential difference between a boarder and a guest at an inn lies in the character in which the party comes—that is, whether he is a transient person or not, and, accordingly, one who stops at an inn for the purposes of his journey. The proprietor is held for the safety of the latter's goods, chattels, and money, when placed infra hospitum and with him has for the purposes of his journey. The proprietor is held to be an insurer to the extent that he must make good to the guest all loss or damage arising from any cause except the act of God or the public enemy, or the fault of the guest himself or his agents or servants. Quinton v. Courtney, 2 N. C. 40; Neal v. Wilcox, 49 N. C. 476. Holstein v. Phillips, 146 N. C. 366, 369, 59 S. E. 1037.

Liability Extends to Guest.—When one is received at a public inn or hotel and entertained as a guest, without any prearrangement as to terms or time, but on the implied invitation held out to the public generally, he is a transient only—a guest and not a boarder—and entitled to recover of the defendant innkeeper as such. Holstein v. Phillips, 146 N. C. 366, 369, 59 S. E. 1037.

Same—Common Law Liability.—The decisions of this State are to the effect that, in the absence of statutory regulation, the keeper of a public inn, or hotel, which is the mod- ern equivalent of the modicum tolerated by the common law, is not an innkeeper in the ordinary sense of the word, but an innkeeper. After concluding such contracts, the innkeeper may contract with the proprietor of a livery stable in the vicinity to secure for the latter, as far as he legitimately can, the patronage of his guests in that line for a consideration. And a guest and not a boarder and guest at an inn lies in the character in which the party comes—that is, whether he is a transient person or not, and, accordingly, one who stops at an inn for the purposes of his journey. The proprietor is held to be an insurer to the extent that he must make good to the guest all loss or damage arising from any cause except the act of God or the public enemy, or the fault of the guest himself or his agents or servants. Quinton v. Courtney, 2 N. C. 40; Neal v. Wilcox, 49 N. C. 476. Holstein v. Phillips, 146 N. C. 366, 369, 59 S. E. 1037.

The exacting requirement of the common law, established in 16 A. & E. Eq. 299, has been fulfilled by the modern innkeeper. After concluding such contracts, the innkeeper may contract with the proprietor of a livery stable in the vicinity to secure for the latter, as far as he legitimately can, the patronage of his guests in that line for a consideration. And a guest and not a boarder and guest at an inn lies in the character in which the party comes—that is, whether he is a transient person or not, and, accordingly, one who stops at an inn for the purposes of his journey. The proprietor is held to be an insurer to the extent that he must make good to the guest all loss or damage arising from any cause except the act of God or the public enemy, or the fault of the guest himself or his agents or servants. Quinton v. Courtney, 2 N. C. 40; Neal v. Wilcox, 49 N. C. 476. Holstein v. Phillips, 146 N. C. 366, 369, 59 S. E. 1037.

Ordinary Care Now Required.—Even at a public inn or hotel, one who holds the position as a regular boarder or lodger can not maintain an action for negligence in the exercise of ordinary, proper and reasonable care in the custody of such baggage and property;
§ 72-3. State Board of Health—For the purpose of carrying out the provisions of this article the State Board of Health is authorized and required to inspect, through its officers or agents, without cost to the hotels or hospitals, all hotels and restaurants, hospitals and sanitariums, public and private, in the state once a year. If upon inspection of any hotel or restaurant, hospital or sanitarium, it shall be found that this article has been fully complied with, the secretary of the state board of health shall issue a certificate to that effect to the person operating the same, and such certificate shall be kept posted in plain view in some conspicuous place in said hotel or restaurant, hospital or sanitarium. (1917, c. 66, s. 23; 1923, c. 173; C. S. 2277.)

Editor's Note.—This section, originally passed in 1917, was repealed by Public Laws 1921, Chapter 186, sec. 22. However in 1923 this section was amended and reinstated in the Code, Public Laws 1923, Chapter 173. The effect of the amendment was to include hospitals and sanitariums, public and private, under the provision for inspection by the State Board of Health.

§ 72-4. Loss by fire.—No innkeeper shall be liable for loss, damage or destruction of any baggage or property caused by fire not resulting from the negligence of the innkeeper or by any other force over which the innkeeper had no control. Nothing herein contained shall enlarge the amount to which the innkeeper shall be liable as provided in preceding sections. (Rev. s. 1912; 1903, c. 563, s. 3; C. S. 2251.)

§ 72-5. Negligence of guest.—Any innkeeper against whom claim is made for loss sustained by a guest may show that such loss resulted from the negligence of such guest or of his failure to comply with the reasonable and proper regulations of the inn. (Rev. s. 1914; 1903, c. 563, ss. 7; C. S. 2252.)

§ 72-6. Copies of this article to be posted.—Every innkeeper shall keep posted in every room of his house occupied by guests, and in the office, a printed copy of this article and of all regulations relating to the conduct of guests. This chapter shall not apply to innkeepers, or their guests, where the innkeeper fails to keep such notices posted. (Rev. s. 1912; 1903, c. 563, ss. 5, 6; C. S. 2254.)

Effect of Noncompliance with Section.—Where the provisions of this section are not complied with the principle of the common law obtains and the keeper is liable as at common law. Holstein v. Phillips, 146 N. C. 366, 369, 59 S. E. 1037.

§ 72-7. Admittance of dogs to bedrooms.—It shall be unlawful for any innkeeper or guest owning, keeping, or who has in his care a dog or dogs, to permit such a dog or dogs admittance to any bedroom or rooms used for sleeping purposes in any inn or hotel. Any person violating the provisions of this section shall be guilty of a misdemeanor and upon conviction shall pay a fine not to exceed fifty dollars or be imprisoned not more than thirty days. (1927, c. 67.)

Cross Reference.—As to special provisions for "Seeing-Eye" dogs, see § 67-29.

Art. 2. Sanitary Inspection and Conduct.

§ 72-8. Annual inspection and certificate by state board of health.—For the purpose of carrying out the provisions of this article the state board of health is authorized and required to...
§ 72-12. Receptacles holding water screened.

“Standing water” defined.—The proprietor of every hotel and restaurant shall keep all cisterns, tanks, and other receptacles containing standing water screened or otherwise so covered as to prevent the entrance of flies, mosquitoes, and other disease-carrying insects. The term “standing water” as used in this article shall mean water that remains for ten days or more in a cistern, tank, or other receptacle. (1921, c. 186, s. 4; C. S. 2283(d).)

§ 72-13. Water to be analyzed. Discontinuance of use.—A sample of water used in every hotel and restaurant, except in cases where the water is derived from some public water supply, shall be sent by the proprietor to the state laboratory of hygiene for analysis twice each year, with a certificate that it is the water used in such hotel or restaurant, and if the sample is found by said laboratory to be unfit for the use that is made of the water in the hotel or restaurant, the further use of such water shall be discontinued until permission is granted by the state board of health to resume the use of such water. (1921, c. 186, s. 5; C. S. 2283(e).)

§ 72-14. Door and window screens. Mosquito bar for beds. Fly paper and fly traps.—The proprietor or keeper of every hotel or restaurant shall keep screened the doors, windows, and all openings of the kitchen and dining-room with suitable mesh-wire gauze from the first of April to the first of December. Every hotel shall have all bedroom windows screened, or else provide each bed with a mosquito bar for the use of its patrons for protection against flies, mosquitoes and other insects, and it shall be the duty of the proprietor or keeper of every hotel and restaurant to use such other means, as fly-paper, fly-traps, etc., as may be necessary to keep the restaurant, kitchen, and dining-room reasonably free from flies. (1921, c. 186, s. 6; C. S. 2283(f).)

§ 72-15. Minimum floor and air space. Beds.—In every sleeping room the minimum floor area shall be sixty (60) square feet per bed, and under no circumstances shall there be provided less than five hundred (500) cubic feet of air space per bed. There shall always be space in each room, and the arrangement of each room shall be such that there may be a space of two feet between any beds in the room. All beds shall be so arranged that the air shall circulate freely under each. In no hotel shall beds or bunks in the same room or apartment be placed one above another: Provided, that this section shall not apply in cases of emergency. (1921, c. 186, s. 7; C. S. 2283(g).)

§ 72-16. Lighting of rooms. Window space. Blinds or shades.—Each room in every hotel hereafter constructed shall be well lighted, with outside window space not less than one-eighth (1/8) the floor space. Each window in every hotel now existing or hereafter constructed shall be provided with suitable mesh-wire gauze, or with a movable shade which effectively excludes the light when drawn. (1921, c. 186, s. 8; C. S. 2283(h).)

§ 72-17. Pillow-slips and sheets; clean sets.—All hotels shall hereafter provide each bed, bunk, cot, or other sleeping place for the use of guests with pillow-slips, under and top sheets to be of sufficient width to cover the mattress thereof, and to be at least ninety (90) inches long. All pillow-slips and sheets, after being used by one guest, must be washed and ironed before used by another guest, a clean set being furnished each succeeding guest. (1921, c. 186, s. 9; C. S. 2283(i).)

§ 72-18. Beds and furnishings to be kept clean and free from vermin.—All beds, bedclothing, mattresses, and pillows shall always be kept clean and free from vermin. (1921, c. 186, s. 10; C. S. 2283(j).)

§ 72-19. Rooms to be disinfected and aired.—Every room, after being occupied by any one known or suspected to be suffering from tuberculosis, diphtheria, or any contagious disease, must be thoroughly disinfected as prescribed by the state board of health before further occupancy; and every room, after being occupied by any one known or suspected to be suffering from measles or whooping-cough, must be thoroughly aired for twenty-four (24) hours before subsequent occupancy. (1921, c. 186, s. 11; C. S. 2283(k).)

§ 72-20. Towels.—All hotels shall furnish each guest with a clean towel; and the use of the roller or other towels used in common is prohibited in all hotels and restaurants. (1921, c. 186, s. 12; C. S. 2283(l).)

§ 72-21. Refrigerators, ice boxes, and cold storage rooms. Kitchens.—The refrigerator, ice boxes, and cold-storage rooms of all hotels or restaurants must be kept free from foul and unpleasant odors, mold, and slimes. The kitchen must be well lighted and ventilated, the floor clean, and the side walls and ceilings free from cobwebs and accumulated dirt. (1921, c. 186, s. 13; C. S. 2283(m).)

§ 72-22. Tableware and kitchen utensils. Service of food.—All dishes, tableware, and kitchen utensils must be thoroughly washed and rinsed with clean water after using; food served to customers when part of same has been used must not again be served to other customers. (1921, c. 186, s. 14; C. S. 2283(n).)

§ 72-23. Protection and removal of garbage.—All garbage must be kept covered and protected from flies, in barrels or galvanized iron cans, and removed at least twice a week. (1921, c. 186, s. 15; C. S. 2283(o).)

§ 72-24. Requirements for lodging-houses.—Every lodging-house accepting transient guests shall at all times be kept free from filth and rubbish in or on the premises belonging to or connected with the same. All water-closets, wash-basins, baths, windows, fixtures, fittings, and painted surface shall at all times be kept clean and in good repair. The floors, walls, and ceilings of all rooms, passages, and stairways must at all times be clean and in good repair. (1921, c. 186, s. 16; C. S. 2283(p).)

§ 72-25. Rules prescribed by state board of
§ 72-26. Annual inspections. Certificates.—No inspection of any hotel or restaurant shall be required oftener than once a year, unless there is a change of proprietors, or unless it shall appear to the state board of health that additional inspections are advisable, or upon complaint from two or more persons setting forth facts indicating that such hotel or restaurant is in an unsanitary condition and not maintained in accordance with the requirements of this article: Provided, however, upon request on the part of the management or proprietor a reinspection may be had within a period of thirty (30) days. When more than one inspection of a hotel or restaurant is made within any one year, the state board of health shall issue a new certificate of inspection, and upon the receipt of the new certificate, the proprietor or manager of the hotel or restaurant a certificate with the rating given to the hotel stated thereon. The proprietor or manager of the hotel or restaurant, upon the receipt of the aforesaid certificate, shall post it in a conspicuous place where it may be easily observed by guests, and shall remove and destroy the said certificate one year after the date written thereon, or sooner when called upon to do so by an officer or agent of the state board of health. (1921, c. 186, s. 17; C. S. 2283(q).)

§ 72-27. Authority of inspectors. Privacy of guests.—The inspectors, officers, or agents of the state board of health are empowered and authorized to enter any hotel or restaurant at all reasonable hours to make such inspection; and it is the duty of every person in the management or control of such hotel or restaurant to afford free access to every part of the hotel or restaurant and render all aid and assistance necessary to enable the inspector to make a full, thorough, and complete examination thereof; but no inspector shall violate the privacy of any guest without his or her consent. (1921, c. 186, s. 19; C. S. 2283(s).)

§ 72-28. Acts and omissions constituting misdemeanor; punishment.—Any owner, manager, agent, or person in charge of a hotel or restaurant, or any other person who shall willfully obstruct, hinder, or interfere with any officer or agent of the state board of health in the proper discharge of his duty, or who shall willfully fail or neglect to comply with any of the provisions of this article, or who shall maintain or operate a hotel or restaurant which, under the requirements and provisions of this article, shall be found to have a rating of less than 70 shall be guilty of a misdemeanor, and upon conviction fined not less than $10 nor more than $50 for each offense, and each day that he shall fail to comply with this article or to maintain his hotel or restaurant with a rating of more than 70 points shall be a separate offense. (1921, c. 186, s. 20; C. S. 2283(t).)

§ 72-29. Inspector to swear out warrants.—It shall be the duty of the inspector, in case he shall have knowledge of any violation of this article, to swear out a warrant against the person offending. (1921, c. 186, s. 21; C. S. 2283(u).)


§ 72-30. Registration to be in true name; addresses; peace officers.—No person shall write, or cause to be written, or if in charge of a register knowingly permit to be written, in any register in any lodging-house or hotel any other or different name or designation than the true name or names in ordinary use of the person registering or causing himself to be registered therein. Any person occupying any room or rooms in any lodging-house or hotel shall register or cause himself to be registered where registration is required by such lodging-house or hotel. Any person registering or causing himself to be registered at any lodging-house or hotel, shall write, or cause to be written, in the register of such lodging-house or hotel the correct address of the person registering, or causing himself to be registered. Any person violating any provision of this section shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine not exceeding two hundred dollars ($200). This section shall not apply to any peace officer of this state who shall privately give his true name to the clerk or proprietor of such hotel or lodging-house. (1921, c. 111; C. S. 2283(v).)

Art. 4. Licensing and Regulation of Tourist Camps and Homes, Cabin Camps, Road Houses and Public Dance Halls.

§ 72-31. License required.—Every person, firm or corporation engaged in the business of operating outside the corporate limits of any city or town in this state a tourist camp, cabin camp, tourist home, road house, public dance hall, or any other similar establishment by whatever name called, where travelers, transient guests, or other persons are or may be lodged for pay or compensation, shall, before engaging in such business, apply for and obtain from the board of county commissioners of the county in which such business is to be carried on a license for the privilege of engaging in such business and shall pay for such license an annual tax in the amount of two dollars ($2.00). (1939, c. 188, s. 1.)
[§ 72-32. Exemptions.—This article shall not apply to hotels and inns within the definition of § 72-9, nor to persons incidental to their principal business or occupation accept from time to time seasonal boarders in their private residences: Provided, however, this shall not be construed to exempt from the provisions of this article residences maintained in connection with a store or other establishment operated for the sale of articles of merchandise. (1939, c. 188, s. 2.)]

[§ 72-33. Application to county commissioners for license.—Every person, firm or corporation making application for license to engage in the business described in § 72-31 shall make application to the board of county commissioners in the county in which such business is to be engaged in and the application shall contain:
(a) The name and residence of the applicant and of the residence within the state of North Carolina.
(b) The address and place for which such license is desired.
(c) The name of the owner of the premises upon which the business licensed is to be carried on.
(d) That the applicant intends to carry on the business authorized by the license for himself or under his immediate supervision and direction.
(e) That such applicant is of good moral character and has never been convicted of a felony involving moral turpitude, or adjudged guilty of violating either the state or federal prohibition laws within the last two years prior to the filing of the application. (1939, c. 188, s. 3.)]

[§ 72-34. Verification of application; disqualifications for license.—The application prescribed in § 72-33 must be verified by the affidavit of the petitioner made before a notary public or other person duly authorized by law to administer oaths. If it appears from the statement of the applicant, or otherwise, that such applicant has been convicted of a felony involving moral turpitude or adjudged guilty of violating either state or federal prohibition laws within the last two years prior to the filing of the application, or within two years from the completion of sentence thereon, the license herein provided for shall not be granted, unless it shall appear to the satisfaction of the board of county commissioners that the licensed premises will be operated in a lawful manner; in which case they may, in their discretion, issue such license. Before any such license shall be issued, the governing body of the county shall be satisfied that the statements required by § 72-33 are true. Every establishment named in this article shall be subject to inspection by the state board of health and the county health authorities in the county in which such business is carried on. (1939, c. 188, s. 4.)]

[§ 72-35. List of employees furnished to sheriff upon request.—At any time upon request of the sheriff of the county in which such business is carried on, the operator of every establishment named in this article shall furnish said sheriff with a list of all employees who are employed by him in connection with said business; and, in every instance when such an operator goes out of business or there is a change of ownership or management thereof, such operator shall immediately file with the clerk of the board of county commissioners of the county in which such business is carried on a notice to this effect, giving the name and address of the purchaser or the new owner or manager thereof. (1939, c. 188, s. 5.)]

[§ 72-36. Registration of guest.—Any person or persons occupying any room or rooms in a tourist camp, cabin camp, tourist home, road house, or any other similar establishment by whatever name called, shall register or cause himself to be registered before occupying the same, and if traveling by motor vehicle shall register at the same time the automobile license tag of such motor vehicle and the name of the manufacturer of such motor vehicle; and no person shall write or cause to be written, or, if in charge of a register, knowingly permit to be written in any register in any of the establishments herein named, any other or different name or designation than the true name or names in ordinary use of the person registering or causing himself to be registered therein, or the true name of the manufacturer of such motor vehicle or the correct license plate and number thereof. Every person to whom a license is issued under the provisions of this article shall provide a permanent register for the purposes set forth herein. (1939, c. 188, s. 6.)]

[§ 72-37. False registration and use for immoral purposes made misdemeanor.—Any man or woman found occupying the same room in any establishment within the meaning of this article for any immoral purpose, or any man or woman falsely registering as or otherwise representing themselves to be husband and wife in any such establishment shall, upon conviction thereof, be guilty of a misdemeanor and shall be fined or imprisoned in the discretion of the court. (1939, c. 188, s. 7.)]

[§ 72-38. Operator knowingly permitting violations, guilt of misdemeanor.—Any person being the operator or keeper of any establishment within the meaning of this article who shall knowingly permit any man or woman to occupy any room in any establishment within the meaning of this article for any immoral purpose, or who shall knowingly permit any man or woman to falsely register as husband and wife in such an establishment, shall, upon conviction thereof, be guilty of a misdemeanor and shall be fined or imprisoned in the discretion of the court. (1939, c. 188, s. 8.)]

Tourist Camp as Nuisance.—Under § 19-2 the operation of a tourist camp in a disorderly manner may be enjoined or it may be abated as a nuisance against public morals. Carpenter v. Boyles, 213 N. C. 432, 196 S. E. 850.]

[§ 72-39. Inducing female to enter tourist camps, etc., for immoral purpose made misdemeanor.—Any person who shall knowingly persuade, induce or entice, or cause to be persuaded, induced or enticed, any woman or girl to enter any establishment within the meaning of this article for the purpose of prostitution or debauchery, or for any other immoral purpose, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined or imprisoned in the discretion of the court. (1939, c. 188, s. 9.)]

[§ 72-40. Revocation of operator's license.—In addition to the penalty herein prescribed for a violation of this article, the court, before whom...
such person is tried and where a conviction is had, shall have the power to revoke the license to operate the establishment or establishments licensed under this article, and whenever any person, firm or corporation has been so convicted, the court, if it shall appear that said premises were being operated in violation of the law with the knowledge, consent or approval of the owner thereof, shall have the authority to prohibit the issuance of any similar license for said premises to any person for a term of six months after the revocation of said license. (1939, c. 188, s. 10.)

§ 72-41. Tax imposed declared additional.—The tax imposed by this article shall be in addition to all other licenses and taxes levied by law upon the business taxed hereunder. (1939, c. 188, s. 11.)

§ 72-42. Time of payment of license; expiration date.—Licenses issued under this article shall be due and payable in advance annually on or before the first day of June of each year, or at the date of engaging in such business, and shall expire upon the thirty-first day of May of each year, and shall be for the full amount of the tax prescribed, regardless of the date such business is begun. Upon the expiration of the license herein required, it shall be unlawful for any person, firm or corporation to engage in such business without first obtaining a license therefor. Any person violating the provisions of this section shall be guilty of a misdemeanor and upon conviction thereof shall be fined or imprisoned in the discretion of the court. (1939, c. 188, s. 12.)

§ 72-43. Operation without license made misdemeanor.—It shall be unlawful for any person, firm or corporation to engage in such business without first obtaining a license therefor. Any person violating the provisions of this section shall be guilty of a misdemeanor and upon conviction thereof shall be fined or imprisoned in the discretion of the court. (1939, c. 188, s. 13.)

§ 72-44. Violations of article made misdemeanor.—Unless another penalty is in this article or by the laws of this State prescribed, any person violating any of the provision of this article shall, upon conviction thereof, be guilty of a misdemeanor and shall be fined or imprisoned in the discretion of the court. (1939, c. 188, s. 14.)

§ 72-45. Application of article to municipalities.—The governing body of any city or town shall have the authority to make any or all of the provisions of this article applicable to any business as defined herein which may be located in the limits of any such city or town. (1939, c. 188, s. 15.)

Local Modification.—Bladen, Caswell, Graham, Hyde, Moore: 1939, c. 188, s. 18; Guilford: 1939, c. 188, s. 16.

Art. 5. Sanitation of Establishments Providing Food and Lodging.

§ 72-46. State board of health to regulate sanitary conditions of hotels, cafes, etc.—For the better protection of the public health, the state board of health is hereby authorized, empowered, and directed to prepare, and enforce rules and regulations governing the sanitation of hotels, cafes, restaurants, tourist homes, tourist camps, summer

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§ 72-47. Inspections; report and grade card.—The officers, sanitarians or agents of the State board of health are hereby empowered and authorized to enter any hotel, cafe, restaurant, tourist home, tourist camp, summer camp, lunch and drink stand, sandwich manufacturing establishment, and other establishments where food is prepared, handled, and served to the public at wholesale or retail for pay, or where transient guests are served food or provided for lodging for pay. The state board of health is also authorized, empowered, and directed to prepare a system of grading all such places, and no such establishment shall operate which receives a grade less than C. (1941, c. 309, s. 1.)

§ 72-48. Violation of article a misdemeanor.—Any owner, manager, agent, or person in charge of a hotel, cafe, restaurant, tourist home, tourist camp, summer camp, lunch and drink stand, sandwich manufacturing establishment, or any other establishment where food is prepared, handled, or served to the public at wholesale or retail for pay, or where transient guests are served food or provided for lodging for pay, or any other person who shall willfully obstruct, hinder, or interfere with a sanitarian, agent, or officer of the state board of health in the proper discharge of his duty, or who shall be found guilty of violating any of the other provisions of this article, or any of the rules and regulations that may be provided under this article, shall be guilty of a misdemeanor, and upon conviction shall be fined not less than ten ($10.00) dollars, nor more than fifty ($50.00) dollars, or imprisoned for not more than thirty days, and each day that he shall fail to comply with this article, or operate a place with a rating of less than a grade of C shall be a separate offense. (1941, c. 309, s. 3.)
Chapter 73. Mills.

Art. 1. Public Mills.

§ 73-1. Public mills defined. — Every water grist-mill, steam mill, or wind-mill, that grinds for toll, is a public mill. (Rev., s. 2119; Code, s. 1846; R. C., c. 71, s. 1; 1777, c. 122, s. 1; C. S. 2353.)

§ 73-2. Miller to grind according to turn; tolls regulated. — All millers of public mills shall grind according to turn, and shall well and sufficiently grind the grain brought to their mills, if the water will permit, and shall take no more toll for grinding than one-eighth of a half bushel. State v. Perry, 50 N. C. 252. The measure kept need not be averred in the indictment. Id.

§ 73-3. Measures to be kept; tolls by weight or measure. — All millers shall keep in their mills the following measures, namely, a half-bushel and peck of full measure, and also proper toll-dishes for each measure; but the toll allowed by law may be taken by weight or measure at the option of the miller and customer. (Rev., s. 2121; Code, s. 1848; 1855, c. 202; R. C., c. 71, s. 7; 1777, c. 122, s. 11; C. S. 2353.)

§ 73-4. Keeping false toll-dishes misdemeanor. — If any owner, by himself or servant, keeping any mill, shall keep any false toll-dishes, he shall be guilty of a misdemeanor. (Rev., s. 3679; Code, s. 1848; R. C., c. 71, s. 7; 1777, c. 122, s. 11; C. S. 2353.)

“False Toll Dishes” Defined. — The words “false toll dish,” as used in the statute, mean a toll dish measuring more than one-eighth of a half bushel. State v. Perry, 50 N. C. 252. The measure kept need not be averred in the indictment. Id.

Sufficiency of Evidence. — An indictment for keeping false toll dishes was sufficiently supported by proving measures of one-seventh and one-sixth of a half bushel were kept. State v. Perry, 50 N. C. 252. But an indictment for keeping a false toll dish is not sustained by proof that the mill owner took one-sixth part of any kind; and every miller and keeper of a mill making default therein shall, for each offense, forfeit and pay five dollars to the party injured: Provided, that the owner may grind his own grain at any time. (Rev., s. 2120; Code, s. 1847; R. C., c. 71, s. 6; 1777, c. 122, s. 10; 1793, c. 402; 1905, c. 694; 1907, c. 367; C. S. 2353.)

Local Modification. — Bertie, Hertford, Hyde: 1933, c. 159; Chowan: 1929, c. 111; Pender: 1933, c. 298; Sampson: 1929, c. 164.

Art. 2. Condemnation for Mill by Owner of One Bank of Stream.

§ 73-5. Special proceedings; parties; summons. — Any person wishing to build a water mill, who has land on only one side of a stream, shall issue a summons returnable to the superior court of the county in which the land sought to be condemned, or some part of it, lies, against the persons in possession and the owners of the land on the opposite side of the stream, and against such others as have an interest in the controversy, and the procedure shall be as is provided in other special proceedings, except so far as the same may be modified by this chapter. (Rev., s. 2122; Code, s. 1849; 1868-9, c. 158, s. 1; C. S. 2353.)

Cross Reference. — For full treatment of eminent domain proceeding, see §§ 49-1 et seq.

Corporation That Erects Mills Generally. — The Legislature, in providing for the condemnation of land for the purpose of erecting mills thereon, classifies a corporation that erects mills generally as one of those private corporations which enjoys a prerogative franchise because of some powers or duties, which it is to perform for the public, and to that extent is quasi public. Bass v. Roanoke Navig., etc., Co., 111 N. C. 439, 454, 16 S. E. 402.

Withdrawal of Verbal Consent to Maintain Dam. — The plaintiff built a mill, and, with the verbal consent of the defendant, constructed a dam across a stream upon land of the latter after the mill had been in operation for several years, the defendant withdrew his consent to the further use of the land for this purpose, and notified the plaintiff to level the dam, which he failed to do. Thereupon the defendant caused the obstruction to be removed. In an action by the plaintiff for damages, it was held that the plaintiff should have taken a conveyance of the easement, or pursued the remedy pointed out for the condemnation of land for mill purposes. Kivett v. McKeithan, 90 N. C. 106.
§ 73-6. Commissioners to be appointed.—If no just cause is shown against the building of such mill, the court shall appoint three freeholders, one of whom shall be chosen by the plaintiff, another by the defendants, and the third by the court, or if the plaintiff or defendants refuse or fail, or unreasonably delay to name a commissioner, the court shall name one in lieu of such delinquent party. These commissioners may be changed from time to time by permission of the court for just cause shown. (Rev., s. 2123; Code, s. 1850; 1868-9, c. 158, s. 2; C. S. 2536.)

§ 73-7. Meeting to be appointed and commissioners notified; witnesses examined.—The third commissioner shall cause the others to be notified of the time and place of meeting, and shall preside at their meetings. They may, if necessary, summon and examine witnesses, who shall be sworn by the presiding commissioner. Any commissioner named by or for either of the parties who, without just cause, fails to attend any meeting notified by the president, shall forfeit and pay to the opposite party fifty dollars; and if the president, in like manner, unreasonably delays to notify the other commissioners of a meeting, or fails to attend one that is appointed, he shall forfeit and pay to the plaintiff fifty dollars, and to the defendant a like sum. (Rev., s. 2124; Code, s. 1851; 1868-9, s. 3; C. S. 2537.)

§ 73-8. Oath and duty of commissioners.—The commissioners shall be sworn by some officer qualified to administer an oath to act impartially between the parties, and to perform the duties herein imposed on them honestly and to the best of their ability. They shall view the premises where the mill is proposed to be built, and shall lay off and value a portion of the land of the defendants opposite thereto, and report their proceedings to the court within a reasonable time, not exceeding sixty days. (Rev., s. 2125; Code, s. 1851; 1868-9, c. 158, s. 3; C. S. 2538.)

§ 73-9. Contents of commissioners’ report.—The report of the commissioners shall set forth:
1. The location, quantities and value of the several areas laid off by them.
2. Whether either of them includes houses, gardens, orchards or other immediate conveniences.
3. Whether the proposed mill will overflow another mill or create a nuisance in the neighborhood.
4. Any other matter upon which they have been directed by the court to report, or which they may think necessary to the doing of full justice between the parties. (Rev., s. 2126; Code, s. 1853; 1868-9, c. 158, s. 5; C. S. 2539.)

§ 73-10. When building not to be allowed.—If the area laid off on the land of either party take away houses, gardens, orchards, or other immediate conveniences; or if the mill proposed will overflow another mill, or will create a nuisance in the neighborhood, the court shall not allow the proposed mill to be built. (Rev., s. 2127; Code, s. 1854; 1868-9, c. 158, s. 6; C. S. 2540.)

Cross Reference.—As to restrictions on condemnation of dwelling houses, gardens and burial grounds, see § 40-10.

§ 73-11. Power of court on return of report.—If the report is in favor of building the proposed mill, and is confirmed, then the court may, in its discretion, allow either the plaintiff or defendant to erect such mill at the place proposed, and shall order the costs, and the value of the opposite area, to be paid by the party to whom such leave is granted; and upon such payment, the party to whom such leave is granted shall be entitled with title in fee to the opposite area. Such payment may be made into court for the use of the parties entitled thereto. (Rev., s. 2128; Code, s. 1855; 1868-9, c. 158, s. 7; C. S. 2541.)

§ 73-12. Time for beginning and building mill; to be kept up.—The person to whom leave is granted shall, within one year, begin to build such water mill, and shall finish the same within three years; and thereafter keep it up for the use and ease of its customers, or such as shall be customers to it; otherwise, the said land shall return to the person from whom it was taken, or to such other person as shall have his right, unless the time for finishing the mill, for reasons approved by the court, be enlarged. (Rev., s. 2129; Code, s. 1856; 1868-9, c. 158, s. 8; C. S. 2542.)

§ 73-13. Rebuilding mill after destruction.—If a water mill belonging to a minor, a person of unsound mind, or imprisoned, falls, burns, or is otherwise destroyed, such person and his heirs shall have three years to rebuild and repair the same, and any person under any disability aforesaid shall have three years from the removal of the disability. (Rev., s. 2130; Code, s. 1857; 1903, c. 74, ss. 1, 2; 1868-9, c. 158, s. 9; C. S. 2543.)

Art. 3. Condemnation for Races, Waterways, etc., by Owner of Mill or Millsite.

§ 73-14. Special proceedings; summons.—Any person who has land on one or both sides of a stream and wishes to build a water mill, or has a water-mill already built and may find it necessary for the better operation of said mill or the building of the said mill to convey water either to or from his mill by ditch, waterway, drain, mill-race or tail-race, or in any other manner, over the lands of any other person, or erect a dam to pond said water over the lands of any other person, or raise any dam already built, is forbidden to proceed without a license. Such person and his heirs shall have three years from the removal of the disability. (Rev., s. 2131; 1905, c. 534, s. 1a, k; C. S. 2544.)
§ 73-15. Contents of petition. — The petition shall specify the lands to be affected, the name of the owner of said lands, and the character of the ditch, race, waterway or drain or pond intended to be made, and said owner or owners shall be made parties defendant. The petition shall state the distance desired to be condemned on each side of the ditch, waterway or drain to be constructed or erected, and not more than thirty feet from each bank can be condemned. (Rev., s. 2132; 1905, c. 534, s. 1b; C. S. 2545.)

§ 73-16. Commissioners to be appointed.—Upon the hearing of the petition, if the prayer thereof be granted, the clerk shall appoint three disinterested persons qualified to act as jurors, and not connected either by blood or marriage with the parties, appraisers to assess the damage, if any, that will accrue to the said lands by the contemplated work, and shall issue a notice to them to meet upon the premises on a day specified, not to exceed ten days from the date of said notice. (Rev., s. 2133; 1905, c. 534, s. 1c; C. S. 2546.)

§ 73-17. Oath and duty of commissioners.—The appraisers having met, shall take an oath before some officer qualified to administer oaths to faithfully perform their duty and to do impartial justice in the case, and shall then examine all the lands in any way to be affected by the said work and assess the damage thereto and make report thereof under their hands and seals to the clerk from whom the notice issued, who shall have power to confirm the same. (Rev., s. 2134; 1905, c. 534, s. 1d; C. S. 2547.)

§ 73-18. Assessment of damages.—In determining the amount of such compensation to be paid to the owners of the said lands and assessing the damages thereto by reason of the erection or construction of such waterway, ditch, drain or dam, they shall make an allowance or deduction on account of any benefits which the parties in interest may derive from the construction or erection of such waterway, ditch, drain or dam, and shall ascertain the damages, as near as may be, to the extent it may damage each acre of land so appropriated or occupied by the said mill-owner. The damage assessed by the appraisers under this article shall include all damages that the owners shall thereafter suffer or be entitled to by reason of the construction of the said waterways, races, ditches or dams. (Rev., s. 2135; 1905, c. 534, s. 1e, m; C. S. 2548.)

§ 73-19. When commissioners' report not to be affirmed.—If the area laid off on the lands of either party take away houses, gardens, orchards or immediate conveniences, or if the mill proposed or erected will overflow another mill of pond water within two hundred feet of another mill, or will overflow or pond water within two hundred feet of the millsite or premises of a mill, or his known or recognized agent in this state. Provided, he has first paid or tendered the damage assessed as above to the owner of such lands or his known or recognized agent in this state. If the owner is a nonresident and has no known agent in this state, the amount so assessed shall be paid by the petitioner into the office of the clerk of the superior court of the county for the use of such owner: Provided further, that the mill-owner shall not be compelled to pay said damages so assessed unless he shall enter upon such lands and make ditches, drains or other works or erect such dam. (Rev., s. 2137; 1905, c. 534, s. 11; C. S. 2550.)

§ 73-20. When petitioner may enter on lands.—After the return of the appraisers and the confirmation thereof the petitioner shall have full right and power to enter upon said lands and make such ditches, waterways, drains, races or other necessary works and construct such dams. Provided, he has first paid or tendered the damage assessed as above to the owner of such lands or his known or recognized agent in this state. If the owner is a nonresident and has no known agent in this state, the amount so assessed shall be paid by the petitioner into the office of the clerk of the superior court of the county for the use of such owner: Provided further, that the mill-owner shall not be compelled to pay said damages so assessed unless he shall enter upon such lands and make ditches, drains or other works or erect such dam. (Rev., s. 2137; 1905, c. 534, s. 11; C. S. 2550.)

§ 73-21. Owner of mills and millsites protected.—No other person shall have the right to erect or maintain any dam, ditch, waterway, drain or race that will overflow or pond water within two hundred feet of the millsite or premises of any person or body corporate who shall have erected a mill, dam, ditch, drain or race under the provisions of this chapter, or of any millsite owned by any person who has the right under this chapter, or by the authority of law, to rebuild a mill after its destruction. When any person violates the provisions of this section the owner of said mill or millsites shall have a right of action against said person to tear down said dam or other works so built or erected to the extent herein forbidden and to abate the same as prescribed by law for the abatement of nuisances. (Rev., s. 2138; 1905, c. 534, s. 1h; C. S. 2551.)

§ 73-22. Report to be registered.—The petitioner, or any other person interested, may have the said assessment registered upon the certificate of the clerk, and shall pay the register the usual legal fees for registering such instruments in his office. (Rev., s. 2139; 1905, c. 534, s. 1i; C. S. 2552.)

§ 73-23. Fees of appraisers.—Each appraiser shall be entitled to a fee of one dollar for each day actually employed in making said assessment, to be paid by the petitioner. (Rev., s. 2140; 1905, c. 534, s. 1j; C. S. 2553.)

§ 73-24. Obstructing mill races or dams a misdemeanor.—Any person who shall obstruct a drain, ditch or dam constructed under this article shall be guilty of a misdemeanor. (Rev., s. 3381; 1905, c. 534, s. 1l; C. S. 2554.)

Art. 4. Recovery of Damages for Erection of Mill.

§ 73-25. Action in superior court; procedure.—Any person conceiving himself injured by the erection of any grist-mill, or mill for other useful purposes, may issue his summons returnable before the judge of the superior court of the county where the damaged land or any part thereof lies, against the persons authorized to be made parties defendant. In his complaint he shall set forth in what respect and to what extent he is injured, together with such other matters as may be necessary to entitle him to the relief demanded. The court shall then proceed to hear and determine all the questions of law and issues of fact arising on the pleadings as in other civil actions. (Rev,
457x730

Exclusiveness of Remedy.—Ordinarily, in cases to which the power to exclude is exercised. Kins- land v. Kinsland, 186 N. C. 760, 120 S. E. 358.

Section Does Not Apply to Trespass.—The remedy under this section does not apply to an action for damages for a trespass committed on the plaintiff's land. Henley v. Wilson, 77 N. C. 216.

Sufficiency of Description.—A petition for damages, caused by the erection of defendant's milldam, an issue involving the amount of annual damage done and the proper one to be submitted to the jury. Hester v. Brook, 84 N. C. 253.

Procedure to Assess Damages.—In a petition for damages resulting from ponding water upon plaintiff's land, caused by the erection of defendant's milldam, an issue involving the amount of annual damage done and the proper one to be submitted to the jury. V. L. R. A. 819, cited in note in 59 L. R. A. 881.

Easement Limited to Mill Purposes.—Where the lower proprietor had built a mill at a lower point on the stream, and therefor the upper proprietor to pond water back therefrom, the dam erected on his own land to operate a public mill, the exercise of this right under the easement does not affect the title to the submerged land of the upper proprietor or subject the upper proprietor to an action for damages that will start the running of the statute of limitations, nor will this use of the water ponded on the land of the former proprietor be liable to be enjoined by the lower proprietor for fishing with hook and seine ripen into his exclusive use for these purposes. Thomas v. Morris, 191 N. C. 129 S. 349.

Liability for Defect in Bridge.—When water was thrown, by the erection of a milldam, upon the highway, and the former proprietor of the mill had built bridges over the water, which, during his ownership, were repaired, and which were also repaired by the present proprietor, who did not give any other evidence, order that the dam, or other cause creating the injury, shall be removed, and the plaintiff is not able to commence the action for damages. Pugh v. Wheeler, 107 N. C. 766, 12 S. E. 369.

Easement Not Granted by Payment of Judgment.—The payment of a judgment for ponding water by a milldam does not amount to the purchase by defendant of an easement to pond back water on plaintiff's land. Candler v. Ashe-ville Elect. Co., 115 N. C. 12, 47 S. E. 114.

§ 73-26. When dams, etc., abated as nuisances.

When damages are recovered in final judgment in such civil actions, and execution issues and is re- turned unsatisfied, and the plaintiff is not able to compel the removal of the nuisance, the court may order that the same be removed, and the plaintiff is entitled to permanent damages, past, present, and prospective. Bor- den v. Carolina Power, etc., Co., 174 N. C. 72, 93 S. E. 424.

Damage to Health.—Damages may be given for injury to health as well as to land, see, Gellet v. Jones, 18 N. C. 339. See also, Waddy v. Johnson, 27 N. C. 333.

Exemplary Damages.—In an action for overflowing plain- tiff's land by the construction of a milldam, where a recovery has been had before, and the nuisance still exists, the plaintiff can recover sufficient exemplary damages to compel an abatement of the nuisance. Carruthers v. Tillman, 2 N. C. 301, cited in note in 59 L. R. A. 856.

Decrease of Custom.—Where, in suit for damages for ponding water, it appeared that plaintiff sustained injury to his mill by reason of defendant's erecting another mill and dam lower down on the same stream, the measure of damages was the amount of the damages actually sustained by plaintiff up to the time of trial; and, in estimating the same, the decrease of custom of the premises was not to be considered. Burnett v. Nicholson, 86 N. C. 99, cited in note in 59 L. R. A. 856.

Counterclaim Inadmissable.—In an action for damages for ponding water, it is not competent for the defendant to frame a counterclaim to the action, and to the judge to charge that defendants could not set up as off- set and counterclaim any benefit which plaintiff had re- ceived from his use of the milldam, that the court should, upon all the evidence, ascertain if plaintiff had sustained any dam- age. McGee v. Fox, 107 N. C. 766, 12 S. E. 369.

Action May Be Brought at Any Time.—Ponding a stream so as to throw the water over the land of a proprietor above, which the water did not before cover, gives him a good cause of action at any time when he may wish to enforce it. Ceder v. Ashe-ville Elect. Co., 115 N. C. 12, 47 S. E. 114.

Permanency of Damages.—In an action for backing water on plaintiff's land, the dam was a permanent one, and the plaintiff was entitled to permanent damages, past, present, and prospective. Bor- den v. Carolina Power, etc., Co., 174 N. C. 72, 93 S. E. 424.

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the plaintiff's family, was advantageous to the public, re-

When Injunction Granted.—In the case of the erection of

Existence of Another Remedy.—On application for an

injunction to restrain the defendant from building a new mill,

When Demand and Allegation of Insolvency Unnecessary.

—The demand for damages in the complaint for ponding

water upon and injuring the lands of the upper proprietor

required by this section, is not necessary when the relief

sought is to enjoin the maintenance of a dam over

the plaintiff's own land by the defendant's trespass thereon, and

the abatement of the nuisance thus caused, and the tresp-

pass being continuing, the allegation of defendant's insolvency

is not necessary. Kinsland v. Kinsland, 188 N. C. 810,

122 S. E. 625.

Cited in Hester v. Broach, 84 N. C. 252.

§ 73-27. Judgment for annual sum as damages.

—A judgment giving to the plaintiff an annual sum by way of damages shall be binding between the parties for five years from the issuing of the summons, if the mill is kept up during that time, unless the damages are increased by raising the water or otherwise.

In all cases where the final judgment of the court assesses the yearly damage of the plaintiff as high as twenty dollars, nothing contained in this chapter shall be construed to prevent the plaintiff, his heirs or assigns, from suing as here-

before, and in such case the final judgment afore-

said shall be binding only for the year's damage preceding the issuing of the summons. (Rev., ss. 2143, 2144; Code, ss. 1860, 1861; 1868-9, c. 158,

ss. 12, 14; C. S. 2557.)

Assessment Cannot Be Beyond Preceding Year.—In pro-

cessing for a certificate for ponding water on plaintiff's land, the jury have no right to go back further than one year in assessing damages, but if they do, the error may be corrected by the court only giving judgment for one year

preceding the issuing of the summons. Goodson v. Mullen, 92 N. C. 207.

Judgment May Be for Sum in Gross.—Where, in an ac-

tion for damages to land by ponding water on it, the jury

found that the land was damaged eighty dollars per year, it was not erroneous for the court to give judgment for a sum in gross, and not for each year's damages. Goodson v. Mullen, 92 N. C. 207, 211.

Recurring Causes of Action.—Case for nuisance in erect-

ing a mill with its accompanying free continuance after action brought; heavy damages are not usual in the first verdict, but in a second action the damages should be high to compel an abatement of the nuisance. — v. Deberry, 2 N. C. 248, cited in note in 59 L. R. A. 836.

Conclusiveness of Damages.—In a proceeding to recover damages for ponding water by a milldam, the verdict of the jury and the judgment of the court thereon are conclusive as to the assessment of damages, up to the time when such judgment was rendered. An application for relief from dam-

ages, assessed for a period subsequent to the time of the judgment, can only be heard if the dam is taken away or lowered. Beatty v. Conner, 34 N. C. 341.

Judgment Not Res Judicata.—An action to abate a dam and for damages to land caused by the ponding back of

water was submitted to arbitrators to find whether plain-

iffs were entitled to damages, and, if so, distinguishing in finding the same between those from permanent injuries and annual damages for five years from a certain date. The arbitrators assessed "the permanent damage of the plain-

iffs to this date to their lands" at a certain sum, and also awarded a certain annual damage for each of the five years.

Judgment was entered on the award, the judgment provid-

ing that the execution should be subject to the provisions of section 73-26. The judgment was not res judicata of plain-

iff's right to recover damages after the termination of the five-year period for all except a fresh injury, since the judgment contemplated the removal of the dam at the end of the five years. Candler v. Asheville Elect. Co., 135 N.

C. 12, 47 S. E. 114.

§ 73-28. Final judgment; costs and execution.

If the final judgment of the court is that the plaintiff has sustained no damage, he shall pay the costs of his proceeding; but if the final judgment is in favor of the plaintiff, he shall have execution against the defendant for one year's damage, pre-

ceding the issuing of the summons, and for all costs: Provided, that if the damage adjudged does not amount to five dollars, the plaintiff shall re-

cover no more costs than damages. And if the defendant does not annually pay the plaintiff, his heirs or assigns, before it falls due, the sum ad-

judged as the damages for that year, the plaintiff may sue out execution for the amount of the last year's damage, or any part thereof which may re-

main unpaid. (Rev., ss. 2145; Code, s. 1862; 1868-9,

ss. 155, s. 15; C. S. 2558.)

Chapter 74. Mines and Quarries.

Art. 1. Operation of Mines and Quarries.

Sec.


74-14. Punishment for violation.

74-15. Commissioner of labor to inspect mines and quarries.

Art. 2. Inspection of Mines and Quarries.

74-16. Inspector to examine mines.

74-17. May enter to make examinations.

74-18. Death by accident investigated.

74-19. Record of examinations.

74-20. Papers to be preserved.

74-21. Inspector to enforce law; counsel furnished.

74-22. Operation enjoined when law violated.

74-23. Report to governor.
Art. 1. Operation of Mines and Quarries.

§ 74-1. Lessor not held partner of lessee.—No lessor of property, real or personal, for mining purposes, although the lessee may receive an uncertain sum of the proceeds or net profits, or any other consideration, which, though uncertain at first, may afterwards become certain, shall be held as a partner of the lessee; nor shall any of the legal or equitable relations or liabilities of copartners exist between them, unless it is so stipulated in the contract between the lessor and lessee. (Rev., s. 4930; Code, s. 3292; R. C., c. 72; 1830, c. 46; C. S. 6897.)

§ 74-2. Minors under sixteen not to be employed.—No minor under sixteen years of age shall be allowed to work in any mine, and in all cases of minors applying for work the agent of such mine shall see that the provisions of this section are not violated; and the inspector may, when doubt exists as to the age of any person found working in any mine, examine under oath such person and his parents, or other witnesses, as to his age. (Rev., s. 4931; 1897, c. 251, s. 7; 1901, c. 100, s. 6; C. S. 6897.)

§ 74-3. Operator to furnish timber. — The owner, agent, or operator of every coal mine shall keep a supply of timber constantly on hand, and shall deliver the same to the working place of the miner, and no miner shall be held responsible for accident which may occur in the mine where the provisions of this section have not been complied with by the owner, agent, or operator thereof, resulting directly or indirectly from the failure to deliver such timber. (Rev., s. 4932; 1897, c. 251, s. 5; C. S. 6898.)

§ 74-4. Unused mines to be fenced.—All underground entrances to any place not in actual course of working or extension shall be properly fenced across the whole width of such entrance so as to prevent persons from inadvertently entering the same. (Rev., s. 4933; 1897, c. 251, s. 5; C. S. 6899.)

§ 74-5. Means of ingress and egress provided.—No owner or agent of any coal mine worked by shaft shall permit any person to work therein unless there are, to every seam of coal worked in such mine, at least two separate outlets, separated by natural strata of not less than one hundred feet in breadth, by which shafts or outlets distinct means of ingress and egress are always available to the persons employed in the mine; but it is not necessary for the two outlets to belong to the same mine if the persons employed therein have safe, ready, and available means of ingress or egress by not less than two openings. This section shall not apply to opening a new mine while being worked for the purpose of making communications between the two outlets, so long as not more than twenty persons are employed at one time in such mine; neither shall it apply to any mine or part of a mine in which the second outlet has been rendered unavailable by reason of the final robbing of pillars previous to abandonment, as long as not more than twenty persons are employed therein at any one time. The cage or cages and other means of egress shall at all times be available for the persons employed when there is no second outlet. The escapement shafts shall be fitted with safe and available appliances, which shall always be kept in a safe condition, by which the persons employed in the mine may readily escape in case an accident occurs; and in no case shall an air shaft with a ventilating furnace at the bottom be construed to be an escapement shaft within the meaning of this section. To all other coal mines, whether slopes or drifts, two such openings or outlets must be provided within twelve months after shipments of coal have commenced from such mine; and in case such outlets are not provided as herein stipulated, it shall not be lawful for the agent or owner of such slope or drift to permit more than ten persons to work therein at any one time. (Rev., s. 4934; 1897, c. 251, s. 4; C. S. 6900.)

§ 74-6. Hoisting engines; how operated.—No owner or agent of any mine operated by a shaft or slope shall place in charge of any engine used for lowering into or hoisting out of mines persons employed therein any but experienced, competent, and sober engineers, and no engineers in charge of such engine shall allow any persons except as may be deputed for such purposes by the owner or agent to interfere with it or any part of the machinery, and no person shall interfere or in any way intimidate the engineer in the discharge of his duties, and in no case shall more than six men ride on any cage or car at one time, and no person shall ride upon a loaded cage or car in any shaft or slope. (Rev., s. 4935; 1897, c. 251, s. 6; 1911, c. 183; C. S. 6901.)

§ 74-7. Ventilation. — The owner or agent of any coal mine, whether shaft, slope, or drift, shall provide and maintain for every such mine an amount of ventilation of not less than one hundred cubic feet per minute per person employed in such mine, which shall be circulated and distributed throughout the mine in such a manner as to—
lute, render harmless and expel the poisonous and noxious gases from every working place in the mine. No working place shall be driven more than sixty feet in advance of a break-through or airway, and all break-throughs or airways, except those last made near the working places of the mine, shall be closed up by brattice trap-doors, or otherwise, so that the currents of air in circulation in the mine may spread to the interior of the mine when the persons employed in such mine are at work. All mines governed by this chapter shall be provided with artificial means of producing ventilation, such as forcing or suction fans, exhaust steam furnaces, or other contrivances of such capacity and power as to produce and maintain an abundant supply of air, and all mines generating fire damp shall be kept free from standing gas. (Rev., s. 4936; 1897, c. 251, s. 5; C. S. 6902.)

§ 74-8. Daily examinations; safety lamps.—Every working place shall be examined every morning with a safety lamp by a competent person before any workmen are allowed to enter the mine. All safety lamps used in examining mines, or for working therein, shall be the property of the operator of the mine, and a competent person shall be appointed, who shall examine every safety lamp before it is taken into the workings for use, and ascertain it to be clean, safe, and securely locked, and safety lamps shall not be used until they have been so examined and found safe and clean and securely locked, unless permission be first given by the mine foreman to have the lamps used unlocked. No one except the duly authorized person shall have in his possession a key, or any other contrivance, for the purpose of unlocking any safety lamp in any mine where locked lamps are used. No matches or any other apparatus for striking lights shall be taken into any mine, or parts thereof, except under the direction of the mine foreman. (Rev., s. 4937; 1897, c. 251, ss. 5, 6; C. S. 6903.)

§ 74-9. Report of ventilation.—The mine foreman shall measure the ventilation at least once a week, at the inlet and outlet, and also at or near the face of all the entries, and the measurement of air so made shall be noted on blanks furnished by the inspector; and on the first day of each month the mine boss of each mine shall sign one of such blanks, properly filled with the actual measurement, and present the same to the inspector. (Rev., s. 4938; 1897, c. 251, s. 6; C. S. 6904.)

§ 74-10. Notice of opening or changing mines given.—The owner, agent, or manager of any mine shall give notice to the inspector in the following cases: 1. When any working is commenced for the purpose of opening a new shaft, slope, or mine, to which this chapter applies. 2. When any mine is abandoned, or the working thereof discontinued. 3. When the working of any mine is recommenced after an abandonment or discontinuance for a period exceeding three months. 4. When a squeeze or crush, or any other cause or change, may seem to affect the safety of persons employed in the mine, or when fire occurs. (Rev., s. 4939; 1897, c. 251, s. 7; C. S. 6905.)

§ 74-11. Notice of accidents given.—The owner, agent, or manager of every mine shall, within twenty-four hours next after any accident or explosion, whereby loss of life or personal injury may have been occasioned, send notice, in writing, by mail or otherwise, to the inspector, and shall specify in such notice the character and cause of the accident, and the name or names of the persons killed and injured, with the extent and nature of the injuries sustained. When any personal injury of which notice is required to be sent under this section results in the death of the person injured, notice in writing shall be sent to the inspector within twenty-four hours after such death comes to the knowledge of the owner, agent, or manager; and when loss of life occurs in any mine by explosion, or accident, or results from personal injuries so received, the owner, agent, or manager of such mine shall notify the coroner of the county in which such mine is situated, and the coroner shall hold an inquest upon the body of the person whose death has been thus caused, and inquire carefully into the cause thereof, and return a copy of the finding of the jury and all the testimony to the inspector. (Rev., s. 4940; 1897, c. 251, s. 6; C. S. 6906.)

§ 74-12. Report to inspector.—The owner, lessee, or agent in charge of any mine or quarry, or who is engaged in mining or quarrying or producing any mineral whatsoever in this state, shall, on or before the thirtieth day of January in every year, send to the office of the inspector upon blanks to be furnished by him a correct return, specifying with respect to the preceding calendar year the quantity of coal, iron ore, fire-clay, limestone, or other mineral product of such mine or quarry, and the number of persons ordinarily employed in or about such mine or quarry below and above ground, distinguishing the persons and labor below ground and above ground: Provided, that nothing in this section shall require the owner, lessor or agent in charge of any quarry who does not employ more than ten persons to work in any one quarry at the same time, to file or make any of the reports required under this section. (Rev., s. 4941; 1897, c. 251, s. 3; 1939, c. 293, s. 2; C. S. 6907.)

Editor's Note.—Prior to the 1939 amendment the report was required to be made on or before the thirtieth of November.

§ 74-13. Liability for injuries.—For any injury to person or property occasioned by any wilful violation of this chapter, or any wilful failure to comply with its provisions, by any owner, agent, or manager of the mine, a right of action shall accrue to the party injured for any damage he may sustain thereby; and in any case of loss of life by reason of such wilful neglect or failure a personal injury of which notice is required to be sent under this section results in the death of the person injured, notice in writing shall be sent to the inspector, and at the time of the accident or death the persons killed and injured, with the extent and cause of the accident, and the name or names of the persons killed and injured, and the amount of wages, if any, for which the deceased might have been entitled, shall be specified in such notice to the inspector, and the amount of wages then due the deceased, together with the wages due to the injured person, shall be certified by the inspector, and the amount of wages so specified in such notice shall be considered as the wages earned by the deceased at the time of his death, and may be recovered as wages due to the deceased if the wages were not then paid, or if the deceased was entitled thereto at the time of his death.

§ 74-14. Punishment for violation.—If any person shall knowingly violate any of the provisions of the law relating to mines or shall do anything whereby the life or health of persons or the security of any mine and machinery is endangered, or if any miner or other person employed in any mine governed by the statutes shall intentionally or wilfully neglect or refuse to securely prop the
roof of any working place under his control, or neglect or refuse to obey any orders given by the superintendent of a mine in relation to the security of a mine in the part thereof where he is at work and for fifteen feet back of his working place, or if any miner, workman, or other person shall knowingly injure any water-gauge, barometer, air-course, or brattice, or shall obstruct or throw open any airways, or shall handle or disturb any part of the machinery of the hoisting engine or signaling apparatus or wire connected therewith, or air pipes or fittings, or open a door of the mine and not have the same closed again, whereby danger is produced either to the mine or those that work therein, or shall enter any part of the mine against caution, or shall disobey any order given in pursuance of law, or shall do any wilful act whereby the lives and health of the persons working in the mine or the security of the mine or the machinery thereof is endangered, or if the person having charge of a mine whenever loss of life occurs by accident connected with the machinery of such mine or by explosion shall neglect or refuse to give notice thereof by mail or otherwise to the inspector and to the coroner of the county in which such mine is situated, or if any such coroner shall neglect or refuse to hold an inquest upon the body of the person whose death has thereby been caused, and return a copy of his findings and a copy of all the testimony to the inspector, he shall be guilty of a misdemeanor, and upon conviction fined not more than fifty dollars or imprisoned in the county jail not more than thirty days, or both. (Rev., s. 3797; 1897, c. 251, s. 8; C. S. 6909.)

Art. 2. Inspection of Mines and Quarries.

§ 74-15. Commissioner of Labor to inspect mines and quarries.—The Commissioner of Labor, acting through the director of the division of standards and inspection of the Department of Labor, shall perform the duties of mine inspector as provided in this chapter. (Rev., s. 4943; 1897, c. 251, s. 1; 1931, c. 312; C. S. 6910.)

Cross Reference.—For provision making this article applicable to quarries, see § 74-24.

§ 74-16. Inspector to examine mines.—It shall be the duty of the inspector to examine all the mines in the state as often as possible to see that all the provisions and requirements of this chapter are strictly observed and carried out; he shall particularly examine the works and machinery belonging to any mine, examine into the state and condition of the mines as to ventilation, circulation, and condition of air, drainage, and general security. (Rev., s. 4944; 1897, c. 251, s. 2; C. S. 6911.)

§ 74-17. May enter to make examinations.—For the purpose of making the inspection and examinations provided for in this chapter, the inspector shall have the right to enter any mine at all reasonable times, by night or by day, but in such manner as shall not unnecessarily obstruct the working of the mine; and the owner or agent of such mine is hereby required to furnish the means necessary for such entry and inspection; the inspection and examination herein provided for shall extend to fire-clay, iron ore, and other mines as well as coal mines. (Rev., s. 4945; 1897, c. 251, s. 2; C. S. 6912.)

§ 74-18. Death by accident investigated.—Upon receiving notice of any death occurring from accident it shall be the duty of the inspector to go himself, or send a representative, at once to the mine in which the death occurred and inquire into the cause of the same, and to make a written report fully setting forth the condition of that part of the mine where such death occurred and the cause which led to the same; which report shall be filed by the inspector in his office as a matter of record and for future reference. (Rev., s. 4946; 1897, c. 251, s. 6; C. S. 6913.)

§ 74-19. Record of examinations.—He shall make a record of all examinations of mines, showing the date when examination is made, the condition in which the mines are found, the extent to which the laws relating to mines and mining are observed or violated, the progress made in the improvements and security of life and health sought to be secured by the provisions of this chapter, number of accidents, injuries received, or deaths in or about the mines, the number of mines in the state, the number of persons employed in or about each mine, together with all such other facts and information of public interest, concerning the condition of mines, development and progress of mining in the state as he may think useful and proper, which record shall be filed in the office of the inspector, and as much thereof as may be of public interest to be included in his annual report. (Rev., s. 4947; 1897, c. 251, s. 2; C. S. 6914.)

§ 74-20. Papers to be preserved.—He shall keep in his office and carefully preserve all maps, surveys, and other reports and papers required by law to be filed with him, and so arrange and preserve the same as shall make them a permanent record of ready, convenient, and connected reference. (Rev., s. 4948; 1897, c. 251, s. 3; C. S. 6915.)

§ 74-21. Inspector to enforce law; counsel furnished.—In case of any controversy or disagreement between the inspector and the owner or operator of any mine or the persons working therein, or in case of conditions or emergencies requiring counsel, the inspector may call on the governor for such assistance and counsel as may be necessary. If the inspector finds any of the provisions of this chapter violated or not complied with by any owner, lessee, or agent in charge, unless the same is within a reasonable time rectified, and the provisions of this chapter fully complied with, he shall institute an action in the name of the state to compel the compliance therewith. The inspector shall exercise a sound discretion in the enforcement of this chapter. (Rev., s. 4949; 1897, c. 251, s. 2; C. S. 6916.)

§ 74-22. Operation enjoined when law violated.—On application of the inspector, after suit brought as directed in § 74-21, of a court of competent jurisdiction may enjoin or restrain the owner or agent from working or operating such mine until it is made to conform to the provisions
of this chapter; and such remedy shall be cumulative, and shall not take the place of or affect any other proceedings against such owner or agent authorized by law for the matter complained of in such action. (Rev., s. 4950; 1897, c. 251, s. 7; C. S. 6917.)

§ 74-23. Report to governor. — The inspector shall annually make report to the governor of all his proceedings, the condition and operation of the different mines of the state, and the number of mines and the number of persons employed in or about such mines, the amount of coal, iron ore, limestone, fire-clay, or other mineral mined in this state; and he shall enumerate all accidents in or about the mines, and the manner in which they occurred, and give all such other information as he thinks useful and proper, and make such suggestions as he deems important relative to mines and mining, and any legislation that may be necessary on the subject for the better preservation of the life and health of those engaged in such industry. (Rev., s. 4951; 1897, c. 251, s. 3; C. S. 6918.)

§ 74-24. Articles one and two made applicable to quarries. — For the purpose of providing for the safety of workers in quarries in North Carolina, the provisions of articles one and two of this chapter, relating to the operation and inspection of mines are hereby made applicable to quarries in so far as such provisions are suitable to the operation and inspection of quarries. (1939, c. 223, s. 1.)

Art. 3. Waterways Obtained.

§ 74-25. Water and drainage rights obtained. — Any person or body corporate engaged or about to engage in mining, who may find it necessary for the furtherance of his operations to convey water either to or from his mine or mines over the lands of any other person or persons, may make application by petition in writing to the clerk of the superior court of the county in which the lands to be affected or the greater part are situate, for the right so to convey such water. The owner of the lands to be affected shall be made a party defendant, and the proceeding shall be conducted as other special proceedings. (Rev., s. 4953; Code, ss. 3293, 3294, 3300; 1871-2, c. 158, ss. 1, 3; C. S. 6920.)

Cross Reference. — As to reports not required of small quarries, see § 74-12.

§ 74-26. The petition, what to contain. — The petition shall specify the lands to be affected, the name of the owner of such lands, and the character of the ditch or drain intended to be made. (Rev., s. 4954; Code, s. 3294; 1871-2, c. 158, s. 3; C. S 6921.)

§ 74-27. Appraisers; appointment and duties. — Upon the hearing of the petition, if the prayer thereof be granted, the clerk shall appoint three disinterested persons, qualified to act as jurors, and not connected either by blood or marriage with the parties, appraisers to assess the damage, if any, that will accrue to the lands by the contemplated work, and shall issue a notice to them to meet upon the premises at a day specified, not to exceed ten days from the date of such notice. The appraisers having met, shall take an oath before some officer qualified to administer oaths to faithfully perform their duty and to do impartial justice in the case, and shall then examine all the lands in any way to be affected by such work, and assess the damage thereto, and make report thereof under their hands and seals to the clerk from whom the notice issued. (Rev., s. 4955; Code, ss. 3295, 3296, 3299; 1871-2, c. 158, ss. 4, 5, 9; C. S. 6922.)

§ 74-28. Confirmation of report; payment of damages; rights of petitioner. — After the filing of the report and confirmation thereof by the clerk, who shall have power to confirm or, for good cause, set aside the same, the petitioner shall have full right and power to enter upon such lands and make such ditches, drains, or other necessary work: Provided, he has first paid or tendered the damages, assessed as above, to the owner of such lands or his known and recognized agent, if he be a resident of this state, or have such agent in this state. If the owner be a nonresident and have no known agent, then in this state, the amount so assessed shall be paid by the petitioner into the office of the clerk of the superior court of the county for the use of such owner. (Rev., s. 4957; Code, s. 3298; 1871-2, c. 158, s. 12; C. S. 6923.)

§ 74-29. Registration of report. — The petitioner, or any other person interested, may have the report of the appraisers registered upon the certificate of the clerk and shall pay the register a fee of twenty-five cents therefor. (Rev., s. 4957; Code, s. 3298; 1871-2, c. 158, s. 8; C. S. 6924.)

§ 74-30. Obstructing mining drains. — If any person shall obstruct any drain or ditch constructed under the provisions of this chapter, he shall be guilty of a misdemeanor. (Rev., s. 3380; Code, s. 3301; 1871-2, c. 158, s. 12; C. S. 6925.)

§ 74-31. Disposition of waste. — In getting out and washing the products of kaolin and mica mines, the persons engaged in such business shall have the right to allow the waste, water, and sediment to run off into the natural courses and streams. (1917, c. 123; 1937, c. 378; C. S. 6926.)

Editor’s Note. — The 1937 amendment, which made this section applicable to mica mines, provides: “This act shall not affect pending litigation.”

Art. 4. Adjustment of Conflicting Claims.

§ 74-32. Liability for damage for trespass. — If any owner or person in possession of any mine or mining claim shall enter upon, either on the surface or underground, any mine or mining claim, the property of another, and shall mine or carry away any valuable mineral therefrom, he shall be liable to the owner of the mine so trespassed upon for double the value of all such mineral mined or carried away and for all other damages; and the value of the mineral mined or carried away shall be presumed to be the amount of the gross value ascertained by an average assay of the excavated material or vein or ledge from which it was taken. If such trespass is wrongfully and wilfully made, punitive damages may be allowed. (1913, c. 51, s. 1; C. S. 6927.)

Action by Cotenant. — Where tenants in common, under the erroneous impression that they owned the fee, removed valuable minerals from the property, upon suit by the other tenant in common for damages under this section and admission by the defendants of the cotenancy, removal and [ 728 ]
value, plaintiff was entitled to judgment on the pleadings, though not to the damages provided in this section. Jones v. McBee, 222 N. C. 152, 22 S. E. (2d) 226.

Cited in Carolina Mineral Co. v. Young, 211 N. C. 387, 190 S. E. 529.

§ 75-13. Persons entitled to bring suit.—The owner of a mine in this state, or any person in possession under a lease or other contract, may maintain an action to recover damages to such property arising from the operation of any adjacent mine by the owner thereof or other person in possession and working the same under lease or contract, and also to prevent the continuance of the operation of the adjacent mine in such a manner as to injure or endanger the safety of the complainant’s mine. (1913, c. 51, s. 1; C. S. 6928.)

§ 75-14. Action to obtain mandatory order. —If the order made for the survey in the manner, at the time, and by the persons mentioned in the order, which shall include a representative of the party making the application, who shall not be one of the surveyors, there shall be given free access to the mine for the purpose of survey, and any interference with the persons acting under the order of survey shall be contempt of court and punished accordingly. If the persons named in the order of survey so require, they, with their instruments, shall be carefully lowered and raised in and out of the mine with the cage, bucket, or skip ordinarily used in the shafts of the mine; and they may demand of the owner of the mine, or his manager or agent, that they be so raised and lowered at a speed agreeable to them and not to endanger their comfort and safety or to injure the accuracy of their instruments. The owner of the mine, his managers or agents, shall be liable in damages to the persons making the examination for any injury to them or to their instruments, caused by the careless and negligent operation of any bucket, cage, or skip at such a high rate of speed as to injure the persons or their instruments while being lowered or raised in the mine. (1913, c. 51, s. 2; C. S. 6930.)

§ 75-16. Civil action by person injured; treble damages. —The costs of the order and survey shall be paid by the person making the application, who shall not be one of the surveyors, there shall be given free access to the mine for the purpose of survey, and any interference with the persons acting under the order of survey shall be contempt of court and punished accordingly. If the persons named in the order of survey so require, they, with their instruments, shall be carefully lowered and raised in and out of the mine with the cage, bucket, or skip ordinarily used in the shafts of the mine; and they may demand of the owner of the mine, or his manager or agent, that they be so raised and lowered at a speed agreeable to them and not to endanger their comfort and safety or to injure the accuracy of their instruments. The owner of the mine, his managers or agents, shall be liable in damages to the persons making the examination for any injury to them or to their instruments, caused by the careless and negligent operation of any bucket, cage, or skip at such a high rate of speed as to injure the persons or their instruments while being lowered or raised in the mine. (1913, c. 51, s. 2; C. S. 6930.)

§ 75-36. Costs of the survey. —The costs of the order and survey shall be paid by the person making the application; but if he shall maintain an action and recover damages for the injury done to them or to their instruments, caused by the careless and negligent operation of any bucket, cage, or skip at such a high rate of speed as to injure the persons or their instruments while being lowered or raised in the mine. (1913, c. 51, s. 2; C. S. 6931.)

Chapter 75. Monopolies and Trusts.

Sec.
75-1. Combinations in restraint of trade illegal.
75-2. Any restraint in violation of common law included.
75-3. Burden of proof as to reasonableness on defendant.
75-4. Contracts to be in writing.
75-5. Particular acts defined.
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75-7. Persons encouraging violation guilty.
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§ 75-1. Combinations in restraint of trade illegal.—Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce in the state of North Caro-
§ 75-2

Any restraint in violation of common law included.—Any act, contract, combination in the form of trust, or conspiracy in restraint of trade or commerce which violates the principles of the common law is hereby declared to be in violation of § 75-1. (1913, c. 41, s. 1; C. S. 2559.)


Monopoly Defined.—"A monopoly consists in the ownership or control of a part of the market supply or output of a given commodity so as to stifle competition, restrict the freedom of commerce, and give the monopolist control over prices." State v. Atlantic Ice, etc., Co., 210 N. C. 742, 747, 188 S. E. 412, quoting Black's Law Dictionary (34 Ed.), p. 1202.

In the modern and wider sense monopoly denotes a combination or organization, or entity which is so extensive and unified that its tendency is to suppress competition, to acquire a dominance in the market, and to secure the power to control prices to the public harm with respect to any commodity which people are under a practical compulsion to buy. State v. Atlantic Ice, etc., Co., 210 N. C. 742, 747, 188 S. E. 412, citing Massachusetts v. Dover, 243 Mass. 472, 133 N. E. 296.

Agreement Not to Compete May Be Forbidden.—Persons and corporations cannot be ordered to compete, but they properly can be forbidden to give directions, or make agreements, to compete. State v. Craft, 168 N. C. 263, 231, 83 S. E. 772.

Agreement Not to Sell to Particular Individual.—A complaint alleging that defendants conspired and agreed not to sell plaintiff's ice, and that as a result thereof plaintiff's business was ruined, fails to state a cause of action, this and the following sections not being applicable. Lineberger v. Colonial Ice Co., 220 N. C. 444, 447 S. E. (2d) 502.

Reduction of Prices to Consuming Public No Defense.—Plaintiff, a carrier by truck, instituted this action against defendants, alleging that the reduction in rates resulted in lower prices to the consuming public on the products on which the rates had been reduced. Held: The matter alleged does not constitute a defense to the action, since the state is against both the raising and lowering of prices by unlawful means for an unlawful purpose, and since the law is interested in preventing competition rather than obtaining temporary benefits from price wars in which competition is extinguished. Patterson v. Southern Ry. Co., 214 N. C. 38, 198 S. E. 364.

Averment without allegation of specific facts is insufficient to constitute a cause of action, under this and following sections. State v. Standard Oil Co., 205 N. C. 225, 176 S. E. 402.


§ 75-2. Any restraint in violation of common law included.—Any act, contract, combination in the form of trust, or conspiracy in restraint of trade or commerce which violates the principles of the common law is hereby declared to be in violation of § 75-1. (1913, c. 41, s. 1; C. S. 2560.)

Cross Reference.—As to difference between "partial restraint" and "general restraint," see annotations to § 77.

Distinction between Common Law and Modern Rules.—Originally at common law, agreements in restraint of trade were held void as being against public policy. The common law has been modified by the decisions of the courts until it has come to be the very generally accepted principle that agreements in partial restraint of trade will be upheld when they are "founded on valuable considerations, are reasonably necessary to protect the interests of the parties in whose favor they are imposed, and do not unduly prejudice the public interest." Mar-Hof Co. v. Rosenbach, 176 N. C. 330, 331, 97 S. E. 169. The distinction may now be made between "general restraint" and "partial restraint." Morehead Sea Food Co. v. Way & Co., 169 N. C. 679, 86 S. E. 603.

§ 75-3. Burden of proof as to reasonableness on defendant.—All contracts, combinations in the form of trust, and conspiracies in restraint of trade or commerce prohibited in §§ 75-1 and 75-2 are hereby declared to be unreasonable and illegal, unless the persons entering into such contract, combination in the form of trust, or conspiracy in restraint of trade or commerce can show affirmatively upon an indictment or civil action for violation of §§ 75-1 and 75-2 that such contract, combination in the form of trust, conspiracy in restraint of trade or commerce does not injure the business of any competitor, or prevent any one from becoming a competitor because his or its business will be unfairly injured by reason of such contract, combination in the form of trust, or conspiracy in restraint of trade or commerce. (1913, c. 41, s. 3; C. S. 2561.)

§ 75-4. Contracts to be in writing.—No contract or agreement hereafter made, limiting the right of any person to do business anywhere in the state of North Carolina shall be enforceable unless such agreement is in writing duly signed by the party who agrees not to enter into any such business within such territory: Provided, nothing herein shall be construed to legalize any contract or agreement not to enter to business in the state of North Carolina, or at any point in the state of North Carolina, which contract is now illegal, or which contract is made illegal by any other section of this chapter. (1913, c. 41, s. 4; C. S. 2562.)

§ 75-5. Particular acts defined.—In addition to the matters and things hereinafter declared to be illegal, the following acts are declared to be unlawful, that is, for any person, firm, corporation, or association directly or indirectly to do or have any contract, express or knowingly implied, to do any of the acts or things specified in any of the subsections of this section.

1. To agree or conspire with any other person, firm, corporation or association to put down or keep down the price of any article produced in this state by the labor of others, which article the person, firm, corporation or association intends, plans or desires to buy.

2. To make a sale of any goods, wares, merchandise, articles or things of value whatsoever in North Carolina, whether directly or indirectly, or through any agent or employee, upon the condition that the purchaser thereof shall not deal in the goods, wares, merchandise, articles or things of value of a competitor or rival in the business of the person, firm, corporation or association making such sales.

3. To willfully destroy or injure, or undertake to destroy or injure, the business of any opponent or business rival in the state of North Carolina with the purpose or intention of attempting any reduction in the price of anything of value when the competition is removed.

4. To directly or indirectly buy or sell within the state, through himself or itself, or through any agent of any kind or as agent or principal, or together with or through any allied, subsidiary or dependent person, firm, corporation or association, any article or thing of value which is sold.
or bought, in the state to injure or destroy or undertake to injure or destroy the business of any rival or opponent, by lowering the price of any article or thing of value sold, so low as to raise the price of any article or thing of value bought, so high as to leave an unreasonable or inadequate profit for a time, with the purpose of increasing the profit on the business when such rival or opponent is driven out of business, or his or its business is injured.

5. To deal in any thing of value within the state of North Carolina, to give away or sell, at a place where there is competition, such thing of value at a price lower than is charged by such person, firm, corporation or association for the same thing at another place, where there is not good and sufficient reason, on account of transportation or the expense of doing business, for charging less at the one place than at the other, with the view of injuring the business of another.

6. To engage in buying or selling any thing of value in North Carolina, to make or have, any agreement or understanding, express or implied, with any other person, firm, corporation or association, not to buy or sell such things of value within certain territorial limits within the state, with intention of preventing competition in selling or to fix the price or prevent competition in buying of such things of value within these limits:

Provided, nothing herein shall be construed to prevent an agent from representing more than one principal; but nothing in this proviso shall be construed to authorize two or more principals to employ a common agent for the purpose of suppressing competition; provided further, that nothing herein shall be construed to prevent a person, firm or corporation from selling his or its business and good will to a competitor, and agreeing in writing not to enter the business in competition with the purchaser in a limited territory, as is now allowed under the common law: Provided, such agreement shall not violate the principles of the common law against trusts and shall not violate the provisions of this chapter. (1913, c. 41, s. 5; C. S. 2563.)

Restrictive Stipulations in Sale.-Transactions involving the sale and disposition of a business trade or profession between individuals with stipulations restricting of competition on the part of the vendor do not, as a rule, tend to un­duly harm the public and are ordinarily sustained to the extent required to afford reasonable protection to the vendee in the enjoyment of property or proprietary rights he has bought and paid for, and to enable a vendor to dispose of his property at its full and fair value. Mar-Hof Co. v. Rosenbacker, 176 N. C. 330, 97 S. E. 169.

Test as to Reasonableness.—A valid contract in partial restraint of trade, while primarily for the advantage of the purchaser of a business, inures to the benefit of the seller and tends to unjustly enrich him to obtain a better price for the sale of his business, the test as to territory being whether the restraint agreed upon is such as to afford protection to the interest of the party in whose favor it is given, and not so large as to interfere with the interest of the public; and such will not be held to be unreasonable when they do not affect the public convenience, nor remove the danger to the purchaser of competition with the seller. Morehead Sea Food Co. v. Way & Co., 160 N. C. 679, 86 S. E. 603.

Contract Not to Engage in Competing Business.—A pro­motion of an agreement for the sale to the vendee to eliminate competition therein, and the agreement was reasonable or necessary for the article to yield a profit in its sale. State v. Craft, 165 N. C. 453, 81 S. E. 772.

Reasonableness of Agreement to Raise Price Immaterial.—A contract made in order to protect him from competition, and raising the price of food, to raise its price, is an indictable offense at the common law, and evidence that dealers controlling a large part of the supply of milk in a town having by agreement raised its price to purchasers, and its price was raised in order to protect the seller from competition in its sale and to secure a profit of a party to the agreement had also raised the price of milk to his customers, or whether the agreement was reasonable or necessary for the article to yield a profit in its sale. State v. Craft, 165 N. C. 453, 81 S. E. 772.

Same—Intent Immaterial.—The intent of milk dealers combining to raise the price of milk is immaterial. State v. Craft, 169 N. C. 679, 86 S. E. 603.

Illegal Division of Territory.—Under a contract dividing a county into separate territory, within which each of the respective parties was not to interfere with the business of the other in operating cotton gins, etc., the plaintiff sold to the defendant a cotton ginning plant, the latter agreeing to remove the plant and not to again operate it there, the intent of the agreement was a division of territory, with the object to eliminate competition therein, and the agreement will not be enforced. Shute v. Shute, 176 N. C. 463, 97 S. E. 132.

Exclusive Sale for Specified Period.—A contract made in good faith between a vendor and purchaser of a certain particular make or character of a manufactured product that restricts the freedom of the vendor to sell articles of the same make to others, and which conflicts with others' right to sell the purchaser's merchandise, and with the objects of the latter's interest or the public or the consumer, is in violation of this section. Food Co. v. Way & Co., 169 N. C. 679, 86 S. E. 603.

Contract not to Sell at Label Price.—A contract of sale of merchandise for resale by the buyer, which stipulates that the buyer will not sell the merchandise except at label prices and will not sell or permit the sale of any other similar merchandise, is violative of this section. Standard Fash­ion Co. v. Grant, 165 N. C. 453, 81 S. E. 603.

Test as to Reasonableness.—A valid contract in partial restraint of trade, while primarily for the advantage of the purchaser of a business, inures to the benefit of the seller and tends to unjustly enrich him to obtain a better price for the sale of his business, the test as to territory being whether the restraint agreed upon is such as to afford protection to the interest of the party in whose favor it is given, and not so large as to interfere with the interest of the public; and such will not be held to be unreasonable when they do not affect the public convenience, nor remove the danger to the purchaser of competition with the seller. Morehead Sea Food Co. v. Way & Co., 160 N. C. 679, 86 S. E. 603.

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Same—Intent Immaterial.—The intent of milk dealers combining to raise the price of milk is immaterial. State v. Craft, 169 N. C. 679, 86 S. E. 603.
§ 75-6. Contract in Violation of Section Unenforceable.—A contract made in violation of the terms of this section will not be enforced. Standard Fashion Co. v. Grant, 165 N. C. 433, 161 S. E. 606; Shute v. Shute, 176 N. C. 463, 176 S. E. 622.

§ 75-7. Threats to Retali ate unless Competition Violation.—Threats by one company that it would sell ice in the town of a second ice company, if that company competed with the first, were not prohibited by this section. Smith v. Morganton Ice Co., 159 N. C. 151, 159 S. E. 961.

§ 75-8. Violation a misdemeanor; punishment.

§ 75-9. Duty of attorney-general to investigate. —The attorney-general of the state of North Carolina shall have power, and it shall be his duty, to investigate, from time to time, the affairs of all corporations doing business in this state, which are or may be embraced within the meaning of the statutes of this state defining and denouncing trusts and combinations against trade and commerce, or which he shall be of opinion are so embraced, and all other corporations in North Carolina doing business in violation of law; and all other public-service corporations of any kind or nature whatever which are doing business in the state for hire. Such investigation shall be with a view of ascertaining whether the law or any rule of the Utilities Commission or Commission of Banks is being or has been violated by any such corporation, officers or agents or employees thereof, and if so, in what respect, with the purpose of acquiring such information as may be necessary to enable him to prosecute any such corporation, its agents, officers and employees for crime, or prosecute civil actions against them if he discovers they are liable and should be prosecuted. (1913, c. 41, s. 5; 1933, c. 134) s. 19416; 188 S. E. 432.

§ 75-10. Power to compel examination. —In performing the duty required in § 75-9, the attorney-general shall have power, at any and all times, to require the officers, agents or employees of any such corporation, and all other persons having knowledge with respect to the matters and affairs of such corporations, to submit themselves to examination by him, and produce for his inspection any of the books and papers of any such corporations, or which are in any way connected with the business thereof; and the attorney-general is hereby given the right to administer oath to any person whom he may desire to examine. He shall also, if it may become necessary, have a right to apply to any judge of the supreme or superior court, after five days notice of such application, for an order on any person or corporation he may desire to examine to appear and subject himself or itself to such examination, and disobedience of such order shall constitute contempt, and shall be punishable as in other cases of disobedience of a proper order of such judge. (1913, c. 41, s. 5; C. S. 2565.)

§ 75-11. Person examined exempt from prose-
CHAPTER 76. NAVIGATION

§ 75-10. Board of commissioners of navigation and pilotage.

§ 75-11. Rules to regulate pilotage service.

§ 75-12. Refusal to furnish information; false swearing.—Any corporation unlawfully refusing or willfully neglecting to furnish the information required by this chapter, when it is demanded as herein provided, shall be guilty of a misdemeanor and fined not less than one thousand dollars: Provided, that if any corporation shall in writing notify the attorney-general that it objects to the time or place designated by him for the examination or inspection provided for in this chapter, it shall be his duty to apply to a judge of the supreme or superior court, who shall fix an appropriate time and place for such examination or inspection, and such corporation shall, in such event, be guilty under this section only in the event of its failure, refusal or neglect to appear at the time and place so fixed by the judge and furnish the information required by this chapter. False swearing by any person examined under the provisions of this chapter shall constitute perjury, and the person guilty of it shall be punishable as in other cases of perjury. (1913, c. 41, s. 10; C. S. 2570.)

§ 75-13. Criminal prosecution; solicitors to assist; expenses.—The attorney-general in carrying out the provisions of this chapter shall have a right to send bills of indictment before any grand jury in any county in which it is alleged this chapter has been violated or in any adjoining county, and may take charge of and prosecute all cases coming within the purview of this chapter, and shall have the power to call to his assistance in the performance of any of these duties of his office which he may assign to them any of the solicitors in the state, who shall, upon being required to do so by the attorney-general, send bills of indictment and assist him in the performance of the duties of his office. (1913, c. 41, s. 13; C. S. 2571.)

§ 75-14. Action to obtain mandatory order.—

If it shall become necessary to do so, the attorney-general may prosecute civil actions in the name of the state on relation of the attorney-general to obtain a mandatory order to carry out the provisions of this chapter, and the venue shall be in any county as selected by the attorney-general. (1913, c. 41, s. 11; C. S. 2572.)

§ 75-15. Actions prosecuted by Attorney-General.—It shall be the duty of the attorney-general, upon his ascertaining that the laws have been violated by any trust or public-service corporation, so as to render it liable to prosecution in a civil action, to prosecute such action in the name of the state, or any officer or department thereof, as provided by law, or in the name of the state on relation of the attorney-general, and to prosecute all officers or agents or employees of such corporations, whenever in his opinion the interests of the public require it. (1913, c. 41, s. 13; C. S. 2573.)

§ 75-16. Civil action by person injured; treble damages.—If the business of any person, firm or corporation shall be broken up, destroyed or injured by reason of any act or thing done by any other person, firm or corporation in violation of the provisions of this chapter, such person, firm or corporation so injured shall have a right of action on account of such injury done, and if damages are assessed by a jury in such case judgment shall be rendered in favor of the plaintiff and against the defendant for treble the amount fixed by the verdict. (1913, c. 41, s. 14; C. S. 2574.)

Causal Relation Between Violation and Injury Must Be Shown.—Section 75-5 condemns a contract of sale only when such sale is made "upon the condition" that the purchaser shall not deal in the goods or merchandise of a competitor of the seller, and in order for a party to recover damages for a breach of the statute under the provisions of this section, he must show a violation of the statute and a causal relation between the violation and injury to his business. Lewis v. Archbell, 199 N. C. 205, 154 S. E. 11. See Bennett v. Southern Ry. Co., 211 N. C. 474, 191 S. E. 240.

Who May Bring Action.—The contention that an action for the violation of this chapter resulting in injury to a party's business can only be brought by the attorney general is contrary to the provisions of this section. Bennett v. Southern Ry. Co., 211 N. C. 474, 191 S. E. 240.

Chapter 76. Navigation.

Sec. 76-13. When employment compulsory; rates of pilotage.

Sec. 76-14. Pay for detention of pilots.

Sec. 76-15. Vessels not liable for pilotage.

Sec. 76-16. First pilot to speak vessel to get fees.

Sec. 76-17. Vessels entering for harborage exempt.

Sec. 76-18. Harbor master of Wilmington; duties.

Sec. 76-19. Port wardens of Wilmington; election; oath.

Sec. 76-20. Port wardens of Wilmington; duties; fees.

Sec. 76-21. Repairing boats in street docks at Wilmington forbidden.

Sec. 76-22. Obstructing docks by flats and barges at Wilmington forbidden.

Sec. 76-23. Obstructing harbor master of Wilmington forbidden.
§ 76-1 CH. 76. NAVIGATION—CAPE FEAR RIVER

§ 76-1. Board of commissioners of navigation and pilotage. — A board of commissioners of navigation and pilotage for the Cape Fear river and bar, to consist of five members, at least four of whom shall be residents of New Hanover County, and none of whom shall be licensed pilots, is hereby created. The members of the board shall be appointed by the governor and their terms of office shall begin on the fifteenth day of April of the year in which they are appointed and continue for four years and until their successors shall be appointed and qualified. They shall be and are hereby declared to be commissioners for a special purpose, within the purview of section seven, article fourteen, of the constitution of North Carolina. It shall be the duty of the governor to appoint, on or before the fifth day of April, one thousand nine hundred and twenty-one, and on or before the fifth day of April of every fourth year thereafter, the members of said board of commissioners. A majority of the board shall constitute a quorum and may act in all cases. The board shall have power to fill vacancies in its membership as they occur during their term, to appoint a clerk to record in a book, rules, orders and proceedings of the board, and the board shall have authority in all matters that may concern the navigation of waters from seven miles above Negro-head Point downwards, and out of the bar and inlets. They shall annually, on the first Monday in May, appoint a harbor master for the port of Wilmington. (1921, c. 79, s. 1; C. S. 6943(a).

Editor’s Note.—The cases discussed below were decided under section C. S. 6943, now repealed. However, these cases seem applicable to the present law as the provisions of former section 6943 are substantially set forth in the instant section.

Constitutionality.—This article is constitutional as it is an exercise of the State’s right to regulate pilotage, and should be construed liberally as a part of the maritime law. It does not create a monopoly or grant special privileges, but only regulates for the protection of the public. St. George v. Hardie, 147 N. C. 88, 60 S. E. 920.

The Legislature may confer upon a local board of commissioners of navigation and pilotage authority to mark out cruising grounds for pilot boats. Morse v. Heide, 152 N. C. 625, 63 S. E. 172.

Time of Appointment.—The time of making the appointment of commissioners is merely directory, and if appointment is made after the fifth day of April, but before the fifteenth day of April, it is valid. St. George v. Hardie, 147 N. C. 88, 60 S. E. 920.

§ 76-2. Rules to regulate pilotage service. — The board shall from time to time make and establish such rules and regulations respecting the qualifications, arrangements, and station of pilots as to them shall seem most desirable, and shall impose such reasonable fines, forfeitures and penalties as may be prescribed for the purpose of enforcing the execution of such rules and regulations. The board shall also have power and authority to prescribe, reduce, and limit the number of pilots necessary to maintain an efficient pilotage service for the Cape Fear River and bar, as in its discretion may be necessary: Provided, that the present number of eleven pilots now actively engaged in the service shall not be reduced except for cause or by resignation, disability, or death. Whenever in the opinion of a majority of the board, the best interests of the port of Wilmington, the state of North Carolina, and the pilotage service shall require it, the board shall have power and authority to organize all pilots licensed by it into a mutual association, under such reasonable rules and regulations as the board may prescribe; any licensed pilot refusing to become a member of such association shall be subject to suspension.
or to have his license revoked, at the discretion of the board. (1921, c. 79, s. 2; 1927, c. 158, s. 1; C. S. 6943(b)).

Editor's Note.—The amendment of 1927 inserted the second sentence.

Reasonable Regulations.—A rule and regulation of the board to the effect that pilots shall not cruise beyond certain territory and that no pilot, except under certain unusual circumstances, shall be entitled to his fee for such services if they be tendered beyond the cruising ground they had left off is valid and reasonable. Morse v. Heide, 152 N. C. 625, 68 S. E. 173.

§ 76-3. Examination and licensing of pilots. — The board, or a majority of them, may from time to time examine, or cause to be examined, such persons as may offer themselves to be pilots for the Cape Fear river and bar, and shall give to such as are approved commissions under their hands and the seal of the board, to act as pilots for the river and bar; and the number of pilots so commissioned, not exceeding fifteen at any one time, shall be left to the discretion of the board, but the limitation as to number herein shall not deprive the board of the power to issue license to any person who is a duly licensed pilot at the time of the passage of this article. (1921, c. 79, s. 3; 1927, c. 158, s. 2; C. S. 6943(c)).

Editor's Note.—The 1927 amendment substituted the word "may" for the word "shall" near the first part of this section.

Limiting Number of Pilots.—The limiting of the number of pilots, and providing for examinations and qualifications, is a valid exercise of the police powers and is not such a grant of special privileges to certain persons as is provided against by the Constitution. St. George v. Hardie, 147 N. C. 88, 60 S. E. 520.

§ 76-4. Appointment and regulation of pilots' apprentices. — The board, when it deems necessary for the best interests of the port, is hereby authorized to appoint in its discretion apprentices, and to make and enforce reasonable rules and regulations relating to apprentices. No apprentice shall be required to serve for a longer period than three years in order to obtain a license to pilot vessels of a draught of not exceeding fifteen feet, and one year thereafter for a license to pilot vessels of a draught of more than fifteen feet. No one shall be entered as an apprentice who is of the age of more than twenty-five years. (1921, c. 79, s. 4; 1927, c. 158, s. 3; C. S. 6943(d)).

Editor's Note.—The words "appoint in its discretion apprentices, and to" appearing in lines 3 and 4 were inserted by the 1927 amendment.

§ 76-5. Classes of licenses issued. — The board shall have authority to issue two classes of licenses as follows:

(1) A license to pilot vessels whose draught of water does not exceed eighteen feet, to such applicants above the age of twenty-one years, who have served as apprentices for such length of time as is required by the rules and regulations of the board to entitle such applicant to such license;

(2) An unlimited or full license to those who have served at least one year under a license of the first class: Provided, that the board shall have power to appoint pilots without reference to apprenticeship record as in its judgment the service may require. (1921, c. 79, s. 5; 1927, c. 158, s. 4; C. S. 6943(e)).

Editor's Note.—The word "eighteen" was substituted for "fifteen" in subsection one and the proviso at the end of subsection two was added by the 1927 amendment.

§ 76-6. Renewal of license; license fee. — All licenses shall be renewed annually upon payment of a fee of five dollars ($5): Provided, the holder of such license shall have, during the year preceding the date for such renewal, complied with the provisions of this article and the reasonable rules and regulations prescribed by the board under authority hereof. (1921, c. 79, s. 6; C. S. 6943(f)).

§ 76-7. Expenses of the board. — Each pilot, or the association of pilots, when organized as in this article provided, shall pay over to the board under such reasonable rules as the board shall prescribe two per cent (2%) of each and every pilotage fee received, for the purpose of providing funds to defray the necessary expenses of the board. In the event that the total of the sums so paid over in any one year shall exceed the expenses of the board, the excess, upon being duly ascertained, shall be paid over to the fund for the benefit of widows and orphans of the deceased pilots, as said fund is now constituted and provided for by law. (1921, c. 79, s. 7; C. S. 6943(g)).

§ 76-8. Pilots to give bond. — Every person before being commissioned as a pilot shall give bond for the faithful performance of his duties, with two or more sureties, payable to the state of North Carolina in the sum of five hundred dollars ($500); the board may, from time to time, and as often as it may deem necessary, enlarge the penalty of the bond, or require new or additional bonds to be given in a sum or sums not to exceed in all, one thousand dollars ($1,000). Every bond taken of a pilot shall be filed with and preserved by the board, in trust for every person, firm, or corporation, who shall be injured by the neglect or misconduct of such pilots, and any person, firm, or corporation, so injured may severally bring suit for the damage by each one sustained. (1921, c. 79, s. 8; C. S. 6943(h)).

§ 76-9. Permission to run as pilots on steamers; other ports. — The board shall have power to grant permission in writing to any pilot in good standing and authorized to pilot vessels, to run regularly as pilots on steamers running between the port of Wilmington and other ports of the United States, under such rules and regulations as the board shall prescribe. (1921, c. 79, s. 9; C. S. 6943(i)).

§ 76-10. Cancellation of licenses. — The board shall have the power to call in and cancel the license of any pilot who has refused or neglected, except in case of sickness, his duty as a pilot for a period of six months in succession, and any pilot who has been absent from the state for a longer period than six months in succession shall, upon his return, surrender his license to the board, or the board may declare the same void, except when such absence has been under permission from the board as provided in § 76-9. (1921, c. 79, s. 10; C. S. 6943(j)).

§ 76-11. Jurisdiction over disputes as to pilotage. — Each member of the board shall have
power and authority to hear and determine any matter of dispute between any pilot and any master of a vessel, or between pilots themselves, respecting the piloting of any vessel and any one of them may issue a warrant against any pilot for the recovery of any demand which one pilot may have against another, relative to piloting, and for the recovery of any forfeiture or penalty provided by law, relating to piloting on Cape Fear River and bar, or provided by any by-law or rule or regulation enacted by the board by virtue of any such law, which warrant the sheriff or any constable in New Hanover or Brunswick counties, shall execute together with any other process authorized by this article. On any warrant issued as herein provided any one of said commissioners may give judgment for any sum not exceeding five hundred dollars ($500), and may issue execution thereon, in like manner as is provided for the issuing of execution on judgments rendered by justices of the peace, which writ of execution shall be executed agreeably to the law regulating the levy and sale under executions issuing from courts of justices of the peace. Any member of the board shall have authority to issue summons for witnesses and to administer oaths, and hearings before any member of the board of any matters as provided in this section shall conform as nearly as may be to procedure provided by law in courts of justices of the peace. From any judgment rendered by any member of the board, either party shall have the right of appeal to the superior court of New Hanover or Brunswick counties, in like manner as is provided for appeals on judgments of justices of the peace. (1921, c. 79, s. 11; C. S. 6943(k).)

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§ 76-14. Pay for detention of pilots.—Every master of a vessel who shall detain a pilot at the time appointed so that he cannot proceed to sea, though wind and weather permit, shall pay such pilot ten dollars ($10) per day during the time of his actual detention, the pilot to have due notice from the master or agent of said vessel. (1921, c. 79, s. 14; C.S. 6943(m).)

Editor’s Note.—A majority of the pilotage rates as fixed by this section were changed by the 1927 amendment, most of them having been raised.

Pilot Entitled to Pilotage.—The first pilot speaking a vessel shall be entitled to the pilotage fees over the bar to Southport and out to sea again, provided said pilot be ready and willing to serve as a pilot, etc. St. George v. Hardie, 147 N.C. 88, 60 S.E. 920. A barge of over sixty gross tons having a United States licensed pilot on board is subject to pilotage, tender and refusal under this section upon entering North Carolina waters. Craig v. Gulf Barge, etc., Co., 201 N.C. 250, 159 S.E. 424.

§ 76-15. Vessels not liable for pilotage.—Any vessel coming into Southport from sea without the assistance of a pilot, the wind and weather being such that such assistance or service could have been reasonably given, shall not be liable for pilotage inward from sea, and shall be at liberty to depart without payment of any pilotage, unless the services of a pilot be secured. (1921, c. 79, s. 15; C.S. 6943(o).)

Validity.—This section is valid, when construed with the other sections of said chapter, being an incentive to render pilots vigilant. St. George v. Hardie, 147 N.C. 88, 60 S.E. 920.

§ 76-16. First pilot to speak vessel to get fees.—The first pilot speaking a vessel from a regularly numbered and licensed boat of this board shall be entitled to the pilotage fees over the bar to Southport, and out to sea again: Provided, said pilot shall be ready and willing to serve as pilot when the vessel is ready to depart, due notice having been given by the master or agent to said pilot. (1921, c. 79, s. 16; C.S. 6943(p).)

§ 76-17. Vessels entering for harborage exempt.—Any vessel coming in from sea for harbor shall not be required to take a pilot either from sea inward or back to sea. (1921, c. 79, s. 17; C.S. 6943(q).)

§ 76-18. Harbor master of Wilmington; duties.—The harbor master appointed for the port of Wilmington shall hold his office for one year next ensuing and until his successor is appointed. The harbor master shall have power and is required: 1. To keep the channel-way of the Cape Fear river and the track of vessels clear; to berth vessels at appropriate wharves or docks; to change the berth of any vessel at request of the owner of the whar or dock; to move such vessels to some other wharf or to a safe anchorage in the stream; and he is further authorized and required to determine in all cases how far and in what instances it is the duty of masters and others having charge of vessels, flats, rafts, or crafts to accommodate each other in their respective berths and situations. 2. To arrest any person violating this chapter, and to immediately bring such offender before some justice of the peace of the county in which such offense may be committed, for trial. 3. Whenever in his judgment it shall be necessary, to cast loose from any wharf or dock any raft, flat, vessel, or other craft by untying or cutting the lines by which it is made fast, if the owner after notice refuses to remove such vessel. 4. Whenever any of the public docks of the city of Wilmington are obstructed by any vessels, flats, barges, logs, hulks, trash, or garbage, and the owner thereof cannot be found or fails to remove the same any time within ten days, to take the most speedy method to clear the docks. 5. To appoint in writing some competent person to act in his place and stead during his temporary absence, or at such times as he is unable to attend to the duties of his office, and such person shall, while acting for such harbor master, have all the power and authority conferred upon and vested in the harbor master by law. 6. To collect from all vessels arriving in the port of Wilmington the following fees and no others, to wit: If over one hundred tons and under three hundred tons, three dollars; if over three hundred tons and under five hundred tons, five dollars; if over five hundred tons and under seven hundred tons, seven dollars; if over seven hundred tons, ten dollars. (Rev., s. 4958; Code, s. 3482; 1903, c. 662; 1905, c. 321; C.S. 6960.)

§ 76-19. Port wardens of Wilmington; election; oath.—There shall be three competent persons at the port of Wilmington, to be known as port wardens. The persons so elected shall at once take

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Vessels calling at the port solely for the purpose of obtaining bunker coal shall pay one-half the fees hereinbefore prescribed. (1921, c. 79, s. 13; 1927, c. 158, s. 5; C.S. 6943(m).)
and subscribe before the clerk of the superior court of New Hanover county the following oath:

I, A. B., do solemnly and sincerely swear that I will faithfully, honestly, and impartially execute and discharge the duty of port warden for the port of Wilmington, by duly appraising and estimating the damage sustained on any vessel or goods arriving in or stranded within the bounds of said port, and will make a true and fair estimate and report of and regarding the seaworthiness of any vessel by me surveyed. (Rev., s. 4959; 1889, c. 437; 1905, c. 321; C. S. 6961.)

§ 76-20. Port wardens of Wilmington; duties; fees.—The port wardens of Wilmington shall, on request made by the master, owner, freighter, or supercargo of any vessel arriving in said port, or stranded within the bounds thereof, survey and make report of her situation and condition, and the causes thereof, and whether she should be repaired or condemned; inspect the conditions of vessels which may arrive in distress or may have suffered by gales of wind or otherwise at sea; the situation and condition of goods, wares, and merchandise which may arrive in said vessels or may have received damage at sea, and report thereon and the probable causes thereof; inspect the storage of cargoes of vessels arriving as aforesaid, or having received damage as aforesaid, before the same shall be discharged, except where vessels may be stranded, in which cases their cargoes may be inspected after the same are removed, and report thereon, whether faulty or not, in which report shall be stated the probable cause of the damage; make surveys of goods, wares, and merchandise, and the cargoes of vessels aforesaid, and make and report estimates of the amount of the damage sustained as aforesaid; and make and report, if required, surveys of vessels outward bound, and report whether they are seaworthy or not, and fit for the voyage intended. All goods which shall be sold by reason of their having received damage as aforesaid, and shall have been surveyed or inspected by the said port wardens, shall be sold under their inspection and direction; and the said port wardens shall respectively receive for their services: For a survey at the town of Wilmington, the sum of ten dollars; for a survey at the Flats, the sum of twelve dollars; and for a survey at Fort Johnson, the sum of fifteen dollars, to be paid by the party at whose request the same is made, and recovered before any court of competent jurisdiction. (Rev., s. 4960; 1889, c. 437, ss. 2, 3; C. S. 6962.)

§ 76-21. Repairing boats in street docks at Wilmington forbidden.—If any person shall, for the purpose of repair, put any flat, steamboat, or other craft, in any of the street docks of the city of Wilmington, or shall, for the purpose of repair, ground any such flat, steamboat, or other craft in any of the public docks of such city on the east side of the Cape Fear river between Church street dock and Red Cross street dock, he shall be guilty of a misdemeanor, and shall be fined not more than fifty dollars or imprisoned not more than thirty days. (Rev., s. 3554; 1903, c. 662, s. 2; C. S. 6963.)

§ 76-22. Obstructing docks by flats and barges at Wilmington forbidden.—The owner of any rafts, flats, vessels, or other craft lying alongside any wharf or wharves or before the entrance of any public dock, his or their agents or servants, shall, upon notice from the harbor master, immediately remove the same, and upon his or their refusal so to do, it shall be the duty of the harbor master, and he is hereby authorized and directed, after notice as aforesaid to the owner or owners thereof, their agents or servants, forthwith to cause all such rafts, flats, vessels, or other craft to be removed at the cost and expense of such owner or owners or their agent or agents, and the owner shall be guilty of a misdemeanor. (Rev., s. 3549; 1903, c. 662, s. 3; C. S. 6964.)

§ 76-23. Obstructing harbor master of Wilmington forbidden.—If any person shall hinder, delay, obstruct, or in any manner willfully interfere with the harbor master of Wilmington in the discharge of his duty he shall be guilty of a misdemeanor, and be fined not more than fifty dollars or imprisoned not more than thirty days. (Rev., s. 3532; 1905, c. 661, s. 8; C. S. 6965.)

§ 76-24. Encumbering docks at Wilmington forbidden.—If any person shall encumber any of the public docks of the city of Wilmington with debris, logs, hulks, flats, or barges, trash or garbage, he shall be guilty of a misdemeanor, and upon conviction thereof shall be fined ten dollars for each and every day thereafter such nuisance shall remain. (Rev., s. 3547; 1903, c. 662, s. 9; C. S. 6966.)

Art. 2. Beaufort Harbor.

§ 76-25. Commissioners of navigation; election.—The commissioners of navigation for Old Topsail inlet and Beaufort harbor shall be composed of three persons, to be elected as follows: The board of commissioners of Carteret county shall elect one, the commissioners of the town of Beaufort shall elect one, and the commissioners of the town of Morehead City shall elect one. They shall be elected at the regular meeting of such boards in June, one thousand nine hundred and five, and every two years thereafter, and shall qualify by taking the oath required by law before the clerk of the superior court of some justice of the peace of Carteret county, and enter upon the discharge of their duties on the first Monday in July following their election. (Rev., s. 4964; 1899, c. 9, ss. 1, 2; C. S. 6967.)

§ 76-26. Authority of commissioners.—They shall have authority in all matters that may concern the navigation of the harbor, Old Topsail inlet, and all the waters of the sound and rivers within ten miles of the town of Beaufort, and in the construction of wharves, and when there is no harbor master, the commissioners aforesaid shall decide all disputes about the moving of vessels and other matters which properly fall within the department of harbor master. (Rev., s. 4965; Code, s. 3328; 1868-9, c. 208, s. 3; C. S. 6968.)

§ 76-27. Harbor master for Beaufort.—The said commissioners immediately after their election shall appoint a harbor master for the port of Beaufort, who shall hold his office for the
§ 76-28. Pilots; how appointed and licensed.—Such commissioners shall elect the pilots for said inlet and harbor, and may make such rules and regulations for their government as the commissioners may deem right and proper, not inconsistent with the constitution and laws of this state or of the United States: Provided, that all persons who may be licensed as pilots shall have had at least two years practical experience as apprentices under some regular licensed pilot of Beaufort Harbor and Old Topsail Inlet, and shall secure two pilots in good standing to endorse in writing each application for license. Application for pilot licenses or branches shall be made to the commissioners in writing, giving the name, age, and occupation of applicants for two years next preceding the date of application. The commissioners shall examine all applicants for pilot’s licenses, and may also examine other persons as to qualification of applicants to perform the duties of pilot, and may in their discretion reject any applicant whom they may deem incompetent. (Rev., s. 4967; 1899, c. 9, ss. 3, 4, 5; 1921, c. 74, s. 6; C. S. 6970.)

§ 76-29. Fees for issuing pilot’s license.—The said commissioners shall give to every pilot elected by them a license or branch under their hands and seals, which shall be and remain in force for one year unless, for good cause to said commissioners appearing, the same shall be sooner revoked by them. They shall charge for each license or branch, fifteen dollars, which they may retain for their expenses and services. (Rev., s. 4968; 1899, c. 9, s. 6; 1921, c. 74, s. 5; C. S. 6971.)

§ 76-30. Expiration of pilot’s license; reinstatement.—Each pilot shall forfeit his branch after fifteen days expiration of the same; however, such pilot may be reinstated by securing two pilots in good standing to sign his branch. (1915, c. 142, s. 3; C. S. 6972.)

§ 76-31. Pilot boats to be numbered.—Each and every pilot vessel in Carteret county shall be numbered; and any pilot piloting a vessel or barge in or out of the territory as set out in this article, without a number, shall be guilty of a misdemeanor and be subject to a fine of not more than fifty dollars or imprisoned not more than thirty days, or both, in the discretion of the court. The commissioners of navigation of Beaufort harbor shall make provision for numbering of pilot vessels as required by this section. All said fines collected under this article shall be applied to the public school fund of Carteret County (1915, c. 142, ss. 2, 3; C. S. 6973.)

§ 76-32. Rates of pilotage.—The pilotage for Old Topsail inlet and Beaufort harbor shall be as follows: For vessels drawing eight feet and under, two dollars and fifty cents per foot; ten feet and over eight, three dollars per foot; twelve feet and over ten, four dollars per foot; all over twelve feet, four dollars and fifty cents per foot. The above fees to be collectible in Beaufort harbor from Middle marsh to Lewis thoroughfare, and from the Neuse river side of the inland waterway through the said waterway and out of Beaufort inlet. For vessels piloted without these bounds an additional charge of fifty cents per foot may be charged. The commissioners shall have the rates of pilotage printed or written on every license or branch issued by them, and every pilot shall exhibit his license to the master of every vessel he has in charge, when demanded by said master. The rates of pilotage as set out in this section shall apply to all vessels entering or leaving “Old Topsail Inlet” and “Beaufort Harbor.” (Rev., s. 4969; 1899, c. 9, ss. 7, 8; 1901, c. 639; 1909, c. 250, s. 1; 1915, c. 112, s. 1; 1921, c. 74, ss. 1-3; C. S. 6974(a).)

§ 76-33. Vessels required to take pilots.—All vessels, coastwise or foreign, over sixty gross tons shall take a state-licensed pilot from sea to Pier One, Morehead City, North Carolina, and from Pier One, Morehead City, North Carolina, to sea, and the rates of pilotage shall be the rates as are set out in § 76-32. (1921, c. 74, s. 4; C. S. 6974(a).)

§ 76-34. Vessel under sixty tons not liable for pilotage.—No pilot, acting under the authority of the commissioners of navigation for Old Topsail inlet, shall be entitled to pilotage for any vessel under sixty tons burden, unless such vessel shall have given a signal for a pilot, or otherwise shall have required the assistance of a pilot. (Rev., s. 4970; Code, s. 3533; R. C., c. 85, ss. 32; 1801, c. 600, s. 3; 1806, c. 711, s. 1; C. S. 6975.)

Art. 3. Bogue Inlet.

§ 76-35. Commissioners of navigation for Bogue inlet.—The board of commissioners of the county of Onslow shall appoint five commissioners of navigation for Bogue inlet and its waters. When vacancies occur in said board, by refusal to act, by resignation, or otherwise, the remaining members of such board shall fill the same until the same be supplied by the appointing board, which is directed to be done at the first meeting after the vacancy occurs. And the said board shall have the same powers and authority as to pilots and pilotage as the commissioners for Old Topsail inlet and Beaufort harbor. (Rev., s. 4971; Code, s. 3515; R. C., c. 85, s. 25; 1783, c. 194; 1784, c. 208, s. 2; 1879, c. 216, s. 4; C. S. 6976.)

§ 76-36. Rates of pilotage.—The branch pilots for Bogue inlet shall be entitled to receive of the commander of such vessel as they may have charge of the following pilotage, namely: For bringing any vessel into the said inlet, drawing less than seven feet, from the outside of the bar to the anchorage before the town, or the customary place in Hill’s channel, one dollar per foot; for a vessel drawing more than seven feet, one dollar and fifty cents per foot; and the same fees for pilotage outward as inward. (Rev., s. 4972; Code, s. 3535; 1899, c. 121; C. S. 6977.)

Art. 4. Hatteras and Ocracoke.

§ 76-37. Board of commissioners of navigation; organization; oath; pilots’ licenses.—John W. Rolinson, R. R. Quidley, George L. Styron, Wil-
liam Balse, and Charles L. Odine shall constitute a board of commissioners of navigation for the port of Hatteras inlet, of the county of Dare; William E. Howard, Christopher O. Neal, Sr., and Gilbert O. Neal, of the county of Hyde; D. R. Roberts and J. W. Gilgo, of the county of Carteret, shall constitute a board of navigation for three times in each year, or a majority of the respective board, after giving at least twenty days notice of each meeting, and when any person is desirous of becoming a pilot at Hatteras or Ocracoke inlets, over the Swashes through Pamlico and Albemarle sounds, he shall be examined by said board, and when found competent to take charge of any ship or vessel as a pilot the board shall issue to him a branch and take the bond authorized by law, and no person shall be authorized to act as a bar or swash pilot unless he shall have a branch from said boards. The said boards shall have their offices at Hatteras and Ocracoke respectively, in which shall be filed the bonds of the pilots, and every pilot receiving a branch from said boards shall pay to the board from which he receives such branch two dollars and fifty cents, of which sum the commissioners of Ocracoke who live in Carteret county shall receive ten cents per mile traveling to and from the meeting of said board, and the residue shall be divided between all the members of said board, and the commissioners shall belong to each board respectively. When a vacancy shall occur in either board by death, resignation, or refusal to act, a majority thereof of each board shall appoint some suitable person thereto, whose residence shall be at the same place where the vacancy occurred; said commissioners shall keep a regular journal of their proceedings, and before entering on the duties of their office they shall take and subscribe before any justice of the peace of the counties of Dare, Carteret, or Hyde the following oath:

I do solemnly swear that I will truly and faithfully and impartially examine every person who shall apply to me for a branch, to the best of my ability; So help me, God.

The branch shall expire in three years from the date thereof. (Rev., s. 4961; Code, s. 3515; R. C., c. 85, s. 24; 1867, c. 134; 1879, c. 216; 1897, c. 211; C. S. 6978.)

§ 76-38. Rates of pilotage.—Branch pilots of Ocracoke or Hatteras shall be entitled to receive of the commander of such vessel as they may have in charge the following pilotage, namely: For every vessel of sixty and not over one hundred and forty tons burden, from the other side of the bar, at any place within the limits of the pilot ground, to Beacon Island road, or Wallace's channel, ten cents for each ton, and the further sum of two and a half cents for each ton over one hundred and forty, and two dollars for each vessel over either of the swashes (that is, over said swashes either to or from Beacon Island road, or Wallace's channel, or over any shoal lying intermediate between either of said swashes and Beacon Island road or Wallace's channel); for every ship or vessel from the mouth of the swash to either of the ports of New Bern or Washington, one dollar per foot, and for every ship or vessel from the same place to the port of Edenton, twelve dollars; and to the port of Elizabeth City, ten dollars; and the same allowance down as up, and outward as inward. (Rev., s. 4962; Code, s. 3524; R. C., c. 85, s. 34; 1794, c. 426; 1806, c. 711; 1846, c. 49, ss. 1, 2, 3; C. S. 6979.)

§ 76-39. Who may be pilots for Hatteras or Ocracoke inlet.—The said boards shall not issue or grant any branch to pilot vessels through Hatteras inlet to any person who does not reside in Hatteras precinct, which precinct extends from Cape Hatteras lighthouse to Hatteras inlet. And the said boards shall not issue or grant a branch to pilot vessels through or over Ocracoke inlet to any person who does not reside upon the island of Ocracoke or in the precinct of Portsmouth. (Rev., s. 4963; Code, s. 3514; 1856-7, c. 29; 1879, c. 216, s. 3; C. S. 6980.)

Art. 5. General Provisions.

§ 76-40. Obstructing navigable waters; removing beacons; penalty; pilot's liability.—If any person shall cast or throw from any vessel, into the navigable water of Carteret or Onslow counties, of Tar or Pamlico rivers, or into the navigable waters of the Cape Fear, or any other river in the state, or into any channel of navigable water elsewhere than in a river, any ballast, stone, shells, earth, trash, or other substance likely to be injurious to the navigation of such waters, rivers, or channel; or if any person shall wilfully pull down any beacon, stake, or other mark, erected or placed by virtue of any by-law, order, or regulation passed or ordained by any commissioners of navigation, he shall be guilty of a misdemeanor and shall forfeit and pay two hundred dollars, to be recovered for the use of the commissioners in whose waters the offense was committed. If any pilot shall knowingly suffer any such unlawful act to be done, and shall not within ten days thereafter give to the said commissioners, or one of them, information thereof, such pilot shall likewise be guilty of a misdemeanor; and, besides the usual punishment of such offense, on conviction, shall be forever incapable of acting as a pilot in the state. (Rev., s. 3560; Code, ss. 3537, 3538; R. C., c. 85, ss. 40, 41; 1833, c. 146; 1784, c. 206, s. 11; R. S., c. 88, ss. 23, 24, 45; 1811, c. 830; 1842, c. 65, s. 4; 1846, c. 60, s. 3; C. S. 6981.)


§ 76-41. Obstructing waters of Currituck sound.—It shall be unlawful for any person to obstruct navigation in the waters of Currituck sound and tributaries, and all persons, corporations, companies, or clubs, who have heretofore placed or caused to be placed any hedging across the mouth of a bay, creek, strait, or lead of water in Currituck sound or tributaries, made of iron, wire, or wood or other material, for the purpose of preventing the free passage of boats or vessels of any size or class, or to stop the public use of such bay, creek, strait, or lead of water, are required to forthwith remove the same. Any person, corporation, or club violating any of the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined not more than fifty dollars nor less than ten dollars,

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§ 76-42. Lumbermen to remove obstructions in Albemarle sound.—If any lumberman shall fail to remove all obstructions placed by him in the waters of Albemarle sound and its tributaries, as soon as practicable, after they have ceased to use them for the purpose for which they were placed in said waters, from the time of such abandonment of said water is not less than two feet deep, and also from all landing places on both sides, for the space of sixty feet from the shore outward, he shall be guilty of a misdemeanor, and fined not less than one dollar nor more than fifty dollars, at the discretion of the court. (Rev., s. 3551; Code, s. 3303; 1880, c. 37, ss. 1, 2; C. S. 6983.)

§ 76-43. Anchoring in range of lighthouses.—If the master of any vessel shall anchor on the range line of any range of lights established by the United States lighthouse board, unless such anchorage is unavoidable, he shall be guilty of a misdemeanor, and punished by a fine not to exceed fifty dollars. (Rev., s. 3550; Code, s. 3086; 1883, c. 165, s. 2; C. S. 6984.)

§ 76-44. Vessels on inland waterways exempt from pilot laws; provisions for steam vessels.—All vessels, barges, schooners, or other craft passing through the inland waterway of this state, when bound to a port or ports in this or any other state, be and the same are hereby exempt from the operations of the pilot laws of North Carolina and are not compelled to take a state licensed pilot: Provided, that steam vessels not having a United States licensed pilot for the waters navigated on board shall be subject to the state pilot laws. (1917, c. 33, s. 2; C. S. 6985.)

Under the Federal Law.—Vessels passing through the inland waterways of the State are exempt from the pilot laws by the State statutes, subject to the proviso of this section; and, under the Federal Statutes, whether a vessel has a gross tonnage of more than fifteen tons should be determined by the method prescribed by the Federal statutes requiring a pilot; and in an action for damages alleged to have been caused by defendant's negligence in a collision, it is reversible error for the trial judge to direct an affirmative answer to the contributory negligence in navigating without a pilot upon plaintiff's assertion that his vessel would carry thirty tons. Harris v. Slater, 187 N. C. 163, 121 S. E. 437.

§ 76-45. Bond of pilot.—Every person, before he obtains a commission or a branch to be a pilot, shall give bond with two sufficient sureties payable to the state of North Carolina, in the sum of five hundred dollars, with condition for the due and faithful discharge of his duties, and the duties of his apprentices; and the body appointing such pilot may, from time to time, and as often as they may deem it necessary, enlarge the penalty of the bond, or require new and additional bonds to be given; and every bond taken of a pilot shall be filed with, and preserved by, the said body appointing such pilot in trust for every person that shall be injured by the neglect or misconduct of such pilot, or his apprentices; who may severally bring suit thereon for the damage by each one sustained. (Rev., s. 307; Code, s. 3487; R. C., c. 85, s. 6; 1784, c. 207, s. 3; C. S. 6986.)

Cross References.—As to pilots' bonds generally, see § 76-8. As to action on official bond, see § 109-34.

§ 76-46. Pilots to have spyglasses.—Every pilot, within such convenient time as the commissioners may direct, who has control over the waters within which he acts, shall furnish himself with a good telescope or spyglass, under the penalty of fifty dollars, to be paid to the commissioners. (Rev., s. 4973; Code, s. 3517; R. C., c. 85, s. 27; 1790, c. 320, s. 3; C. S. 6987.)

§ 76-47. Acting as pilot without license.—If any person shall act as a pilot, who is not qualified and licensed in the manner prescribed in this chapter, he shall be guilty of a misdemeanor and upon conviction shall be fined not more than $50.00 and not less than $25.00, or imprisoned not more than thirty days at the discretion of the court: Provided, that should there be no licensed pilot in attendance, any person may conduct into port any vessel in danger from stress of weather or in a leaky condition. (Rev., s. 4974; Code, s. 3519; R. C., c. 85, s. 29; 1783, c. 194, s. 3; 1784, c. 208, s. 4; 1880, c. 283, s. 1; C. S. 6988.)

Editor's Note.—Public Laws of 1933, c. 325, struck out the former provision and inserted the present reading in lieu thereof. A comparison of the two sections is necessary to determine the changes.

§ 76-48. Penalty on pilot neglecting to go to vessel having signal set.—When any pilot shall see any vessel on the coast, having a signal for a pilot, or shall hear a gun of distress fired off the coast, and shall neglect or refuse to go to the assistance of such vessel, such pilot shall forfeit and pay one hundred dollars, to be recovered in the name of the state, one-half to the use of the informer and the other half to the master of the vessel, unless such pilot is then actually in charge of another vessel. (Rev., s. 4975; Code, s. 3521; R. C., c. 85, s. 34; 1784, c. 307, s. 10; 1790, c. 320, s. 2; 1783, c. 194, s. 6; C. S. 6989.)

§ 76-49. Pilots may be removed.—Unless otherwise provided in the first article of this chapter for the Cape Fear river, whenever any pilot appointed, as authorized in this chapter, shall, on trial, be found incompetent, or shall be guilty of improper conduct by intoxication or otherwise, or of any misbehavior in his office, or shall absent himself from his duty for any period of six months, or where the pilot so offending may be removed from his office by the board of commissioners under whose authority he is acting, by a notice to him in writing; and if after such removal he shall attempt to take charge of any vessel, he shall forfeit and pay two hundred dollars for the use of said board. And it shall be the duty of the board to put up a written notice of the removal, in the public places within the port, or publish it in some convenient newspaper. But no pilot for the navigation of Hatteras inlet shall be required to surrender or forfeit his branch by reason of absence from the state for a period of less than six months. (Rev., s. 4976; Code, ss. 3518, 3490; 1869-70, c. 235, s. 7; 1881, c. 261, s. 2; R. C., c. 85, s. 28; R. S., c. 88, ss. 7, 33, 35; 1784, c. 207, s. 4; 1819, c. 1025, s. 4; 1800, c. 558; 1876-7, c. 22; 1881, c. 261, s. 1; C. S. 6990.)

Entitled to Fees Until Removed.—A duly licensed pilot may recover charges for his services; and while his failure to have his boat registered and numbered will cause a forfeiture of his license, the lawful pilotage charges for the service of such boat is recoverable by him until the commissioners of navigation and pilotage have acted thereon and
CHAPTER 77. RIVERS AND CREEKS

Art. 1. Commissioners for Opening and Clearing Streams.

Sec. 77-1. County Commissioners to appoint commissioners.
Sec. 77-2. Flats and appurtenances procured.
Sec. 77-3. Laid off in districts; passage for fish.
Sec. 77-4. Gates and slopes on milldams.
Sec. 77-5. Owner to maintain gate and slope.
Sec. 77-6. Gates and slopes discontinued.
Sec. 77-7. Failure of owner of dam to keep gates, etc.

Art. 2. Obstructions in Streams.

Sec. 77-8. Repairing breaks.
Sec. 77-9. Entry upon lands of another to make repairs.
Sec. 77-10. Draws in bridges.
Sec. 77-11. Public landings.

Chapter 77. Rivers and Creeks.

Sec. 76-50. Pilots refused, entitled to pay.—If a branch pilot shall go off to any vessel bound in, and offer to pilot her over the bar, the master or commander of such vessel, if he refuses to take such pilot, shall pay to such pilot, if not previously furnished with one, the same sum as is allowed by law for conducting such vessel in, to be recovered before a justice of the peace, if the sum be within his jurisdiction: Provided, that the first pilot, and no other, who shall speak such vessel so bound in shall be entitled to the pay provided for in this section. (Rev., s. 4978; Code, s. 3522; R. C., c. 85, s. 32; 1871–2, c. 117; C. S. 6991.)

Sec. 76-51. Pay of pilots when detained by vessel.—Every master of a vessel who shall detain a pilot at the time appointed, so that he cannot proceed to sea, though wind and weather should permit, shall pay to such pilot three dollars per day during the time of his actual detention. (Rev., s. 4979; Code, s. 3495; 1858–9, c. 23, s. 7; C. S. 6992.)

Sec. 76-52. Rates of pilotage annexed to commission.—The commissioners of navigation for the several ports of this state shall annex to the branch or commission, by them given to each pilot, a copy of the fees to which such pilot is entitled. (Rev., s. 4980; Code, ss. 3497, 3536; R. C., c. 85, ss. 9, 33; 1784, c. 268, s. 4; 1796, c. 470, s. 5; C. S. 6993.)

Sec. 76-53. Harbor masters; how appointed.—The several boards of commissioners of navigation may appoint a harbor master for their respective ports. They shall appoint a clerk to keep books, in which shall be recorded all their proceedings. (Rev., s. 4981; Code, s. 3525; R. C., c. 85, s. 35; C. S. 6994.)

Sec. 76-54. Commissioners of navigation may hold another office.—A commissioner of navigation and pilotage shall be deemed a commissioner for a special purpose within the meaning of section seven of article fourteen of the constitution of North Carolina, so as not to be prohibited from holding at the same time with his commissionership another office under the national or state governments. (Ex. Sess. 1913, c. 76; C. S. 6995.)

Sec. 76-55. Commissioners of navigation to designate place for trash.—The several boards of commissioners established by this chapter may, subject to such regulations as the United States may make, designate the places whereat, within the waters under their several and respective control, may be cast and thrown ballast, trash, stone, and like matter. (Rev., s. 4985; Code, s. 3537; R. C., c. 85, s. 40; R. S., c. 88, ss. 23, 24, 45; 1883, c. 146, ss. 1, 2, 3; 1848, c. 60, s. 3; C. S. 6996.)


Sec. 76-56. Harbor master; how appointed where no board of navigation.—Where no board of navigation exists the governing body of any incorporated town, situated on any navigable water course, shall have power to appoint a harbor master for the port, who shall have the same power and authority in respect of ports as the harbor master of Wilmington is by this chapter given for that port, and shall receive like fees and no others. (Rev., s. 4983; C. S. 6997.)

Sec. 76-57. Rafts to exercise care in passing buoys, etc., penalty.—If any person having charge of any raft passing any buoy, beacon, or day-mark, shall not exercise due diligence in keeping clear of it, or, if unavoidably fouling it, shall not exercise due diligence in clearing it, without dragging from its position such buoy, beacon, or day-mark, he shall be guilty of a misdemeanor, and punished by fine not to exceed fifty dollars. (Rev., s. 3545; Code, s. 2087; 1883, c. 165, s. 3; C. S. 6998.)

Sec. 76-58. Interfering with buoys, beacons, and day-marks.—If any person shall moor any kind of vessel, or any raft or any part of a raft, to any buoy, beacon, or day-mark placed in the waters of North Carolina by the authority of the United States lighthouse board, or shall in any manner hang on with any vessel or raft, or part of a raft, to any such buoy, beacon, or day-mark, or shall willfully remove, damage, or destroy any such buoy, beacon, or day-mark, or shall cut down, remove, damage, or destroy any beacon erected on land in this state by the authority of the said United States lighthouse board, or through unavoidable accident run down, drag from its position, or in any way injure any buoy, beacon, or day-mark, as aforesaid, and shall fail to give notice as soon as practicable of having done so, to the lighthouse inspector of the district in which said buoy, beacon, or day-mark may be located, or to the collector of the port, or, if in charge of a pilot, to the collector of the port from which he comes, he shall for every such offense be guilty of a misdemeanor and shall be punished by a fine not to exceed two hundred dollars, or imprisoned not to exceed three months, or both, at the discretion of the court. (Rev., s. 3546; Code, s. 3085; 1858–9, c. 58, ss. 2, 3; 1883, c. 165, s. 1; C. S. 6999.)
Art. 1. Commissioners for Opening and Clearing Streams.

§ 77-1. County Commissioners to appoint commissioners.—Where any inland river or stream runs through the county, or is a line of their counties, the boards of commissioners of the several counties may appoint commissioners to view such river or stream, and make out a scale of the expense of labor with which the opening and clearing thereof will be attended; and if the same is deemed within the ability of the county, and to be expedient, they may appoint and authorize the commissioners to proceed in the most expeditious manner in opening and clearing the same. (Rev., s. 5297; Code, s. 3706; 1887, c. 370; C. S. 7365.)

Cross Reference.—As to building bridges, see §§ 136-58 et seq.

§ 77-2. Flats and appurtenances procured.—The board of county commissioners appointing the commissioners may direct them to purchase or hire a flat with a windlass and the appurtenances necessary to remove loose rock and other things, which may by such means be more easily removed, and allow the same to be paid for out of the county funds. (Rev., s. 5299; Code, s. 3708; R. C., c. 100, s. 3; 1785, c. 242, s. 2; C. S. 7365.)

§ 77-3. Laid off in districts; passage for fish.—The board of county commissioners may appoint commissioners to examine and lay off the rivers and creeks in their county; and where the stream is a boundary between two counties, may lay off the same on their side; in doing so they shall allow three-fourths for the owners of the streams for erecting slopes, dams and stands; and one-fourth part, including the deepest part, they shall leave open for the passage of fish, marking and designating the same in the best manner they can; and if mills are built across such stream, and slopes may be necessary, so as to cause the stream to return to its former channel. (Rev., s. 5297; Code, s. 3710; R. C., c. 100, s. 5; 1787, c. 272, s. 1; C. S. 7367.)

Cross Reference.—As to obstructing passage of fish in streams, see §§ 113-251, 113-252 and 113-299. As to erecting artificial islands or lumps in public waters, see § 14-123. As to injuries to dams and water channels of mills and factories, see § 14-142. See annotations to § 77-4.


§ 77-4. Gates and slopes on milldams.—The commissioners appointed by the board of county commissioners to examine and lay off the rivers and creeks within the county, where the stream is a boundary between counties, shall have power to lay off gates, with slopes attached thereto, upon any milldam built across such stream, of such dimensions and construction as shall be sufficient for the convenient passage of floating logs and other timber, in cases where it may be deemed necessary by the said board of county commissioners; and they shall return to the board of county commissioners appointing them a plan of such gates, slopes, and dams in writing. (Rev., s. 5302; Code, s. 3712; 1855-9, c. 26, s. 1; C. S. 7368.)

Only Applicable to Floatable Streams.—It would seem that the sections were passed with reference only with reference to floatable streams because without condemnation the commissioners would have no right to enter upon and clean out beds of streams which were not natural highways. Commissioners v. Catawba Lumber Co., 116 N. C. 731, 744, 21 S. E. 941.

Dams Built under Permit.—Authority over streams, conferred upon county commissioners while it stands and is unimpeached by allegations of fraud or other illegal conduct, is a bar to the remedy by injunction. Therefore, a defendant will not be restrained from erecting a dam across a stream, when he is proceeding under the permit and direction of the commissioners. McLaughlin v. Hope Mfg. Co., 103 N. C. 100, 9 S. E. 307.


§ 77-5. Owner to maintain gate and slope.—Upon the confirmation of the report made by the commissioners, and notice thereof given to the owner or keeper of said mill, it shall be his duty forthwith to construct, and thereafter to keep and maintain, at his expense, such gate and slope, for the use of persons floating logs and other timber as aforesaid, so long as said dam shall be kept up, or until otherwise ordered by the board of county commissioners. (Rev., s. 5303; Code, s. 3713; 1855-9, c. 26, s. 2; C. S. 7369.)

§ 77-6. Gates and slopes discontinued.—The commissioners appointed as aforesaid, at any time that they may deem such gate and slope no longer necessary, may report the fact to their respective boards of county commissioners, and said boards of county commissioners may order the same to be discontinued. (Rev., s. 5304; Code, s. 3714; 1855-9, c. 26, s. 3; C. E. 7370.)

§ 77-7. Failure of owner of dam to keep gates, etc.—If any owner or keeper of a mill, whose dam is across any stream, shall fail to build a gate and slope therein, or thereafter to keep and maintain the same as required by commissioners to lay off rivers and creeks, he shall be guilty of a misdemeanor. (Rev., s. 3383; Code, s. 3715; 1855-9, c. 26, s. 4; C. S. 7371.)

§ 77-8. Repairing breaks.—Wherever any stream of water which is used to propel machinery shall be by freshet or otherwise diverted from its usual channel so as to impair its power as used by any person, such person shall have power to repair the banks of such stream at the place where the break occurs, so as to cause the stream to return to its former channel. (Rev., s. 5305; Code, s. 3716; 1855-9, c. 26, s. 1; C. S. 7372.)

§ 77-9. Entry upon lands of another to make repairs.—In case the break occurs on the lands of a different person from the one utilizing the stream, the person utilizing the stream shall have power to enter upon the lands of such other person to repair the same, and in case such person objects, the clerk of the superior court of the county in which the break occurs shall, upon application of the party utilizing the stream, appoint three disinterested freeholders, neither of whom shall be related to either party, who after being duly sworn shall lay off a road if necessary by which said person may pass over the lands of such other person to the break and repair said break from time to time as often as may be necessary, so as to cause the stream to [743]
§ 77-10. Draws in bridges. — Whenever the navigation of any river or creek which, in the strict construction of law, might not be considered a navigable stream, shall be obstructed by any bridge across said stream, it shall be lawful for any person owning any boat plying on said stream to make a draw in such bridge sufficient for the passage of such boat; and the party owning such boat shall construct and maintain such draw at his own expense, and shall use the same in such manner as to delay travel as little as possible. (Rev., s. 5306; Code, s. 3717; 1879, c. 53, s. 2; C. S. 7373.)

§ 77-11. Public landings. — The board of county commissioners may establish public landings on any navigable stream or watercourse in the county upon petition in writing. Unless it shall appear to the board that the person owning the lands sought to be used for a public landing shall have had twenty days’ notice of the intention to file such petition, the same shall be filed in the office of the clerk of the board until the succeeding meeting of the board, and notice thereof shall be posted during the same period at the court house door. At said meeting of the board, the allegations of the petition shall be heard, and if sufficient reason be shown, the board shall order the establishment of the public landing. The board is authorized to enter upon any land and locate a public landing after service of notice on the landowner that a landing is to be established under the authority of this section. If the board and landowner cannot agree on the damages, if any, the board shall, on the expiration of sixty days from the completion of the landing, cause to be summoned three disinterested freeholders of the county, who shall go upon the land and assess the damages and benefits according to the general law. All damages assessed shall be a county charge. In assessing damages, the jury shall take into consideration any special benefit accruing to the landowner, and if such benefits exceed the damages, the amount of such excess of benefits shall be assessed against the landowner and constitute a lien on the land adjoining the landing, and shall be collected in the same manner as county taxes. The board shall order how the costs shall be paid.

No suit shall be instituted by a landowner for damages for the location of the landing earlier than sixty days, nor later than six months, after the completion of the landing. Either party may appeal to the Superior Court for the assessment of damages and benefits, where the matter shall be heard de novo by the court and jury. No cost shall be awarded against the county upon appeals where the recovery awarded on appeal is not more favorable to the appellant than the award of the referees. All places heretofore established as public landings shall remain such. (Rev., ss. 2684, 2685, 5308; Code, ss. 2038, 2040, 2092; R. C. 60, s. 1; c. 101, ss. 2, 4; 1784, c. 206, s. 4; 1769, c. 179, s. 2; and “whereby” replaced for, s. 1; 1822, c. 1139, s. 2; 1869, c. 20, s. 8, sub-sec. 29; 1873-5, c. 189, s. 3; 1879, c. 82, s. 9; 1917, c. 284, ss. 33; 1919, c. 68; C. S. 3667, 3762, 3763, 7375.)

Part 2. Obstructions in Streams.

§ 77-12. Obstructing passage of boats. — If any person shall obstruct the free passage of boats along any river or creek, by felling trees, or by any other means whatever, he shall be guilty of a misdemeanor. (Rev. s. 3561; Code, s. 3711; R. C., 100, s. 6; 1796, c. 460, s. 2; C. S. 7376.)


§ 77-13. Obstructing streams a misdemeanor. — If any person shall willfully fell any tree, or willfully put any obstruction, except for the purposes of utilizing water as a motive power, in any branch, creek, or other natural passage for water, whereby the natural flow of water through such passage is lessened or retarded, and where the navigation of such stream by any raft or flat may be impeded, delayed, or prevented, the person so offending shall be guilty of a misdemeanor, and fined not to exceed fifty dollars, or imprisoned not to exceed thirty days. Nothing in this section shall prevent the erection of fish dams or hedges which do not extend across more than two-thirds of the width of any stream where erected, but if extending over more than two-thirds of the width of any stream, the said penalties shall attach. (Rev., s. 3559; Code, s. 1123; 1872-3, c. 107, ss. 1, 2; C. S. 7377.)

Motive Power Defined.—Water used in “sluicing” is not used as a “motive power” within the meaning of this section. The section has obvious reference to the use of the energies of water dammed, as a moving force, and not to the operation of the current in motion. State v. Duplin Canal Co., 91 N. C. 637.

Applicable Only to Navigable Streams.—The word “and” being a part of the sentence “... and whereby it is provided that every obstruction of a stream, no matter how insignificant, private, or removed from public access or use, shall be indictable and subject the offender to fine and imprisonment.” It cannot be supposed that an intelligent Legislature meant that every obstruction of a stream, no matter how insignificant or trivial, might not be an offense under this section. State v. Pool, 74 N. C. 402.

Applicable Though Stream is Private Property.—The best of a lake or water course may be private property, but if the waters are navigable in their natural state the public have an easement of navigation in them, which easement the owner cannot divest himself of by judicial construction. State v. Pool, 74 N. C. 402.

When Malice Must Be Shown. — In an action wherein actual damages were claimed, with punitive damages, for damming a navigable stream, made a misdemeanor by this section, it was held that to recover punitive damages it was insufficient to show merely that the stream was obstructed to plaintiff’s damage, it being necessary to prove, in such cases, a special and fraudulent wanton disregard of plaintiff’s rights, or other circumstances of recklessness or aggravation. Warren v. Coharie lumber Co., 154 N. C. 34, 59 S. E. 685.

Indictment.—The indictment under this section must charge that the obstruction was not “for the purpose of utilizing.” Such a charge is not necessary in an indictment for “obstructing, at common law.” State v. Narrows Island Club, 100 N. C. 477, 5 S. E. 411.

Same—Compared with Common Law Rule.—At common law it was an offense to obstruct any navigable stream, but...
Chapter 78. Securities Law.

Sec.
78-13. Register of qualified securities.
78-15. Examination and examiners.
78-16. Complaints, investigations, findings of facts.
78-17. Certain information and records open to inspection by public.
78-18. Appeals.
78-19. Dealers and salesmen; registration.
78-20. Assistants, clerks, etc., employment of.
78-21. Fee paid into State Treasury; expenses of administration.
78-22. Remedies.
78-23. Violation of chapter; punishment.
78-24. Foreign corporations to name process officer within State.

Sec. 78-1. Title.—This chapter may be cited and shall be known as the “Securities Law” of the State of North Carolina. (1925, c. 190, s. 1; 1927, c. 149, s. 1; 1943, c. 104, s. 1.)

I. Generally.
II. Note to Section 6363, Consolidated Statutes.
III. Note to Section 6367, Consolidated Statutes.
IV. Note to Section 6371, Consolidated Statutes.

I. GENERALLY

Editor’s Note.—An article discussing the history of blue sky laws and summarizing the various statues will be found in 3 N. C. Law Rev. 150 et seq. The North Carolina cases are also discussed.

The Act of 1927 repealed the law of 1925 and substituted the following provisions therefor. See Durham Citizens Hotel Corp. v. Dennis, 195 N. C. 420, 422, 142 S. E. 578. The amendment substituted the words “Securities Law” for the words “Capital Issues Law.” The annotations set forth herein include cases decided under the present statute—placed under the analysis line “I. Generally”—and cases decided under §§ 6363 to 6375, Consolidated Statutes, prior to their repeal by Public Laws 1925, c. 190 and Public Laws 1927, c. 149, s. 26—placed under appropriate analysis lines. Said §§ 6363 to 6375 pertain to similar subject matter and it is believed the decisions construing those provisions will be of value in considering the present chapter.

This Regulation Is within Police Power.—The regulation of the sale of securities for the protection of the public is within the police power of the state. State v. Allen, 216 N. C. 621, 5 S. E. (2d) 844.

Application of Chapter.—This chapter applies where money is invested in stock, bonds, debentures, or the like, issued by corporations or individuals for the purpose of purchasing the water of a river or lake as a source of power. State v. Carrington, 216 N. C. 614, 199 S. E. 324. Similar provisions have been enacted in other states under the term “blue sky laws.”

II. NOTE TO SECTION 6363, CONSOLIDATED STATUTES.

Constitutionality.—It is within the police powers of a state to pass a statute for the protection of its citizens against the sale to them of worthless shares of stock in speculative companies in the exercise of a reserved power in the state from that granted to the general government, and does not contravene either the State or Federal Constitution. State v. Fidelity, etc., Co., 191 N. C. 634, 132 S. E. 792.

The purpose is to protect the general public from “wild cat” organizers, promoters and their agents, whether foreign or domestic, preying upon an unsuspecting and confiding public by selling “blue sky stock,” without obtaining license and giving bond. Id.

“The laws of Massachusetts on the subject have been copied with few exceptions throughout the country. This class of legislation has come to be known as the ‘Blue Sky Laws.’ The object, of course, of the ‘Blue Sky Laws’ is not only to keep worthless stock off the market but to make actual values and par values correspond. Thus, if the par value of a share of stock is one hundred dollars, the part of the assets of the corporation represented by a share of stock must be worth one hundred dollars.” 1 N. C. Law Rev. 27.

Scope of Section.—It is an “investment company” offering to the public an investment in lands and timber in Georgia. It is also offering the “obligation of said corporation” to cultivate said land, and giving its contract to make title in compliance with certain terms; and, lastly, it is offering for sale, such “evidences of property.” Under all three of these provisions it is within the scope of this section.

State v. Agey, 171 N. C. 831, 833, 88 S. E. 726.

Limitations of Suit.—Contracts of indemnity against loss, or surety bonds, for the faithful performance of a building contract are regarded in the nature of contracts of insurance coming under the provisions of this section and any conflicting restriction in such contract as to the time of bringing an action to recover damages for the breach of the contract is void. Guilford Lumber Mfg. Co. v. Johnson, 177 N. C. 44, 45, 97 S. E. 732.

Process and Service.—This section does not require service of process in any county in which the corporation resides. State v. Agey, 174 N. C. 694, 696, 678, 94 S. E. 414.

Agent’s Liability for Violation.—The failure or refusal of the corporation to comply with the requirements of our statute to obtain license makes the defendant, its agent, guilty of the offense charged. State v. Agey, 171 N. C. 831, 833, 88 S. E. 726.

One who sells certificates of shares of stock in a corporation upon a commission basis without having obtained a license to do so, comes within the inhibition of this statute, though the sale may have been effected by another acting through such solicitor without compensation. Burlington Hotel Corp. v. Bell, 192 N. C. 630, 631, 135 S. E. 616.

Enforcement of Contract.—Where a subscription contract for purchase of shares of stock in a corporation was procured by one who has not obtained a license from the In-
surance Commissioner, the contract is not enforceable against such corporation or organization. Burlington Hotel Corp. v. Bell, 192 N. C. 630, 621, 135 S. E. 616.

Contracts To Be Executed Out of State.—Where a foreign corporation has issued a bond indemnifying a North Carolina concern against loss under a contract with an agency, located in another State, established to collect moneys, etc., for insurance premiums, which bond was delivered to the agent to be sent to the indemnified here for approval and acceptance, the contract of indemnity is to be construed and enforced in accordance with our own laws. Dixie Fire Ins. Co. v. American Bonding Co., 162 N. C. 384, 385, 78 S. E. 430.

Domestic Corporations.—This section applies to sales of stock in a domestic corporation as well as a foreign one, irrespective of whether the same was either fraudulently procured or falls within the intent and meaning of the “Blue-Sky” law. Burlington Hotel Corp. v. Bell, 192 N. C. 630, 135 S. E. 616.

Notes given for the purchase of shares of stock in a corporation being organized are not void for noncompliance with the provisions of sections 6363 and 6367, when the shares were not put upon the market by agents, or commissions paid to anyone for procuring subscriptions therefor, Burlington Hotel Corporation v. Bell, 192 N. C. 630, 135 S. E. 616, cited and distinguished. Durham Citizens Hotel Corp. v. Dennis, 195 N. C. 430, 147 S. E. 578. Cited in Hotel Corporation v. Dixon, 196 N. C. 265, 145 S. E. 244.

III. NOTE TO SECTION 6367, CONSOLIDATED STATUTES.

Fraudulent Representations.—If the agent selling the stock represents to the plaintiff that certain parties would devote their time to the business, and that the statute has been complied with, and that the stock would not be sold below a certain price, such representation if false within the knowledge of the defendant constitutes actionable fraud. McNair v. Southern States Finance Co., 191 N. C. 710, 133 S. E. 88.

Knowledge of the Plaintiff.—When plaintiff did not know, and was not in a position to know of the falsity of the representations as made to him the parties will not be considered in pari delicto. McNair v. Southern States Finance Co., 191 N. C. 710, 133 S. E. 85.

Recovery of Damages.—A purchaser of shares of stock may recover damages upon the false representations of the seller that all of the provisions of the Blue-Sky Law, this section, had been complied with, with the burden of proof on the purchaser, the plaintiff in the action, to show his damages arising therefrom. McNair v. Southern States Finance Co., 191 N. C. 710, 711, 133 S. E. 85.

Domestic Corporations.—This law was at first applied only to foreign corporations but by chapter 121, Public Laws 1919, it was made to apply as well to domestic corporations. The law appears in toto in 6363-6375, and the provision which in itself is known as the “Blue-Sky” law, is section 6307-3 N. C. Law Rev. 151.

The requirements of this section as to soliciting the purchase of shares of stock in a certain corporation in accordance with certain conditions, applies by statutory amendment of 1919, not only to corporations formed in other states, but also to domestic corporations. Seminole Phosphate Co. v. Johnson, 188 N. C. 419, 124 S. E. 859. See also Burlington Hotel Corp. v. Bell, 192 N. C. 630, 135 S. E. 616.

Notes Given for Stock.—Where a negotiable note is given for shares of stock in a corporation, solicited in violation of the Blue-Sky Law, the note is voidable against a holder who has notice of the illegality or fraud in the procurement of the instrument. Planters Bank, etc. Co. v. Felton, 188 N. C. 384, 124 S. E. 849.

IV. NOTE TO SECTION 6372, CONSOLIDATED STATUTES.

Liability for Principal’s Act.—The State has a right to require evidence of good faith, of assets, and of responsibility from nonresident parties offering to sell to our people “investments” or “evidences of property” on contracts. An agent of a company who fails to do this, in defiance of our laws, is properly found guilty. State v. Agey, 171 N. C. 831, 836, 88 S. E. 726.

§ 78-2. Definitions.—

(a) The term “person” shall mean and include a natural person, firm, partnership, association, syndicate, joint-stock company, unincorporated company or organization, trust, incorporated or unincorporated, and any corporation organized under the laws of the District of Columbia, or of any state or territory of the United States, or of any foreign government. As used herein, the term “trust” shall be deemed to include a trust created and administered for the benefit of a person, trust, estate, or any other thing, and the term “investment” or “evidences of property” on contracts. An investment contract, or beneficial interest in or transfers either the ownership of or an interest in a security. Any security given or delivered with or as a bonus on account of any purchase of securities, or of any other thing shall be deemed to constitute a part of the subject of such purchase and to have been sold for value. “Sale,” or “sell” shall also include an attempt to sell, an option of a purchase or sale, a solicitation of a sale, a subscription, or an offer to sell, either directly or by agent, or by a circular letter, advertisement, or otherwise; but nothing herein shall limit or diminish the full meaning of the term “sell” or “sale” as used by or accepted in courts of law or equity. Provided, that a privilege pertaining to a security giving the holder the privilege to convert such security into another security of the same issuer shall not be deemed a sale, or offer to sell, or option of sale of such other security within the meaning of this definition and such privilege shall not be construed as affecting the status of the security to which such privilege pertains with respect to exemption or registration under the provisions of this chapter, but when such privilege of conversion shall be exercised such conversion shall be subject to the limitations hereinafter provided in subsection (8) of § 78-4; and provided further, that the issue or transfer of a right pertaining to a security entitling the holder to subscribe to have been sold for value. “Sale,” or “sell” shall also include an attempt to sell, an option of a purchase or sale, a solicitation of a sale, a subscription, or an offer to sell, either directly or by agent, or by a circular letter, advertisement, or otherwise; but nothing herein shall limit or diminish the full meaning of the term “sell” or “sale” as used by or accepted in courts of law or equity. Provided, that a privilege pertaining to a security giving the holder the privilege to convert such security into another security of the same issuer shall not be deemed a sale, or offer to sell, or option of sale of such other security within the meaning of this definition and such privilege shall not be construed as affecting the status of the security to which such privilege pertains with respect to exemption or registration under the pro-
visions of this chapter; but the sale of such other security upon the exercise of such right shall be subject to the provisions of this chapter.

(d) The term "issuer" shall include every person who proposes to issue or who issues or who has issued or shall hereafter issue any security (sold or to be sold, offered or to be offered for sale).

(e) The term "intangible assets" shall mean and include patents, formulae, good will, promotions, trade brands, franchises, evidences of indebtedness or corporate securities, titles or rights in and to intangible property, and all other like assets.

(f) "Tangible assets" shall mean all assets other intangible assets, as above defined.

(g) "Mortgage" shall be deemed to include a deed of trust to secure a debt. (1925, c. 190, s. 3; 1927, c. 149, s. 2; 1933, c. 433; 1943, c. 104, ss. 2, 3.)

Editor's Note.—The enforcement and administration of this chapter was formerly intrusted both under Public Laws 1925, c. 190, s. 2, and Public Laws 1927, c. 194, s. 8, to the secretary of state upon the filing of a schedule of the securities so listed; or evidences of indebtedness guaranteed by companies any stock of which is so listed, if the corporation, or equipment securities where the ownership of any of the securities herein above in this chapter.

§ 78-3. Exempted securities.—Except as hereinafter provided, the provisions of this chapter shall not apply to any security which, at the time of sale thereof, is within any of the following classes of securities:

(a) Any security issued or guaranteed by the United States or by any territory or insular possession thereof, or by the District of Columbia, or by any state or municipal corporation or political subdivision or agency thereof.

(b) Any security issued or guaranteed by any foreign government, or by any state, province or political subdivision thereof, having the power of taxation or assessment, with which the United States is maintaining diplomatic relations and which security is recognized at the time it is offered for sale in this State as a valid obligation for its face value by such foreign government, or by the State, province or political subdivision thereof issuing same.

(c) Any security issued by a national bank, or by any Federal Land Bank, or joint-stock land bank, or national farm loan association under the provisions of the Federal Farm Loan Act of July seventeen, nineteen hundred and sixteen, or any amendments thereof, or by the War Finance Cor-

poration, or by any corporation created or acting as an instrumentality of the government of the United States pursuant to authority granted by the Congress of the United States, provided, that such corporation is subject to supervision or regulation by the government of the United States.

(d) Any security issued or guaranteed as to principal, interest, or dividend, by a corporation, domestic, or foreign, owning or operating a railroad, or any other public service utility; Provided, that such corporation is subject to regulation or supervision, either as to its rates or charges or as to the issue of its own securities by a public commission, board or officer, or by any governmental, legislative or regulatory body of this State, or of the United States, or of any State, territory or insular possession thereof, or of the District of Columbia, or of the Dominion of Canada, or any province thereof, or by any public service or public utility corporation, or by any public service or public utility corporation, or by any public service or public utility corporation, or by any public service or public utility corporation, or by any public service or public utility corporation.

(e) Securities appearing in any list of securities dealt in or any organized stock exchange having an established meeting place in a city of over five hundred thousand population according to the last preceding United States census and providing facilities for the use of its members in the purchase and sale of securities listed by such exchange and on which exchange actual transactions have accrued during each of the preceding twenty years in the purchase and sale of United States bonds, or other bonds of any of the classes exempted herein from the provisions of this chapter, and which require financial statements to be submitted at the time of listing and annually thereafter; or on any other recognized and responsible stock exchange which has been previously investigated and approved by the secretary of state and which securities have been so listed pursuant to official authorization by such exchange, and also all securities senior to any securities so listed, or represented by subscription rights which have been so listed; or evidences of indebtedness guaranteed by companies any stock of which is so listed, if the company whose securities are guaranteed is a subsidiary of the guaranteeing corporation and controlled by lease or ownership of stock, such securities to be exempt only so long as such listing shall remain in effect: Provided, however, that the secretary of state may at any time withdraw his [247]
approval of any security so listed on any stock exchange in a city of five hundred thousand population as above defined, or any other approved stock exchange, and thereafter such security shall not be entitled to the benefit of this exemption, except upon further order of the secretary of state.

(i) Any security issued by, and representing an interest in, or a direct contract obligation of a bank, trust company or savings institution, which bank, trust company or savings institution is incorporated under the laws of, and subject to the examination, supervision and control of the United States, or of any state or territory of the United States, or of any insular possession thereof: Provided, this section shall not apply to any security based upon mortgages on real estate nor to saving institutions and trust companies not approved by the commissioner of banks of the State of North Carolina.

(g) Negotiable promissory notes or commercial paper if such issue of negotiable notes or commercial paper mature in not more than fifteen months from the date of issue and shall be issued within three months after date of sale.

(h) Securities issued by building and loan associations incorporated under the laws of the State of North Carolina.

(i) Securities issued by insurance companies in North Carolina, subject to State supervision.

(j) Securities issued by any corporation organized not for pecuniary profit or organized exclusively for educational, benevolent, fraternal, charitable or reformatory purposes.

(k) Securities evidencing indebtedness due under any contract made in pursuance to the provisions of any statute of any State of the United States providing for the acquisition of personal property under conditional sale contract.

(l) Bonds or notes secured by lien on vessels shown by policies of marine insurance taken out in responsible companies to be of value, after deducting any and all other indebtedness secured by prior lien, of not less than one hundred and twenty-five (125%) per cent of the par amount of such bonds or notes.

(m) Any security other than common stock outstanding and in the hands of the public for a period of not less than five years upon which no default in payment of principal, interest or dividend exists and upon which no such default has occurred for a continuous immediately preceding period of five years.

(n) Any security which, under the laws of this State, is a legal investment for savings banks of trust funds.

(o) Securities issued by a domestic corporation, partnership, association, company, syndicate or trust owning a property, business or industry which has been in continuous operation for not less than three years prior thereto, and which has shown during a period of not less than two years nor more than five years prior to the close of its last fiscal year preceding the offering of such securities average annual net earnings, after deducting all prior charges, not including the charges or prior securities to be retired out of the proceeds of such sale, as follows:

(1) In the case of interest bearing securities, not less than one and one-half times the annual interest charges thereon and upon all other outstanding interest-bearing obligations of equal rank.

(2) In the case of preferred stock not less than one and one-half times the annual dividend requirements on the total of the preferred stock and on all other outstanding stock of equal rank.

(3) In the case of common stock with par value not less than six per cent upon all outstanding common stock of equal rank, or in the case of common stock without par value, not less than six per cent upon the amount charged to capital by reason of the issuance thereof: Provided, the tangible assets of such corporation, partnership, association, company, syndicate, or trust (not including any intangible assets), together with the proceeds of the sale of such securities accruing to the issuer, shall equal or exceed:

(1) In the case of evidence of indebtedness, one hundred twenty-five per centum of the par value of such evidence of indebtedness, and all other obligations of equal rank then outstanding and not to be retired out of the proceeds of the sale of such evidence of indebtedness.

(2) In the case of interest bearing securities, one hundred twenty-five per centum of the par value of the aggregate amount of all outstanding preferred stock of equal and prior rank and the stock then offered for sale, after the deduction from such assets of all indebtedness which will be existing and of the par value of all stock of senior rank which will be outstanding after the application of the proceeds of the preferred stock offered for sale.

(3) In the case of common stock one hundred per centum of the aggregate of all outstanding stock of equal rank and the stock then offered for sale, reckoned at the price at which such stock is offered for sale or sold after the deduction from such assets of all indebtedness which will be existing and of the par value of all stock of senior rank which will be outstanding after the application of the proceeds of the common stock offered for sale: Provided, however, that in the case of preferred or common stock, without par value, computation hereunder shall be made upon the basis of the amount charged to capital by reason of the issuance thereof, instead of upon the basis of par value.

§ 78-4. Transactions exempted from operation of this chapter.—Except as hereinafter provided, the provisions of this chapter shall not apply to the sale or the offering for sale of any security in any of the following transactions, viz.:

(1) At any judicial, executor's, administrator's, or guardian's sale, or at any sale by a receiver or trustee in insolvency or bankruptcy.

(2) By or for the account of any pledgeholder or mortgagee, selling or offering for sale, in the ordinary course of business, to liquidate a bona fide debt, a security pledged in good faith as security for such debt.

(3) In an isolated transaction in which any security is sold or offered for sale by the owner thereof, or by his representative for the owner's account in the usual and ordinary course of business and not for the direct or indirect promotion of any scheme or enterprise within the purview of this chapter, and when such sale or offer for sale
§ 78-5. Burden of proof as to such transactions.—It shall not be necessary to negative any of the aforesaid exemptions in any complaint, information, indictment or proceeding laid or brought under this chapter in either a court of law or equity, or before the secretary of state, in either a civil or a criminal action or suit. The sale, unless the transaction is exempted from the operation of this chapter, of any security not exempt from the provisions of this chapter, of any security not exempt from the provisions of this chapter as hereinbefore provided and not admitted to the record and recorded as hereinafter provided, shall be prima facie evidence of the violation of this chapter and the burden of proof of any such exemption shall be upon the party claiming the benefit thereof. (1925, c. 190, s. 5; 1927, c. 149, s. 5.)

§ 78-6. Registration of securities.—No securities except of a class exempt under any of the provisions of § 78-3 or unless sold in any transaction exempt under any of the provisions of § 78-4 shall be sold within this State unless such securities shall have been registered by notification or by qualification as hereinafter defined. Registration of stock shall be deemed to include the registration of rights to subscribe to such stock if the notice under § 78-7 or the application under § 78-8 for registration of such stock includes a statement that such rights are to be issued. (1925, c. 190, s. 6; 1927, c. 149, s. 6.)

§ 78-7. Advertisement of securities.—It shall be unlawful hereafter:  
(1) To advertise in this State, through or by means of any prospectus, circular, price list, letter, order blank, newspaper, periodical or otherwise, or  
(2) To circulate or publish any newspaper, periodical or either written or printed matter in which any advertisement in this section specified shall appear, or  
(3) To circulate any prospectus, price list, order blanks, or other matter for the purpose of inducing or securing any subscriptions to or sale of any security or securities not exempted under any of the provisions of § 78-3, and not sold or to be sold in one of the transactions exempted under the provisions of § 78-4 and except as provided in § 78-8, unless and until the requirements of § 78-6 have been fully complied with and such advertising matter has been filed and approved by the secretary of state. (1925, c. 190, s. 7; 1927, c. 149, s. 7.)

§ 78-8. Registration by notification.—The following classes of securities shall be entitled to registration by notification in the manner provided in this section:
(1) Securities issued by a corporation, partnership, association, company, syndicate or trust owning a property, business or industry which has been in continuous operation not less than three years, and which has shown during a period of not less than two years, nor more than five years, next prior to the close of its last fiscal year preceding the offering of such securities, average annual net earnings, after deducting all prior charges not including the charges upon securities to be retired out of the proceeds of sale, as follows:

(a) In the case of interest bearing securities, not less than one and one-half times the annual interest charge thereon and upon all other outstanding interest bearing obligations of equal rank.

(b) In the case of preferred stock, not less than one and one-half times the annual dividend requirements on such preferred stock and on all other outstanding stock of equal rank.

(c) In the case of common stock not less than five per centum upon all outstanding common stock of equal rank, together with the amount of common stock then offered for sale reckoned upon the price at which such stock is then offered for sale or sold. The ownership by a corporation, partnership, association, company, syndicate or trust or more than 50 per cent of the outstanding voting stock of a corporation shall be construed as the proportionate ownership of the property, business or industry of such corporation, and shall permit the inclusion of the earnings of such corporation, applicable to the payment of dividends upon the stock so owned in the earnings of the corporation, partnership, association, company, syndicate, or trust issuing the securities sought to be registered by notification.

(2) Any bond or notes secured by a first mortgage upon agricultural lands used and valuable for agricultural purposes (not including oil, gas or mining property or leases), or upon city, town or village real estate and when said mortgaged property is thereto, and when said mortgaged real estate or leaseholds, respectively, including any improvements appurtenant thereto, and when said mortgaged property is used principally to produce through rental a net annual income, after deducting operating expenses and taxes, or has a fair rental value, after deducting operating expenses and taxes, at least equal to the annual interest, plus not less than 3 per centum of the principal of said mortgage indebtedness.

(3) Bonds or notes secured by first lien on collateral pledged as security for such bonds or notes with a bank or trust company as trustee, which bank or trust company is incorporated under the laws of and subject to examination and supervision by the United States or by a state of the United States, which collateral shall consist of (a) a principal amount of first mortgage bonds or notes conforming to the requirements of any one or more of the provisions of subsection (2) of this section and/or (b) a principal amount of obligations secured as hereinafter in this subsection provided, and/or (c) a principal amount of obligations of the United States, and/or (d) cash, equal to not less than 100 per cent of the aggregate principal amount of all bonds or notes secured thereby. The portion of such collateral referred to in clause (b) shall consist of obligations secured by a first lien on a principal amount of first mortgage bonds or notes conforming to the requirements of subsection (2) of this section, and/or a principal amount of obligations of the United States and/or cash equal to not less than 100 per cent of the aggregate principal amount of such obligations so secured thereby, and all such pledged securities including cash so securing such securities shall have been deposited with a bank or trust company as trustee, which bank or trust company is incorporated under the laws of and subject to examination and supervision by the United States or by a state of the United States.

Securities entitled to registration by notification shall be registered by the filing by the issuer or by any registered dealer interested in the sale thereof in the office of the secretary of state as follows:

(a) Name of issuer.

(b) A brief description of the security including amount of the issue.

(c) Amount of securities to be offered in the State.

(d) A brief statement of the facts which show that the security falls within one of the classes in this section defined.

(e) The price at which the securities are to be offered for sale.

In the case of securities falling within the class defined by subsection (1), if the circular to be used for the public offering is not filed with the statement, then a copy of such circular shall be filed in the office of the secretary of state within two days thereafter, or within such further time as the secretary of state shall allow.

In the case of securities falling within the classes defined by subsections (2) and (3) the circular to be used for the public offering shall be filed with the statement.

The filing of such statement in the office of the secretary of state and the payment of the fee hereinafter provided shall constitute the registration of such security. Upon such registration, such securities equal to the amount so registered by notification may be sold in this State by any registered dealer by giving notice in the manner hereinafter provided in § 78-19, subject, however, to the further order of the secretary of state as hereinafter provided.
If, at any time, in the opinion of the secretary of state, the information contained in the statement or circular filed is misleading, incorrect, inadequate, or incomplete, or the sale or offering for sale of the security may work or tend to work a fraud or, in the opinion of the secretary of state, be contrary to good business practices, the secretary of state may require from the person filing such statement such further information as may, in his judgment, be necessary to establish the classification of such security as claimed in said statement, or to enable the secretary of state to ascertain whether the transfer of such security would be fraudulent, or would result in fraud, and the secretary of state may also suspend the right to sell such security pending further investigation by entering an order specifying the grounds for such action, and by notifying personally by mail, telephone or telegraph the person filing such statement and every registered dealer who shall have notified the secretary of state of an intention to sell such security. The refusal to furnish information required by the secretary of state, within a reasonable time to be fixed by the secretary of state, may be a proper ground for the entry of such order of suspension. Upon the entry of any such order of suspension no further sales of such security shall be made until the further order of the secretary of state, unless the person to be affected by such order shall file with the secretary of state a bond in a penalty to be fixed by him in some solvent surety company licensed in the State of North Carolina, to pay all such damages as might be sustained by any purchaser of such security, which bond shall be made payable to the State of North Carolina and sued upon by any person damaged by such sale.

In the event of the entry of such order of suspension the secretary of state shall upon request give a prompt hearing to the parties interested. If no hearing is requested within a period of twenty (20) days from the entry of such order, or if upon such hearing the secretary of state shall determine that any such security does not fall within a class entitled to registration under this section, or that the sale thereof would be fraudulent or would result in fraud, or that the continued sale of the same, is in his opinion contrary to good business practices, he shall enter a final order prohibiting sales of such security, with his findings with respect thereto: Provided, that if the finding with respect to such security is that it is not entitled to registration under this section, the applicant may apply for registration by qualification by complying with the requirements of § 78-9. Appeals from such final order may be taken as hereinafter provided. If, however, upon such hearing, the secretary of state shall find that the security is entitled to registration under this section, and that its sale will neither be fraudulent nor result in fraud, or that the continued sale thereof is not contrary to good business practices, he shall forthwith enter an order revoking such order of suspension and such security shall be restored to its status as a security registered under this section, as of the date of such order of suspension.

At the time of filing the statement, as hereinafter prescribed in this section, the applicant shall pay to the secretary of state a filing fee of ten dollars and a fee of one-twentieth of one per cent of the aggregate par value of the securities to be sold in this State for which the applicant is seeking registration, but in no case shall such latter fee be less than twenty-five dollars, and not exceeding one hundred and fifty dollars. In the case of stock having no par value, the fee paid at which such stock is to be offered to the public shall be deemed to be the par value of such stock.

§ 78-9. Registration by qualification.—All securities required by this chapter to be registered before being sold in this State, and not entitled to registration by notification, shall be registered only by qualification in the manner provided by this section.

The secretary of state shall receive and act upon applications to have securities registered by qualification and may prescribe forms on which he may require such applications to be submitted. Applications shall be in writing and shall be duly signed by the person applying and sworn to by a proper officer. No applications to have securities registered by qualification may be filed by the issuer of the securities for which registration is applied for by any registered dealer desiring to sell the same within this State.

The secretary of state may require the applicant to submit to the secretary of state the following information respecting the issuer and such other information as he may, in his judgment, deem necessary to enable him to ascertain whether such securities shall be registered pursuant to the provisions of this section:

(a) The names and addresses of directors, trustees and officers, if the issuer be a corporation or association or trust organized or existing under the common law (as hereinafter defined), of all partners, if the issuer be a partnership, and of the issuer if the issuer be an individual.

(b) The location of the issuer's principal business office and of its principal office in this State, if any, and if not, the name of its process officer within this State.

(c) The purposes of incorporation, (if incorporated) and the general character of the business actually to be transacted by the issuer, and the purpose of the proposed issue.

(d) A statement of the capitalization of the issuer; a balance sheet showing the amount and general character of its assets and liabilities on a day not more than sixty (60) days prior to the date of filing such balance sheet; a detailed statement of the plan upon which the issuer proposes to transact business; a copy of the security for the registration of which application is made; and a copy of all circulars, prospectuses, advertisements or other descriptions of such securities then prepared by or for such issuer, and/or by or for such applicant (if the applicant shall not be the issuer) to be used for distribution or publication in this State.

(e) A statement of the amount of the issuer's income, expenses, and fixed charges during the last fiscal year, or if in actual business less than one year, then for such time as the issuer has been in actual business.

(f) A statement showing the price at which such security is proposed to be sold, together with the maximum amount of commission or other form of remuneration to be paid in cash or otherwise, di-
directly or indirectly, for or in connection with the sale, or offering for sale, of such securities.

(g) A detailed statement showing the items of cash, property, services, patents, good will and any other consideration for which such securities have been or are to be issued in payment.

(h) The amount of capital stock which is to be set aside and disposed of as promotion stock, and a statement of all stock issued from time to time as promotion stock.

(i) If the issuer is a corporation, there shall be filed with the application a certified copy of its articles of incorporation with all amendments and of its existing by-laws, if not already on file in the office of the secretary of state of this State. If the issuer is a trustee there shall be filed with the application a copy of all instruments by which the trust is created or declared and in which it is accepted and acknowledged. If the issuer is a partnership or an unincorporated association, or joint stock company, or any other form of organization whatsoever, there shall be filed with the application a copy of its articles of partnership or association and all other papers pertaining to its organization, if not already on file in the office of the secretary of state of this State.

All of the statements, exhibits, and documents of every kind required by the secretary of state under this section, except properly certified public documents, shall be verified in such manner and form as may be required by the secretary of state.

With respect to securities required to be registered by qualification under the provisions of this section, the secretary of state may by order duly entered fix the maximum amount of commission or other form of remuneration to be paid in cash or otherwise directly or indirectly, for or in connection with the sale or offering for sale of such securities which shall in no case exceed ten per cent of the actual sale price of the security.

At the time of filing the information, as hereinbefore prescribed in this section, the applicant shall pay to the secretary of state a filing fee of twenty-five dollars and, upon the entry of an order for the registration of the securities, shall pay to the secretary of state a fee of one-tenth of one per cent of the aggregate par value of the securities to be sold in this State, for which the applicant is seeking registration, but in no case shall such fee exceed two hundred and fifty dollars. In case the filing fee be less than twenty-five dollars, and not exceeding two hundred and fifty dollars. In case of stock having no par value the price at which such stock is to be offered to the public shall be deemed to be the par value of such stock. (1927, c. 149, s. 9.)

§ 78-10. Consideration of application by secretary of state.

(1) As soon as practicable after the filing of an application, under § 78-9, the secretary of state shall examine the application, statements and documents so filed; and if he deems it advisable, may make or cause to be made such inspection, examination, audit and investigation of the business and affairs of the issuer as he may deem necessary or advisable, which said inspection, examinations, audit and investigation, shall be at the expense of the applicant. As a part of the aforesaid inspection, examination, audit and investigation, the secretary of state may, if he deems it necessary or advisable, cause an appraisal to be made of the property or assets of the issuer or parts thereof. Appraisals herein provided for may be made by three disinterested appraisers, and the secretary of state is authorized to nominate and appoint such appraisers, who shall be paid not more than twenty-five dollars per day and their actual expenses while so employed, which compensation and expenses shall be paid by the applicant. The secretary of state may require a bond sufficient to cover the expense of any such inspection, examination, audit or investigation as may be deemed necessary by the secretary of state in connection with the application before, or after the granting of such application for registration.

(2) The secretary of state shall make a complete report of the inspection, examination, etc., of the business and affairs of the applicant above provided for, which record shall include a copy of the appraisal aforesaid, provided such an appraisal be made. (1925, c. 190, s. 10; 1927, c. 149, s. 10.)
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§ 78-12. No representation to be made of endorsement.—No person, dealer, or agent shall represent any securities sold under the provisions of this chapter as being endorsed or recommended by the state of North Carolina or any officer thereof, nor shall he make any mention whatever of their being recorded or admitted to record in the state of North Carolina. (1925, c. 190, s. 11; 1927, c. 149, s. 11.)

§ 78-13. Register of qualified securities.—The secretary of state shall keep and maintain a permanent register of qualified securities and shall enter therein the names and amounts of all securities the privilege of offering which to the public in the State of North Carolina has been granted by the secretary of state, and the date thereof, and such other data as the secretary of state may deem proper. All securities admitted to record and recorded in such register shall be deemed, for the purpose of this chapter, to have been fully qualified for sale in the State of North Carolina and thereafter any person may lawfully sell or offer for sale any part of such issue as recorded; subject, however, to the provisions of this chapter. Such register shall be open to inspection;
§ 78-14. Report to secretary of state.—Every issuer whose securities have been admitted to record and recorded as herein provided, may be required during the offering of such securities to file within thirty days after the close of business on December thirty-first, March thirty-first, June thirtieth, and September thirtieth, of each year, and at such other times as may be required by the secretary of state, a statement, verified under oath by some person having actual knowledge of the facts therein stated, setting forth, in such form as may be prescribed by the secretary of state, the financial condition, the amount of assets and liabilities, of such issuer on the above dates and such other information as said secretary of state may require. It shall be unlawful for any issuer subject to the provisions of this chapter, who refuses or fails to comply with the provisions of this section, or for his agent or agents, to thereafter sell such securities in this State. (1925, c. 190, s. 14; 1927, c. 149, s. 14.)

§ 78-15. Examination and examiners. — The records and the business affairs of every company or person, whose securities have been admitted to record in the register of qualified securities shall be subject to examination and inspection by the secretary of state or upon his direction by his assistants, accountants, or examiners, at any time said secretary of state may deem it advisable; and such company or person shall pay a fee for each of such examinations of not to exceed twenty-five dollars ($25) for each day or fraction thereof, plus the actual traveling and hotel expenses of said secretary of state, his assistant, accountant or examiner, that he is absent from the capital of the State for the purpose of making such examination. (1925, c. 190, s. 15; 1927, c. 149, s. 15.)

§ 78-16. Complaints, investigations, findings of facts.—The secretary of state may, upon his own initiative or upon the complaint of any reasonable person, hold such public hearings or make or have made such special inspection, examination or investigation as he may deem necessary, in connection with the promotion, sale or disposal in this State of any security or securities, to determine whether the same constitutes a violation of law; and the said secretary of state, his assistant or deputy shall have power and authority:

1. To issue subpoenas and process compelling the attendance of any person and the production of any paper, records or books relating to any matter of which the secretary of state has jurisdiction under this article, and

2. To administer an oath to any person whose testimony may be required on such inspection, examination, or investigation. Upon the conclusion of any such hearing, inspection, examination or investigation the secretary of state may make findings of fact concerning the matter or matters investigated. Such findings of facts shall be admissible in evidence in any suit or action, at law or in equity, instituted under any of the laws of this State, and shall be prima facie evidence of the truth of the matters therein found by said secretary of state, and

3. To maintain by injunction or other remedy any action in any court of competent jurisdiction in this State for the purpose of enforcing this chapter, or making investigations. (1925, c. 190, s. 16; 1927, c. 149, s. 16.)

§ 78-17. Certain information and records open to inspection by public.—All information received by the secretary of state shall be kept open to public inspection at all reasonable hours, and the secretary of state shall supply to the public upon request copies of any papers on record with the secretary of state at charges equaling the cost of typing same; and the secretary of state shall have power and authority to place in a separate file, not open to the public except on his special order, any information which he deems in justice to the person filing the same should not be made public. An exemplification of the record under the hand of the secretary of state, or of his deputy, shall be good and sufficient evidence of any record made or entered by the secretary of state. A certificate under the hand of the department of state or his deputy or assistant and the seal of the department of state showing that the securities in question have not been recorded in the register of qualified securities, shall constitute prima facie evidence that such securities have not been qualified for sale pursuant to the provisions of this chapter, and shall be admissible in evidence in any proceeding, either civil or criminal, instituted under any of the laws or statutes of this State. (1925, c. 190, s. 17; 1927, c. 149, s. 17.)

§ 78-18. Appeal.—Any interested person being dissatisfied with any findings, rulings, or judgments of the secretary of state if final and made after a formal hearing elsewhere provided for in this chapter, may, within thirty days after the making and issuance thereof, appeal to the superior court. Any interested person aggrieved by any other order or the failure of the secretary of state to make an order under any of the provisions of this chapter shall, if a hearing is not otherwise provided for, upon written request to the secretary of state and within thirty days after the filing of such request, be entitled to a hearing. The secretary of state shall rule upon the subject matter of such hearing, and any interested person may, within thirty days after the making and issuance of his ruling or order, appeal to the superior court. In all cases of appeals from the secretary of state to the superior court, the record made before such secretary shall thereupon be certified to the superior court of the county in which such interested person may reside, or any county adjoining thereto in the discretion of said secretary of state and thereafter the parties may plead and conduct the proceedings as he shall be had as in other causes within the jurisdiction of said superior court, and after the issues shall have been determined by the court or jury, as the case may be, such judgment shall be rendered by the court as the findings may require. Appeals may be taken from the decision of the superior court to the supreme court by either party in the same manner as is provided by law in other civil cases, but the secretary of state may appeal without bond. Pending any such appeal, the said findings, rulings, orders and judgments of the secretary of state shall be prima facie evidence that they are just and reasonable and that the facts found and true, and shall remain in full force and effect, if no such suit be brought within said thirty days, said findings, [754]
ruling, order or judgment shall become final and binding. (1925, c. 190, s. 18; 1927, c. 149, s. 18.)

Cross Reference.—See Editor's Note under § 78-2.

§ 78-19. Dealers and salesmen; registration.—No dealer or salesman shall carry on business in the State of North Carolina as such dealer or salesman, or sell securities, including any securities exempted under the provisions of § 78-3, unless he has been registered as dealer or salesman in the office of the secretary of state pursuant to the provisions of this section. Every applicant for registration shall file in the office of the secretary of state, pursuant to the provisions of this section, an application in writing, duly signed and sworn to, in such form as the secretary of state may prescribe, giving particulars concerning the business reputation of the applicant. The secretary of state, in his discretion, may require that the applicant shall have been a bona fide resident of the State of North Carolina for a term not to exceed two years prior to the filing of the application. The names and addresses of all persons approved for registration as dealers or salesmen shall be recorded in a register of dealers and salesmen kept in the office of the secretary of state, which shall be open to public inspection. Every registration under this section shall expire on the thirty-first day of March in each year, but the same may be renewed. The fee for such registration and for each annual renewal thereof shall be fifty dollars in the case of dealers, and ten dollars in the case of salesmen. Registration may be refused or a registration granted may be cancelled by the secretary of state if, after reasonable notice and a hearing, the secretary of state determines that such applicant or dealer or salesman so registered (1) has violated any provision of this chapter or any regulation made hereunder; or (2) has made a material false statement in the application for registration; or (3) has been guilty of a fraudulent act in connection with any sale of securities in the State of North Carolina, or has been or is engaged in making fictitious or pretended sales or purchases of any such securities or has been engaged in any practice or transaction or course of business relating to the purchase or sale of securities which is fraudulent or in violation of law; or (4) has demonstrated his unworthiness to transact the business of dealer or salesman. It shall be sufficient cause for refusal or cancellation of registration in the case of a partnership, corporation or unincorporated association or trust estate has been guilty of any act or omission which would be cause for refusing or cancelling the registration of an individual dealer or salesman. The word "dealer" as used in this section shall include every person other than a salesman, who in the State of North Carolina engages, either for all or part of his time, directly or through an agent, in the business of offering for sale, selling or otherwise dealing in securities, including securities exempted under the provisions of § 78-3, or of purchasing or otherwise acquiring such securities from another person with the purpose of reselling them or of offering them for sale to the public for a commission or at a profit, or who deals in futures on market quotations of prices or values of any securities, or accepts margins on prices or values of said securities. The word "salesman," as used in this section shall include every person employed, appointed or authorized by another person to sell securities in any manner in the State of North Carolina. No person shall be registered as a salesman except upon the application of the person on whose behalf such salesman is to act. It shall be unlawful for any person required to register under the provisions of this section to sell any security to any person in the State of North Carolina without having registered, or after such registration has expired or been cancelled and not renewed.

Provided, however, that employees of a company, or of a company directly controlling such company, or the general agent of a domestic corporation, securities of which are exempted under the provisions of § 78-5, may sell or solicit or negotiate for the sale or purchase of any such securities of such company in the territory served by such company or in which it operates without being considered as salesmen or dealers within the meaning of this chapter and without being required to register under its provision.

The partners of a partnership and the executive officers of a corporation or other association registered as a dealer may act as salesmen during such time as such partnership, corporation or association is so registered without further registration as salesmen. Changes in registration occasioned by changes in the personnel of a partnership or in the principals, copartners, officers or directors of any dealer may be made from time to time by written application setting forth the facts with reference to such change.

Every registered dealer who intends to offer any security of any issue, registered or to be registered, shall notify the secretary of state in writing of his intention so to do. The notice shall contain the name of the dealer and shall state the name of the security to be offered for sale, and whenever a dealer shall have prepared such notice and shall have forwarded the same by registered mail, postage prepaid, and properly addressed to the secretary of state, such dealer, as to the content of such notice and filing thereof, shall be deemed to have complied with the requirements of this paragraph. Any issuer of a security required to be registered under the provisions of this chapter, selling such securities except in exempt transactions as defined in § 78-4, shall be deemed a dealer within the meaning of this section and required to comply with all the provisions hereof.

(1925, c. 190, s. 19; 1927, c. 149, s. 19.)

Cross Reference.—See Editor's Note under § 78-2.

§ 78-20. Assistants, clerks, etc., employment of.—It shall be the duty of the secretary of state to administer and enforce the provisions of this chapter, and he may appoint such clerks and other assistants as may from time to time be needed.

(1925, c. 190, s. 20; 1927, c. 149, s. 20.)

Cross Reference.—See Editor's Note under § 78-2.

§ 78-21. Fee paid into State Treasury; expenses of administration.—All fees herein provided for shall be collected by the secretary of state and shall be paid over to the State Treasurer to go into the general fund; as well as all fees, per diems, expenses, etc., of appraisers, assistants, and in-

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vestigators as herein provided, and all other expenses and fees required by this chapter. (1925, c. 190, s. 21; 1927, c. 149, s. 21.)

§ 78-22. Remedies. — Every sale or contract for sale made in violation of any of the provisions of this chapter shall be voidable at the election of the purchaser and the person making such sale or contract for sale and every director, officer or agent of or for such seller, if such director, officer or agent shall have participated or aided in any way in making such sale shall be jointly and severally liable to such purchaser in an action at law in any court of competent jurisdiction upon tender to the seller of the securities sold or of the contract made for the full amount paid by such purchaser: Provided, that no action shall be brought for the recovery of the purchase price after two years from the date of such sale or contract for sale; and provided further, that no purchaser otherwise entitled shall claim or have the benefit of this section who shall have refused or failed within sixty days to accept the voluntary offer of the seller to take back the security in question and to refund the full amount paid by such purchaser and court costs, together with interest on such amount for the period from the date of payment by such purchaser down to the date of repayment, such interest to be computed.

(a) In case such securities consist of interest-bearing obligations at the same rate as provided in § 78-19, has been cancelled by the secretary of state under § 78-8, or pending the filing of the bond which may be required under § 78-11, shall be deemed guilty of a violation of this chapter, shall suppress or withhold any information from the secretary of state which he possesses and which if submitted by him to the secretary of state would render such security incompetent to be registered by qualification under and pursuant to the terms of this chapter, shall be deemed guilty of a violation of this chapter, and upon conviction thereof shall be imprisoned in the State prison for not less than one, nor more than five years, or fined in any sum not more than one thousand dollars ($1,000), or both.

(b) Whoever sells or causes to be sold, or offers for sale or causes to be offered for sale, any security in this State after being notified by the secretary of state that the registration of such securities has been cancelled, shall be deemed guilty of a violation of this chapter, shall suppress or withhold any information from the secretary of state which he possesses and which if submitted by him to the secretary of state would render such security incompetent to be registered by qualification under and pursuant to the terms of this chapter, shall be deemed guilty of a violation of this chapter, and upon conviction thereof shall be imprisoned in the State prison for not less than one, nor more than five years, or fined in any sum not more than one thousand dollars ($1,000), or both.

(c) Whoever shall, for the purpose of selling any security in this State, fraudulently represent to the purchaser or prospective purchaser thereof the amount of dividends, interest or earnings which such security will yield, or the time when it will be paid or the money or property that will be received therefrom, shall deemed guilty of a violation of the provisions of this chapter and upon conviction thereof shall be imprisoned in the State prison for not less than one year nor more than five years, or fined in any sum not more than one thousand dollars ($1,000), or both.

(d) Whoever, for the purpose of securing the registration by qualification of any securities under this chapter, shall make any false representation concerning any material fact submitted to the secretary of state shall be deemed guilty of a violation of this chapter, and upon conviction thereof shall be imprisoned in the State prison for not less than one, nor more than five years, or fined in any sum not more than one thousand dollars ($1,000), or both.

(e) Whoever, for the purpose of procuring the registration by qualification of any security under this chapter, shall suppress or withhold any information from the secretary of state which he possesses and which if submitted by him to the secretary of state would render such security incompetent to be registered by qualification under and pursuant to the terms of this chapter, shall be deemed guilty of a violation of this chapter, and upon conviction thereof shall be imprisoned in the State prison for not less than one, nor more than five years, or fined in any sum not more than one thousand dollars ($1,000), or both.

(f) Whoever sells or causes to be sold, or offers for sale or causes to be offered for sale, any security in this State after having been notified by the secretary of state that the registration of such securities has been cancelled, shall be deemed guilty of a violation of this chapter, and upon conviction thereof shall be imprisoned in the State prison for not less than one, nor more than five years, or fined in any sum not more than one thousand dollars ($1,000), or both.

§ 78-23. Violation of chapter; punishment. —

(a) Whoever for the purpose of procuring the registration of any security by notification under this chapter, shall knowingly make or cause to be made any false representation of a material fact to the secretary of state shall be guilty of a felony, and, upon conviction thereof, shall be imprisoned in the State prison for not less than one year or more than five years or fined in any sum not more than one thousand dollars ($1,000), or both.

(b) Whoever shall sell or cause to be sold, or offer to sell or cause to be offered for sale, any security in this State, which is not exempt under any of the provisions of § 78-3, unless sold in any transaction exempt under any of the provisions of § 78-4, and which such securities so sold, or caused to be sold or so offered for sale or caused to be offered for sale, have been registered as provided in this chapter, shall be guilty of a violation of this chapter, and upon conviction thereof shall be imprisoned in the State prison for a period of not less than one, nor more than five years, or fined in any sum not more than one thousand dollars ($1,000), or both.

(c) Whoever shall, for the purpose of selling any security in this State, fraudulently represent to the purchaser or prospective purchaser thereof the amount of dividends, interest or earnings which such security will yield, shall be deemed guilty of a violation of the provisions of this chapter and upon conviction thereof shall be imprisoned in the State prison for not less than one year nor more than five years, or fined in any sum not more than one thousand dollars ($1,000), or both.

(d) Whoever for the purpose of procuring the registration of any dealer or agent under this
Chapter 79. Strays.

§ 79-1. Notice to owner of stray, or to register of deeds.

§ 79-2. Owner may reclaim.

§ 79-1. Notice to owner of stray, or to register of deeds.—Any person who shall take up any stray horse, mare, colt, mule, ass or jennet, neat cattle, hog or sheep, shall within ten days after taking up such stray inform the owner, if to him known, if not, he shall inform the register of deeds of the supposed age, marks, brands and color of the stray, and that the same was taken up at his plantation or place of abode; whereupon the register of deeds shall record such information in a book kept by him for that purpose, for which service the taker-up of the stray shall pay a fee of twenty-five cents, except for hogs and sheep, for which the fee shall be ten cents. The register of deeds shall at once publish a notice of the taking up of such stray, by posting the same at the courthouse door, and if the cost does not exceed two dollars, then in some newspaper published in the county. Such notices shall be published for thirty days, and shall contain a full and complete description of the stray and of all marks or brands on the same, and when and where the same was taken up. The fees for publishing such notices shall be paid by the party taking up the stray. (Rev., s. 2833; Code, s. 3768; 1874-5, c. 258, s. 2; C. S. 3981.)

Cross Reference.—As to license to look for strays upon the lands of another, see § 14-134.

§ 79-2. Owner may reclaim.—When any stray has been taken up, the owner may at any time, before a sale reclaim such stray by proving his ownership and paying to the party capturing the same the actual costs paid the register of deeds as provided in § 79-1, together with the actual costs of keeping such stray, as fixed by the county commissioners. The board of commissioners of the several counties shall fix a scale of costs for keeping strays. (Rev., s. 28-34; C. S. 3952.)

§ 79-3. When and how strays sold.—If the owner of any stray shall fail to claim the same within thirty days after the publication of the notice required by law, the person taking up the stray shall cause the stray to be appraised by the [757]
CHAPTER 80. TRADEMARKS, BRANDS, ETC.

nearest magistrate and two freeholders, none of whom shall receive any fees for such services. Such appraisement shall give a full and accurate description of such stray and shall by the magistrate be returned to the register of deeds, and by him recorded in his book for strays; and the register of deeds shall issue an order to the sheriff directing him to sell such stray, and the sheriff shall sell such stray at public auction after ten days public advertisement as for sales of personal property under execution; and out of the proceeds he shall pay the cost of publishing the notices as to strays, the costs of keeping and the cost of sale, and shall pay the surplus to the county treasurer for the benefit of the public school fund of the county. The county board of education shall, at any time within twelve months after such funds have been paid to the county treasurer, upon due proof of ownership, issue an order commanding the county treasurer to pay to the owner of the stray the net amount paid the county treasurer as the proceeds of the sale of the stray. (Rev., s. 2835; C. S. 3953.)

§ 79-4. Failure to comply with stray law misdemeanor.—If any person shall fail to comply with any of the requirements of law as to strays, he shall be guilty of a misdemeanor and upon conviction be fined not exceeding fifty dollars or imprisoned not exceeding thirty days. (Rev., s. 3306; C. S. 3954.)

Cross Reference.—As to fences and stock law, see §§ 68-1 et seq.

Chapter 80. Trademarks, Brands, etc.

Art. 1. Trademarks.

Sec.
80-1. Adoption and filing for registry.
80-2. Property rights protected by filing for registry.
80-3. Filing to be with secretary of state; contents of affidavits; fees.
80-4. Registration; certified copies evidence; fees.
80-5. Transfer of trademarks.
80-6. Similar trademarks refused registration.
80-7. Fraudulent registration; penalty.
80-8. Use of counterfeit trademarks unlawful.
80-9. Unauthorized use unlawful; use under license.
80-10. Remedies; damages; destruction of counterfeits.
80-12. Use of private marks or labels to defraud, punishment.
80-13. Selling goods with forged marks or labels, misdemeanor.
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Art. 2. Timber Marks.

80-15. Timber dealers may adopt.
80-17. Property in and use of trademarks.
80-18. Effect of branding timber purchased.
80-20. Fraudulent use of timber trademark, misdemeanor.
80-23. Possession of branded logs without consent, misdemeanor.

Art. 3. Mineral Waters and Beverages.

80-24. Description of name, labels, or marks filed and published.
80-25. Clerk to record description.
80-26. Refilling vessels and defacing marks forbidden; punishment.
80-27. Possession of vessels as evidence of offense.
80-29. Concurrent jurisdiction of superior courts and justices of the peace.
80-30. Accepting deposit not deemed sale.

Sec.
80-31. When refiling description not required.
80-32. Application of the article.

Art. 4. Farm Names.

80-33. Registration of farm names authorized.
80-34. After registry, similar name not registered.
80-35. Distinctive name required.
80-36. Application for registry; publication and hearing.
80-37. Fees for registration.
80-38. When transfer of farm carries name.

Art. 5. Stamping of Gold and Silver Articles.

80-40. Marking gold articles regulated.
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80-42. Marking articles of gold plate regulated.
80-43. Marking articles of silver plate regulated.
80-44. Violation of article misdemeanor.

Art. 6. Cattle Brands.

80-45. Owners of stock to register brand or marks.

Art. 7. Recording of Cattle Brands and Marks with Commissioner of Agriculture.

80-47. Stock growers limited to single mark or brand; registration not required; law compulsory upon registration.
80-48. Commissioner of agriculture named corder.
80-49. Recording with commissioner.
80-50. Application; effect of recording; fee; no duplication allowed.
80-51. Certified copy of mark or brand; registration; fees and disposition thereof.
80-52. Certified copy prima facie evidence of ownership.
80-53. Records to be kept by those engaged in slaughtering.
80-54. Purchaser of branded cattle to keep record of purchases.
80-55. Defacing marks or brands made misdemeanor.
80-56. Violation of article made misdemeanor.
§ 80-1. Adoption and filing for registry. — It shall be lawful for any person to adopt for his protection and file for registry, as in this chapter provided, any label, trademark, term or design that has been used or is intended to be used for the purpose of designating, making known or distinguishing any goods, wares, merchandise or products of labor that have been or may be wholly or partly made, manufactured, produced, prepared, packed or put on sale by any such person, or to or upon which any work or labor has been applied or expended by any such person, or by any member of any corporation, or association or union of workmen, that has adopted and filed for registry any such label, trademark, term or design, or announcing or indicating that the same have been made in whole or in part by any such person or corporation, or association or union of workmen, or by any member thereof.

The word "person" as used in this article includes associations or unions of workmen, whether incorporated or unincorporated. Any duly authorized officer or agent of any such association or union may act in its behalf in securing for the association or union the benefits and protection of this article. (Rev., s. 3012; 1903, c. 271; 1941, c. 255, s. 1; C. S. 3971.)

Editor's Note.—The 1941 amendment inserted the words "or association or union of workmen" in the first paragraph and added the second paragraph. It is deemed expedient at this point to quote at length from the opinion of the court delivered by Mr. Justice Bynum in Blackwell v. Wright, 73 N. C. 310, 312. The learned Justice lays down the theory upon which is based the law dealing with trade-marks, brands, etc. His theory is, in part, as follows:

"Every manufacturer has the unquestionable right to distinguish the goods that he manufactures and sells by a peculiar mark or device, so that they may be known as his in the market, and he may thus secure the profits which their superior reputation as his may be the means of gaining. If, therefore, the inventor or manufacturer adopts a label, symbol or trademark to distinguish the article he thus manufactures and sells, no other person has the right to adopt his label or trademark, or one so like his as to be calculated to deceive, without the permission or consent of the manufacturer. This rule is grounded upon a two-fold reason: 1st, that the public may be protected from being imposed upon by a spurious or inferior article, as an imitation or counterfeit of the original; and 2nd, that the inventor may have the exclusive benefit of the reputation which his skill has given to the article made by him. When one, therefore, adopts a symbol or device, and affixes it to the goods he thus manufactures and puts upon the market, the law will throw its protection around the trade-mark thus affixed, as his property and a thing of value. And it would seem to be immaterial whether an infringing trade-mark is adopted by fraud or mistake, for the injury is the same. When an article, not of his manufacture, is sold with the mark or device affixed, which he has adopted to distinguish his own goods, a damage results upon him. If he establishes the existence of the contract and his right to the exclusive use of the said label, trademark, term or design of the person filing the same, and there are true and correct copies, facsimiles or counterparts filed therefor, with the said secretary, and filing therewith a statement in the form of an affidavit, subscribed and sworn to by any such person, or by any officer, agent or attorney, if a corporation or association or union of workmen, specifying the person by whom any such label, trademark, term or design is filed, and the class or character of the goods, wares, merchandise or products of labor to which the same has been or is intended to be appropriated or applied, and that the person so filing the same has the right to the use of the said label, trademark, term or design, and that no other person, firm or corporation has the right to such use, either in the identical form or in any such near resemblance thereto as may be calculated to deceive, without the permission or authority of the person filing the same, and that the copies, facsimiles or counterparts filed therewith are true and correct copies, facsimiles or counterparts of the genuine label, trademark, term or design of the person filing the same; and there shall be paid for such registry a fee of five dollars to the secretary of state for the use of the state, and the same recording fees required by law for recording certificates of incorporation of corporations. (Rev., s. 3014; 1903, c. 271, s. 3; 1925, c. 69; 1941, c. 255, s. 2; C. S. 3972.)

§ 80-2. Property rights protected by filing for registry.—Whenever any person shall adopt and file for registry any label, trademark, term or design pursuant to the provisions of this chapter, the property, privileges, rights, remedies and interests in and to any such label, trademark, term or design, and in and to the use of same, provided or given by this chapter to, or otherwise conferred upon or enjoyed by, the person filing the same for the registry, shall be fully and completely secured, preserved and protected as the property of those entitled to the same before any such label, trademark, term or design has been actually applied to any goods, wares, merchandise, or product of labor, and put upon the market for sale or otherwise, and before any use or appropriation of any such label, trademark, term or design has been made in connection with any such goods, wares, merchandise or product of labor, as well as after the same has been used or applied to designate, make known or distinguish any such goods, wares, merchandise or product of labor and they have been put upon the market. (Rev., s. 3013; 1903, c. 271, s. 2; C. S. 3972.)

§ 80-3. Filing to be with secretary of state; contents of affidavits; fees.—Any person who has heretofore adopted and used, or shall hereafter adopt and use any label, trademark, term or design, as in this chapter provided, may file the same for registry in the office of the secretary of state, by leaving two copies, facsimiles or counterparts thereof, with the said secretary, and filing therewith a statement in the form of an affidavit, subscribed and sworn to by any such person, or by any officer, agent or attorney, if a corporation or association or union of workmen, specifying the person by whom any such label, trademark, term or design is filed, and the class or character of the goods, wares, merchandise or products of labor to which the same has been or is intended to be appropriated or applied, and that the person so filing the same has the right to the use of the said label, trademark, term or design, and that no other person, firm or corporation has the right to such use, either in the identical form or in any such near resemblance thereto as may be calculated to deceive, without the permission or authority of the person filing the same, and that the copies, facsimiles or counterparts filed therewith are true and correct copies, facsimiles or counterparts of the genuine label, trademark, term or design of the person filing the same; and there shall be paid for such registry a fee of five dollars to the secretary of state for the use of the state, and the same recording fees required by law for recording certificates of incorporation of corporations. (Rev., s. 3014; 1903, c. 271, s. 3; 1925, c. 69; 1941, c. 255, s. 2; C. S. 3973.)

Editor's Note.—The amendment of 1935 increased the registry fee from one to five dollars. The 1941 amendment inserted after the word "corporation" in the eleventh line the words, "or association or union of workingmen."
§ 80-4. Registration; certified copies evidence; fees.—The secretary of state, upon the filing of any such label, trademark, term or design that is not in conflict with § 80-6, shall register the same, and shall deliver to the person filing the same as many certified copies thereof, with his certificate of such registry, as any such person may request, and for every such copy and certificate there shall be paid to the secretary of state, for the use of the state, a fee of one dollar; and any such certified copy and certificate shall be admissible in evidence and competent and sufficient proof of the adoption, filing and registry of any such label, trademark, term or design, by any such person in any action or judicial proceeding in any of the courts of this state, and of due compliance with the provisions of this chapter. (Rev., s. 3015; 1903, c. 271, s. 4; C. S. 3974.)

§ 80-5. Transfer of trademarks.—The right to use any registered label, trademark, term or design shall be transferred, unattached to any writing, duly filed in the office of the secretary of state. The fees for recording or filing such transfer and issuing copies thereof shall be the same as for filing such label, trademark, term or design. (Rev., s. 3016; C. S. 3975.)

§ 80-6. Similar trademarks refused registration.—It shall not be lawful for the secretary of state to register for any person any label, trademark, term or design that is in the identical form of any other label, trademark, term or design theretofore filed by any other person, or that bears any such near resemblance thereto as may be calculated to deceive, or that would be liable to be mistaken therefor. (Rev., s. 3017; 1903, c. 271, s. 5; C. S. 3976.)

§ 80-7. Fraudulent registration; penalty.—Any person who shall file or procure the filing and registry of any label, trademark, term or design in the office of the secretary of state under the provisions of this chapter, by making any false or fraudulent representations or declarations, with fraudulent intent, shall be liable to pay any damages sustained in consequence of any such registry, to be recovered by or in behalf of the party injured thereby. (Rev., s. 3018; 1903, c. 271, s. 5; C. S. 3977.)

§ 80-8. Use of counterfeit trademarks unlawful.—Whenever any person has adopted and filed for registry any label, trademark, term or design, as provided by law, and the same shall have been registered pursuant to law, it shall be unlawful for any other person to manufacture, use, sell, offer for sale, or in any way utter or circulate any counterfeit or imitation of any such label, trademark, term or design, or have in possession, with intent that the same shall be sold or disposed of, any goods, wares, merchandise, or product of labor to which or on which any counterfeit or imitation of any such label, trademark, term or design is attached, affixed, printed, stamped, impressed or displayed, or to sell or dispose of, or offer to sell or dispose of, or have in possession with intent that the same shall be sold or disposed of, any goods, wares, merchandise, or product of labor contained in any box, case, can or package to which or on which any such counterfeit or imitation is attached, affixed, printed, stamped, impressed or displayed. (Rev., s. 3019; 1903, c. 271, s. 6; C. S. 3978.)

When Injunction Granted.—If it appears that the trademark alleged to be imitation, though resembling the complainant's in some respects, would not probably deceive the ordinary mass of purchasers, an injunction will not be granted. An imitation is colorable, and will be enjoined, which requires a careful inspection to distinguish its mark and appearance from that of the manufacture imitated. Blackwell v. Wright, 73 N. C. 310, 313.

§ 80-9. Unauthorized use unlawful; use under license.—Whenever any person has adopted and registered any label, trademark, term or design, as provided by law, it shall be unlawful for any other person to make any use, sale, offer for sale or display of the genuine label, trademark, term or design of any such person filing the same, or to have any such genuine label, trademark, term or design in possession with intent that the same shall be used, sold, offered for sale or displayed, or that the same shall be applied, attached or displayed in any manner whatever to or on any goods, wares or merchandise, or to sell, offer to sell, or dispose of, or have in possession with intent that the same shall be sold or disposed of, any goods, wares or merchandise in any box, case, can or package to or on which any such genuine label, trademark, term or design of any such person is attached, affixed, or displayed, or to make any use whatever of any such genuine label, trademark, term or design, without first obtaining in every such case the license of the person adopting, filing and registering the same; and any such license may be revoked and terminated at any time upon notice, and thereafter any use thereof shall be unlawful. (Rev., s. 3020; 1903, c. 271, s. 7; C. S. 3979.)

When Relief Granted.—Before the owner of a trade-mark can call upon the courts for relief, he must show not only that he has a clear legal right to the trade-mark, but that the defendant is so assimilated to that of the plaintiff as to deceive purchasers. And it will make no difference whether the party designed to mislead the public or whether the symbol adopted was intended to be enjoined. Blackwell v. Wright, 73 N. C. 310, 313.

§ 80-10. Remedies; damages; destruction of counterfeits.—Any person who has registered any label, trademark, term or design under the provisions of this chapter shall have a right of action against any person for the unauthorized use of such label, trademark, term or design, and the courts shall by appropriate remedies prevent the unauthorized or unlawful use, manufacture or display of any label, trademark, term or design, or the imitation or counterfeit thereof, or the sale, disposal or display of any articles of property on which any counterfeit or imitation of any registered label, trademark, term or design, or on which any genuine label, trademark, term or design may be used or displayed without proper authority; and shall further secure and protect all persons in all rights of property and interest which they may have in any label, trademark, term or design registered under this chapter; and the court shall award to the plaintiff any and all damages resulting from any such wrongful use of any such label, trademark, term
or design; and any counterfeit or imitation of any labels, trademarks, terms or designs, and any die, engraving, mould or mechanical device or the manufacture of the same in the possession or under the control of the defendant, shall be delivered up to an officer of the court, to be destroyed, and any such genuine labels, trademarks, terms or designs in the possession or under the control of any such defendant shall be delivered to the plaintiff: Provided, however, no restraining order or injunction granted to any association or union of workingmen to prevent violations of this article shall have the effect of impounding or preventing the free flow into the channels of commerce of any goods, wares, merchandise or products already manufactured or in the process of manufacture to which any label, trademark, term or design has been affixed at the time of the institution of the action in which the injunctive relief is sought, unless the owner or manufacturer of said goods, wares, merchandise or products has permitted the affixing of such label, trademark, term or design with the actual knowledge that it was being used or affixed in violation of the provisions of this article. (Rev., s. 3021; 1903, c. 271, s. 8; 1914, c. 255, s. 3; C. S. 3980.)

Editor's Note.—The 1941 amendment added the proviso at the end of this section.

§ 80-11. Concurrent action for penalty.—In addition to any other rights, remedies or penalties provided by this chapter, and as concurrent therewith, any person who shall violate any of the provisions of this chapter shall be liable to a penalty of two hundred dollars, to be recovered by any person who has filed any such label, trademark, term or design. (Rev., s. 3022; 1903, c. 271, s. 9; C. S. 3981.)

§ 80-12. Use of private marks or labels to defraud; punishment.—If any person shall knowingly and wilfully forge or counterfeit, or cause or procure to be forged or counterfeited the private marks, tokens, stamps or labels of any mechanic, manufacturer or other person, being a resident of the United States, with intent to deceive and defraud the purchasers, mechanics, or manufacturers of any goods, wares or merchandise whatsoever, upon conviction thereof he shall be punished by a fine of not less than fifty dollars and not exceeding one thousand dollars, or by imprisonment of not less than thirty days or more than five years, or both fine and imprisonment, at the discretion of the court. (Rev., s. 3023; Code, s. 1039; 1870-1, c. 253, s. 1; C. S. 3982.)

§ 80-13. Selling goods with forged marks or labels, misdemeanor.—If any person shall vend any goods, wares or merchandise having thereon any forged or counterfeited marks, tokens, stamps or labels purporting to be the marks, tokens, stamps or labels of any person being a resident of the United States, knowing the same at the time of the purchase thereof by him to be forged or counterfeited, he shall be guilty of a misdemeanor, and punished by imprisonment in the county jail not exceeding six months, or by a fine not exceeding one hundred dollars, or by both fine and imprisonment, at the discretion of the court. (Rev., s. 3850; Code, s. 1039; 1870-1, c. 253, s. 2; C. S. 3983.)

§ 80-14. Misbranding sacks to defraud, misdemeanor.—If any person shall knowingly use the mark or brand of any other person on any sack, or shall knowingly impress on any sack the mark or brand of another person, with intent to defraud or for the purpose of enhancing the value of his own property, the person so offending shall be guilty of a misdemeanor. (Rev., s. 3851; Code, s. 1040; 1874-5, c. 225; 1943, c. 543; C. S. 3984.)

Editor's Note.—The 1941 amendment struck out the words "and punished as if convicted of larceny" formerly appearing at the end of this section.

Art. 2. Timber Marks.

§ 80-15. Timber dealers may adopt.—Any person dealing in timber in any form shall be known as a timber dealer and as such may adopt a trademark, in the manner and with the effect in this article provided. (Rev., s. 3023; 1903, c. 261, s. 1; C. S. 3985.)

§ 80-16. How adopted, registered and published. —Every such dealer desiring to adopt a trademark may do so by the execution of a writing in form and effect as follows: Notice is hereby given that I (or we, etc., as the case may be) have adopted the following trademark, to be used in my (or our, etc.) business as timber dealer (or dealers), to wit: (Here insert the words, letters, figures, etc., constituting the trademark, or if it be any device other than words, letters or figures, insert a facsimile thereof).

Dated this ……… day of ……… 19………
A…………………… B……………………

Such writing shall be acknowledged or proved for record in the same manner as deeds are acknowledged or proved, and shall be registered in the office of the register of deeds of the county in which the principal office or place of business of such timber dealer may be, in a book to be kept for that purpose marked Registry of Timber Marks, also in office of secretary of state, and a copy thereof shall be published at least once in each week for four successive weeks in some newspaper printed in such county, or if there be no such newspaper printed therein, then in some newspaper of general circulation in such county. (Rev., s. 3024; 1889, c. 143; 1903, c. 261, s. 2; C. S. 3986.)

§ 80-17. Property in and use of trademarks.—Every trademark so adopted shall, from the date thereof, be the exclusive property of the person adopting the same. The proprietor of such trademark shall, in using the same, cause it to be plainly stamped, branded or otherwise impressed upon each piece of timber upon which the same is placed. (Rev., s. 3025; 1889, c. 143; 1903, c. 261, ss. 3, 4; C. S. 3987.)

§ 80-18. Effect of branding timber purchased.—When timber is purchased by the proprietor of any such trademark, the said trademark is placed thereon as hereinbefore provided, such timber shall thenceforth be deemed the property of such purchaser, without any other or further delivery thereof, and such timber shall thereafter be at the risk of the purchaser, unless otherwise provided by contract in writing between the parties. (Rev., s. 3026; 1889, c. 143; 1903, c. 261, s. 6; C. S. 3988.)
§ 80-19. Trademark on timber evidence of ownership. — In any action, suit or contest in which the title to any timber, upon which any trademark has been placed as aforesaid, shall come in question, it shall be presumed that such timber was the property of the proprietor of such trademark, in the absence of satisfactory proof to the contrary. (Rev., s. 3027; 1903, c. 261, s. 7; C. S. 3989.)

§ 80-20. Fraudulent use of timber trademark, misdemeanor. — If any person shall use or attempt to use any timber trademark without the written consent of the proprietor thereof, or falsely and fraudulently place any trademark on timber not the property of the owner of such trademark without his written consent, or intentionally and without lawful authority remove, deface or destroy any timber trademark or the imprint thereof on any timber or intentionally put any such timber in such a position or place so remote from the stream from which it was taken or on which it was affixed as to render its identification unnecessarily expensive to replace the same in such stream, he shall be guilty of a misdemeanor. (Rev., s. 3854; 1903, c. 261, ss. 3-5; C. S. 3990.)

§ 80-21. Larceny of branded timber. — If any person shall knowingly and unlawfully buy, sell, take or carry away, secrete, destroy or convert to his own use, any timber upon which a trademark is stamped, branded or otherwise impressed, or shall knowingly and unlawfully buy, sell, take and carry away, secrete, destroy or convert to his own use, any timber upon which a trademark has been intentionally and without lawful authority removed, defaced or destroyed, he shall be deemed guilty of larceny thereof and punished as in other cases of larceny. (Rev., s. 3853; 1903, c. 261, s. 5; C. S. 3991.)

§ 80-22. Altering timber trademark crime. — If any person shall willfully change, alter, erase or destroy any registered timber mark or brand put or cut upon any logs, timber, lumber or boards, except by the consent of the owner thereof, with intent to steal the said logs or timber, he shall be guilty of a misdemeanor, and punished by a fine of not more than fifty dollars or imprisoned not more than thirty days, or both. (Rev., s. 3855; 1889, c. 142, s. 3; 1903, c. 41; 1943, c. 543; C. S. 3992.)

Editor's Note.—The 1943 amendment struck out the words "if the same shall have been done with a felonious intent, such person shall be guilty of larceny and punished as for that offense."

§ 80-23. Possession of branded logs without consent, misdemeanor. — If any person shall knowingly and willfully take up or have in his possession any log, timber, lumber or board upon which a registered timber mark or brand has been put or cut, except by the consent of the owner thereof, he shall be guilty of a misdemeanor, and punished by a fine of not more than fifty dollars or imprisoned not more than thirty days, or both. (Rev., s. 3856; 1889, c. 142, s. 4; 1903, c. 42; C. S. 3993.)

Art. 3. Mineral Waters and Beverages.

§ 80-24. Description of name, labels, or marks filed and published.—Any person, partnership or corporation engaged in manufacturing, bottling, selling or dealing in mineral, soda or aerated waters, beers, lager-beer, milk or other beverages, in kegs, boxes, trays, crates, bottles, syphons, barrels, casks, or other vessels, with his name or other marks or devices printed, impressed, or otherwise produced thereon, or upon labels pasted thereon, shall file with the clerk of the superior court of the county in which his principal office or place of business (or in case of a foreign corporation, its principal office or place of business or agency) is located, a description of the names, marks, or devices so used by him, and cause such description to be printed twice a week for two successive weeks in some daily newspaper published in said county, if there be a daily newspaper published therein, and if not, then in some newspaper published in said county once a week for two successive weeks. The description of the names, marks or devices, before being filed as aforesaid, shall be signed by the person filing the same, or in case of a partnership, by a partner, or in case of a corporation, by one of its officers or managers, and shall be acknowledged by the person signing the same as his act, or as the act of said partnership or corporation, before an officer competent to take acknowledgment of deeds. The publication hereby required need only be a brief description, sufficient for identification, of such names or marks, and need not contain a certified copy of the acknowledgment. The provisions of this article shall apply to all vessels enumerated above upon which said names or marks shall appear as aforesaid, whether or not any of the same shall be in existence at the time of said filing and publication. (1907, c. 901, s. 1; C. S. 3994.)

§ 80-25. Clerk to record description. — The several clerks of the superior courts mentioned in the preceding section shall record a book of record in their custody all such descriptions filed with them, and also copies of the said advertisement in the newspaper, certified to by the publishers thereof, and shall furnish copies thereof, duly certified by them in the usual manner, to any person who may apply therefor, and shall receive for the recording of such copies a fee of fifty cents. Such certified copies shall be evidence that the provisions of the preceding section have been complied with, and shall be prima facie evidence of the title of the person, named therein, to the vessels upon which his name, marks, labels or devices appear as described in said description. (1907, c. 901, s. 2; C. S. 3995.)

§ 80-26. Refilling vessels and defacing marks forbidden; punishment.—After any person has filed and published his description of such names, marks or devices, in accordance with the preceding provisions of this article, it shall be unlawful for any persons to fill in any way the vessels upon which such names or other marks are printed, impressed or otherwise produced, with any water or beverage enumerated in this article, nor to deface, remove or conceal such names or other marks thereon, with intent to convert the same to his use, or to have on sale, offer for sale, traffic in, handle in the course of business, transport, or to take or collect from
§ 80-27. Possession of vessels as evidence of offense.—If any person shall be found to be in possession of any of the vessels mentioned above in this article, or any parts thereof, and the person whose name, marks or devices have been placed thereon, as above provided, have complied with the provisions of this article, and the persons so found in possession thereof shall be charged with any of the offenses mentioned in the preceding section, then such possession shall be prima facie evidence that such person is guilty of the offenses so charged: Provided, this section shall not apply to such vessels as the bottler charges his customers for at the time of sale of the goods. (1907, c. 901, s. 3; C. S. 3996.)

§ 80-28. Search warrants.—If the owner of any vessel mentioned in § 80-24 who has complied with the provisions thereof, or the officer, agent or employee of such owner, shall make an affidavit before a justice of the peace asserting that he has reason to believe and does believe that any person making use of, any article above mentioned or any part thereof, or in any way declared to be unlawful by § 80-26, the justice may issue his search warrant to any sheriff, constable or other officer of the law to whom such warrant may be directed, and cause the premises designated in the warrant to be searched; and if article above mentioned or any part thereof shall be found upon the premises so designated, the officer executing such search warrant shall thereupon report the same, under his oath, to the justice, who shall thereupon, upon said report and upon the oath of any person or persons charging any violations of § 80-26, issue his warrant for the arrest of the person against whom the charge is made, and cause him, together with such articles, to be brought before him for trial. (1907, c. 901, s. 5; C. S. 3999.)

§ 80-29. Concurrent jurisdiction of superior courts and justices of peace.—The justices of the peace in the counties of this state shall have concurrent jurisdiction with the superior courts of their respective counties in the case of persons arrested for violation of the above provisions of this article, and such justices of the peace shall proceed to hear and determine such cases when the parties arrested are brought before them, in all cases where the punishment fixed in this article is such as to give the justices jurisdiction under the constitution and laws of this state. And if such person shall be found to be guilty of the violation of any of the provisions of this article, the court trying such person and imposing the punishment herein prescribed shall also award possession to the owner of all the property involved in such violation. (1907, c. 901, s. 6; C. S. 4000.)

§ 80-30. Accepting deposit not deemed sale.—The requiring, taking or accepting of any deposit for any purpose upon any vessel above enumerated shall not be deemed to constitute a sale of such property, either optional, conditional or otherwise, in any proceedings under this article. (1907, c. 901, s. 7; C. S. 4001.)

§ 80-31. When refileing description not required.—Any person, partnership, or corporation that has heretofore filed and published a description of his name, marks or devices for the purposes mentioned in § 80-1, in accordance with the law existing at the time of such filing and publication, shall not be required to again file such description, but shall be entitled to all the benefits of this article as fully as if he had complied with all the provisions thereof. (1907, c. 901, s. 8; C. S. 4002.)

§ 80-32. Application of the article.—The provisions of this article do not apply to any person using the vessels enumerated above for the beverages placed therein by the owners, or who after consumption of the contents is in possession of the same, while awaiting the return to the owners, nor shall the provisions of this article apply to any garbage man collecting the same in the regular course of his business: Provided, this article shall not apply to beer and mineral water bottles shipped into this state from other states. (1907, c. 901, s. 9; C. S. 4003.)

Art. 4. Farm Names.

§ 80-33. Registration of farm names authorized.—Any owner of a farm in the state of North Carolina may have the name of his farm, together with a description of his lands to which said name applies, recorded in a register kept for that purpose in the office of the register of deeds of the county in which the farm is located, and the register of deeds shall furnish to such landowner a proper certificate setting forth the name and description of the lands. (1915, c. 108, s. 1; C. S. 4004.)

Local Modifications.—Sampson, Stokes, Surry: C. S. 401.

§ 80-34. After registry, similar name not registered.—When any name has been registered as the name of any farm in such county, the name, or one so nearly like it as to produce confusion, shall not be recorded as the name of any other farm in the same county. (1915, c. 108, s. 1; C. S. 4005.)
§ 80-35. Distinctive name required.—No name shall be registered as the name of a farm where such proposed name is so nearly like it as to produce confusion, has been so used in connection with another farm in the same county as to become generally known prior to March 5, 1915, unless the name used has also prior to March 5, 1915, become well known as the name of the farm proposed to be registered; and in this event two or more farms in the same county may be registered with the same name with some prefix or suffix added to distinguish them. (1915, c. 108, s. 2; C. S. 4006.)

§ 80-36. Application for registry; publication and hearing.—Before a name shall be registered the clerk shall have publication made at least once a week for four weeks in some secular newspaper published in the county, if one is so published, and if one is not so published, then one having a general circulation in the county, giving the name of the applicant, the proposed name of registration and a sufficient description to identify the farm and the time of the return; and if the owner or clerk knows of another farm in the county of the same or very similar name, a summons shall be served on the owner thereof at least ten days before the return day. On the return day any person, firm or corporation may file claim to the name, and the clerk may pass upon the claim and award the name to any party, with the right to appeal to the aggrieved party to the superior court within ten days, as in other cases, and on such appeal the judge shall decide the matters unless a jury be demanded by some party. (1915, c. 108, s. 2; C. S. 4007.)

§ 80-37. Fees for registration. — Any person having the name of his farm recorded as provided in this article shall first pay to the register of deeds a fee of one dollar, which fee shall be paid to the county treasurer as other fees are paid to the county treasurer by him. (1915, c. 108, s. 5; C. S. 4010.)

Art. 5. Stamping of Gold and Silver Articles.

§ 80-40. Marking gold articles regulated.—It shall be unlawful to make for sale, or sell, or offer to sell or dispose of, or have in possession with intent to sell or dispose of, any article of merchandise made in whole or in part of gold or any alloy of gold, and having stamped, branded, engraved or imprinted thereon, or upon any tag, card or label attached thereto, or upon any box, package, cover or wrapper in which the article is enclosed, any mark indicating or designed to indicate that the gold, or alloy or gold, therein is of a greater degree of fineness than its actual fineness, unless the actual fineness, in the case of flat-ware and watch-cases, is not less by more than three one-thousandths parts, and in the case of all other articles is not less by more than one-half karat than the fineness indicated, according to the standards and subject to the qualifications hereinafter set forth.

In any test for ascertaining the fineness of gold or alloy in the articles, according to the required standards, the part of the gold or alloy taken for the test, analysis or assay shall be a part not containing or having attached thereto any solder or alloy of inferior fineness used for brazing or uniting the parts of the articles. In addition to the foregoing tests and standards, the actual fineness of the entire quantity of gold and of its alloys contained in any article mentioned in this section (except watch-cases), including all solder or alloy of inferior metal used for brazing or uniting the parts (all such gold, alloys, and solder being assayed as one piece), shall not be less by more than one karat than the fineness indicated by the mark used as above indicated. Violation of this section is a misdemeanor, punishable as provided in this article. (1907, c. 381, s. 1; C. S. 4012.)

§ 80-41. Marking silver articles regulated.—It shall be unlawful to make for sale or sell or offer to sell or dispose of or have in possession with intent to sell or dispose of—

1. Any article of merchandise made in whole or in part of silver or any alloy of silver, and having marked, stamped, branded or engraved or imprinted thereon, or upon any tag, card or label attached thereto, or upon any box, package, cover or wrapper in which the article is enclosed, the words “sterling silver” or “sterling” or any colorable imitation thereof, unless nine hundred and twenty-five one-thousandths of the component parts of the metal appearing or purporting to be silver, of which the article is manufactured, are pure silver, subject to the qualifications hereinafter set forth: Provided, that in the case of all such articles there shall be allowed a divergence in fineness of four one-thousandths parts from the foregoing standard.

2. Any article of merchandise made in whole or in part of silver or of any alloy of silver, and having marked, stamped, branded, engraved or imprinted thereon, or upon any card, tag or label attached thereto, or upon any box, package, cover or wrapper in which the article is enclosed, the words “coin” or “coin silver,” or any color-
§ 80-42. Marking articles of gold plate regulated.—It shall be unlawful to make for sale, or sell, or offer to sell or dispose of, or have in possession with intent to sell or dispose of, any article of merchandise made in whole or in part of inferior metal, having deposited or plated thereon or brazed or otherwise affixed thereto, a plate, plating, covering or sheet of silver or of any alloy of silver, which article is known in the market as "silver plate" or "silver electroplate," and having stamped, branded, engraved or imprinted thereon, or upon any tag, card or label attached thereto, or upon any box, package, cover or wrapper in which the article is enclosed, any mark or word (other than the word "sterling") or the word "coin" indicating, or designed to indicate, that the silver or alloy of silver in the article is of a greater degree of fineness than its actual fineness, unless the actual fineness is not less by more than four one-thousandths parts than the actual fineness indicated by the use of such mark or word, subject to the qualifications hereinafter set forth.

In any test for ascertaining the fineness of the articles mentioned in this section, according to the foregoing standards, the part taken for test, analysis or assay shall be a part not containing or having attached thereto any solder or alloy of inferior metal used for brazing or uniting the parts of such article. In addition to the foregoing test and standards, the actual fineness of the entire quantity of metal purporting to be silver, contained in any article mentioned in this section, including all solder or alloy of inferior fineness used for brazing or uniting the parts (all such silver, alloy or solder being assayed as one piece), shall not be less by more than ten one-thousandths parts than the fineness indicated according to the foregoing standards, by the mark employed as above indicated. Violation of this section is a misdemeanor, punishable as provided in this article. (1907, c. 331, s. 4; C. S. 4015.)

§ 80-43. Marking articles of silver plate regulated.—It shall be unlawful to make for sale, or sell, or offer to sell or dispose of, or have in possession with intent to sell or dispose of, any article of merchandise made in whole or in part of inferior metal, having deposited or plated thereon or brazed or otherwise affixed thereto a plate, plating, covering or sheet of silver or of any alloy of silver, which article is known in the market as "silver plate" or "silver electroplate," and having stamped, branded, engraved or imprinted thereon, or upon any tag, card or label attached thereto, or upon any box, package, cover or wrapper in which the article is enclosed, the word "sterling" or the word "coin," either alone or in conjunction with any other words or marks. Violation of this section is a misdemeanor, punishable as provided in this article. (1907, c. 331, s. 5; C. S. 4016.)

Art. 6. Cattle Brands.

§ 80-45. Owners of stock to register brand or marks.—Every person who has any horses, cattle, hogs or sheep may have an earmark or brand different from the earmark or brand of all other persons, which he shall record with the clerk of the board of commissioners of the county where his horses, cattle, hogs or sheep are; and he may brand all horses eighteen months old and upwards with the said brand, and earmark all his hogs and sheep six months old and upwards with the said earmark; and earmark or brand all his cattle twelve months old and upwards; and if any dispute shall arise about any earmark or brand, the same shall be decided by the record thereof. (Rev., s. 3028; Code, s. 2317; R. C., c. 17, s. 1; C. S. 4017.)

Art. 7. Recording of Cattle Brands and Marks with Commissioner of Agriculture.

§ 80-46. "Stock growers" and "live stock" defined.—Every person, firm, association or corporation, who owns, raises, buys or sells cattle in this State, is deemed a stock grower, and all cattle are deemed live stock, within the meaning of this article. (1935, c. 232, s. 1.)

§ 80-47. Stock growers limited to single mark or brand; registration not required; law compulsory upon registration.—Every stock grower in this State must use one, and only one, mark or brand for said stock grower's cattle, which mark or brand shall be placed in some conspicuous place on said cattle, which place must be designated in the application for the recording of said mark or
brand hereinafter provided for in this article: Provided, however, nothing in this section nor in any subsequent section of this article shall be construed to be compulsory upon any stock grower in this State to apply for or register his mark or brand of cattle; but when a stock grower does so, then this article and all provisions thereof shall be binding and compulsory upon said stock grower.

(1935, c. 232, s. 2.)

§ 80-48. Commissioner of agriculture named recorder.—The commissioner of agriculture of the State of North Carolina is hereby declared to be the state recorder of marks and brands of cattle growers in this State. (1935, c. 232, s. 3.)

§ 80-49. Recording with commissioner. — All brands or marks shall be recorded with the state recorder. (1935, c. 232, s. 4.)

§ 80-50. Application; effect of recording; fee; no duplication allowed.—Any stock grower in the State of North Carolina, who desires to avail himself of the provisions of this article, shall make and sign an application, furnished by the state recorder, setting forth a facsimile and description of the brand or mark which said stock grower desires to use, and shall file the same with the state recorder, who shall record the same in a book kept by him for that purpose, and from and after the filing of the same, the stock grower filing the same shall have exclusive right to use said brand or mark within the State; and shall pay the state recorder a fee of one dollar; Provided, that the state recorder shall not file or record such mark or brand if the same has been heretofore recorded by him in favor of some other grower. (1935, c. 232, s. 5.)

§ 80-51. Certified copy of mark or brand; registration; fees and disposition thereof.—Upon the recording of any such brand or mark with the state recorder, as herein provided, the owner thereof may procure from the state recorder a certified copy thereof, paying therefor the sum of fifty cents, and may cause the same to be recorded in the office of the register of deeds in the county where said stock grower resides, and shall pay said register of deeds a fee of fifty cents for recording same. It shall be unlawful for any register of deeds to record any such mark or brand, unless the same is certified to him by the state recorder. Application blanks and a book for recording said marks and brands shall be furnished each register of deeds of the county applying for same, and shall be paid for by the state recorder, if he has sufficient funds derived from the recording fees, and if not, then by the county so applying for same. All fees received by the state recorder shall be used in the administration of this article, and any surplus paid into the general fund of the agriculture department. In order to put the provisions of this article in force the commissioner of agriculture is hereby authorized to use any fund in his department not otherwise appropriated. (1935, c. 232, s. 6.)

§ 80-52. Certified copy prima facie evidence of ownership.—In all civil or criminal suits in any court in this State a duly certified copy, under the seal of the department of agriculture, of any brand or mark, duly recorded under the provisions of this article, shall be prima facie evidence of the ownership of the animal of said cattle grower. (1935, c. 232, s. 7.)

§ 80-53. Records to be kept by those engaged in slaughtering.—Any person, firm or corporation engaged in the business of slaughtering cattle shall keep at its place of business a book in which must be kept the name or names of the persons from whom any marked or branded cattle are purchased and the date of purchase and his address, and the mark or brand of such cattle. Said book must be kept ready at all times for the inspection of any person who desires to examine the same. (1935, c. 232, s. 8.)

§ 80-54. Purchaser of branded cattle to keep record of purchases.—Any person purchasing any marked or branded cattle, the mark or brand of which has been duly recorded under the provisions of this article, shall keep the name and address of the person from whom said cattle are purchased, a description of the mark or brand and the date of the purchase, and exhibit same to any person desiring to examine same. (1935, c. 232, s. 9.)

§ 80-55. Defacing marks or brands made misdemeanor. — No stock grower or other person in this State must change, conceal, deface, disfigure or obliterate any brand or mark previously branded, impressed or marked on any head of cattle, or put his or any other brand or mark upon or over any part of any brand or mark previously branded or marked upon any head of cattle, and no person shall make or use any counterfeit of any mark or brand of any other person. Any person violating any of the provisions of this section shall be guilty of a misdemeanor. (1935, c. 232, s. 10.)

§ 80-56. Violation of article made misdemeanor. — Any person violating any of the provisions of this article shall be guilty of a misdemeanor, and upon conviction thereof shall be fined or imprisoned in the discretion of the court. (1935, c. 232, s. 11.)
Chapter 81. Weights and Measures.

Art. 1. Uniform Weights and Measures.

§ 81-1. Office of superintendent of weights and measures.—In order to protect the purchasers of any commodity and to provide one standard of measure of length, surface, weight and capacity established by Congress, the office of Superintendent of Weights and Measures for the State of North Carolina is hereby established as hereinafter provided. (1927, c. 261, s. 1.)

§ 81-2. Administration of article. — The provisions of this article shall be administered by the State Department of Agriculture through a suitable person to be selected by the Commissioner of Agriculture and known as the Superintendent of Weights and Measures. In administering the provisions of this article, the rules...
and codes of specifications and tolerances as adopted by the National Conference of Weights and Measures and recommended by the United States Bureau of Standards and approved by the North Carolina Department of Agriculture are hereby adopted; however, the Department of Agriculture is empowered to make such rules and regulations as may be necessary to make effective the purposes and provisions of this article and to fix and prescribe reasonable charges and fees for examining, testing, adjusting and certifying the correct, or incorrect, equipment used in the buying or selling of any commodity or thing, or for hire or award, or in the computation of any charge for services rendered on the basis of weight or measure, or in the determination of weight and measure when a charge is made for such determination. Such rules and regulations and fees and charges shall be published thirty days before such rules, regulations, fees and charges become effective. (1927, c. 261, s. 2; 1931, c. 150; 1943, c. 762, s. 1.)

Editor's Note.—The Act of 1931 amended this section by adding the provision as to rules adopted by the National Conference of Weights and Measures. The 1943 amendment inserted in the second sentence the words “and approved by the North Carolina Department of Agriculture.”

§ 81-3. Employment of superintendent of weights and measures.—The Commissioner of Agriculture shall have authority to employ a superintendent of weights and measures and necessary assistants, local inspectors and such other employees as may be necessary in carrying out the provisions of this article, and fix and regulate their duties.

The person named as superintendent of weights and measures shall give bond to the State of North Carolina in the sum of ten thousand dollars to guarantee the faithful performance of his duties, the expense of said bond to be paid by the State to be approved as other bonds for the State officers. The superintendent of weights and measures shall, to safeguard the interests of the buyer and seller, require bond from other employees authorized under the first paragraph of this section in the amounts of not less than one thousand dollars for each employee designated as a local inspector or sealer of weights and measures. (1927, c. 261, ss. 3, 4.)

§ 81-4. Salaries and expenses. — All salaries and necessary expenses shall be provided as now provided for the other departments and agencies of the State government. (1927, c. 261, s. 5; 1931, c. 150.)

Editor's Note.—Prior to the 1931 Amendment this section provided for the payment of salaries, etc., from the fees collected under this article.

§ 81-5. Standard of work for local standard keepers.—When any town or county wishes to appoint a local standard keeper or inspector or sealer of weights and measures the appointment and regulation of his work must be in keeping with the rules and regulations of the State Department of Agriculture and his work subject to supervision of the State Superintendent of Weights and Measures. (1927, c. 261, s. 6.)

§ 81-6. Receipts for fees; approved standards to be marked.—The State Superintendent of Weights and Measures, or his deputies, or inspectors on his direction, shall, after examining any standards of weights or measures or other apparatus used for determining the weight or measure of anything, issue to the owner of such measuring device or apparatus a receipt for any fees collected and, when such measuring device or apparatus is found to be accurate, stamp upon, or tag, the measuring instrument with the letters “N.C.” and two figures representing the year in which the inspection was made. (1927, c. 261, s. 7.)

§ 81-7. Standard equipment.—There shall be issued to each deputy inspector, or local sealer of weights and measures, such standard equipment as may be necessary. (1927, c. 261, s. 8.)

§ 81-8. Standards of weights and measures. —The weights and measures received from the United States under joint resolution of Congress, approved June fourteenth, one thousand eight hundred and twenty-six, and July twenty-seventh, one thousand eight hundred and sixty-six, and such new weights and measures as shall be received from the United States as standards of weights and measures in addition thereto, or in renewal thereof, and such as shall be supplied by the State in conformity therewith and certified by the National Bureau of Standards shall be the State standards of weights and measures, and in addition thereto there shall be supplied from time to time such copies of these as may be deemed necessary. The Superintendent of Weights and Measures shall take charge of the standards adopted by this article as the standards of the State and cause them to be kept in a fire proof building belonging to the State, from which they shall not be removed except for repairs or for certification, and he shall take all other necessary precautions for their safe keeping. He shall maintain the State standards in good order and shall submit them at least once in ten years to the National Bureau of Standards for certification. He shall keep complete record of the standards, balances and other apparatus belonging to the State and take a receipt for same from his successor in office. He shall annually, on the first day of July, make to the Commissioner of Agriculture a report of all work done in his office. (1927, c. 261, s. 9; 1943, c. 543.)

Editor's Note.—The 1943 amendment substituted “July” for “December” in the last sentence of this section.

§ 81-9. Supervision of devices offered for.—The State Superintendent of Weights and Measures shall have and keep a general supervision of the weights and measures and weighing or measuring devices offered for sale, sold, or in use in the State. He, or his deputies, or inspectors at his direction, shall, upon written request of any citizen, firm, or corporation, or educational institution in the State, test or calibrate weights, measures and weighing or measuring devices used as standards in the State. (1927, c. 261, s. 10.)

§ 81-10. Authority of deputy or local inspector. — Each deputy or local inspector shall have the power, and it shall be his duty, under the direction of the State Superintendent of [768]
§ 81-11. Condemnation and destruction of incorrect weights, measures or devices.—The deputy or local inspector shall condemn, seize, and may destroy incorrect weights and measures or weighing and measuring devices, which in his best judgment are not susceptible of satisfactory repair, but such as are incorrect and yet in his best judgment are not susceptible of satisfactory repair, but such as are incorrect and yet in his best judgment may be repaired, he shall mark or tag as "Condemned for Repairs" in a manner prescribed by the State Superintendent of Weights and Measures. The owners or users of any weights, measures or weighing or measuring devices of which such disposition is made shall have the same repaired and corrected within ten days and they may neither use nor dispose of same in any way, but shall hold the same at the disposal of the sealer. Any weights, measures, or weighing or measuring devices which have been condemned for repairs and have not been repaired as required shall be confiscated by the sealer. (1927, c. 261, s. 12.)

§ 81-12. Seizure of false weights and measures.—The Superintendent of Weights and Measures, his deputies and inspectors are hereby made special policemen and are authorized and empowered in relation to weighing and measuring devices kept, offered, or exposed for sale, sold, or used or employed within the State by any proprietor, agent, lessee, or employee in proving the size, quantity, extent, area, or measurement of quantities, things produced, or articles for distribution or consumption, purchased or offered or submitted by any person or persons for sale, or to arrest without formal warrant, any violator of the statutes in relation to weights and measures, or to stop any vendor, peddler, junk dealer, coal wagon, ice wagon, delivery wagon, or any person whomsoever and require him, if necessary, to proceed to some place which the sealer may specify for the purpose of making the proper test. (1927, c. 261, s. 11.)

§ 81-13. Obstruction to officers misdemeanor.—Any person who shall hinder or obstruct in any way the Superintendent of Weights and Measures, his deputies or inspectors, in the performance of his official duties shall be guilty of a misdemeanor and, upon conviction in any court of competent jurisdiction, shall be punished by a fine of not less than ten dollars or more than two hundred dollars, or by imprisonment in the county jail for not more than three months, or by both fine and imprisonment. (1927, c. 261, s. 14.)

§ 81-14. Impersonation of superintendent of weights and measures or deputies misdemeanor.—Any person who shall impersonate in any way the Superintendent of Weights and Measures, his deputies or inspectors, by the use of his seal or counterfeit of his seal or otherwise, shall be guilty of a misdemeanor and upon conviction therefor in any court of competent jurisdiction, shall be punished by a fine of not less than one hundred dollars or more than five hundred dollars, or by imprisonment for not more than one year, or by both such fine and imprisonment. (1927, c. 261, s. 15.)

§ 81-14.1. Weighing livestock sold at public livestock market; weight certificates.—Whenever livestock is offered or exposed for sale, or sold by weight at a public livestock market, the livestock shall be weighed by a public weigh master and each individual sale shall be accompanied with a weight certificate in duplicate on which shall be expressed in ink or other indelible substance, the name and address of seller, the kind, number and weight of livestock being offered for sale, or sold, the time of day and date of weighing and the name of weigh master. The information expressed on said certificate shall be announced or otherwise made known immediately preceding the sale, if said sale be by auction. (1943, c. 762, s. 1.)

§ 81-15. Weights of goods sold in packages to be stated on package.—It shall be unlawful to keep for the purpose of sale, or expose for sale, or sell any commodity in package form unless the net quantity of the contents are plainly and conspicuously marked on the outside of the package in terms of weight, measure, or numerical count: Provided, however, that reasonable variations or tolerances shall be permitted and that these reasonable variations or tolerances, and also exemptions as to small packages shall be established by rules and regulations made by and published with other rules and regulations approved by the Department of Agriculture. (1927, c. 261, s. 16.)

§ 81-16. Sales when no claim of weight or measure made.—Nothing in this article shall be construed to prohibit the sale by farmers, dealers or merchants, of fruits and vegetables when sold by the piece, head or bunch, and there is no claim made as to its weight or measure. (1927, c. 261, s. 17.)

§ 81-17. Net weight basis of sales by weight.—Whenever any commodity is sold on a basis of weight, it shall be unlawful to employ any other weight in such sale than the net weight of the commodity and all contracts concerning goods sold on a basis of weight shall be understood and construed accordingly. Whenever the weight of a commodity is mentioned in this article, it shall be understood and construed to mean the net weight of the commodity. (1927, c. 261, s. 18.)

§ 81-18. Acts and omissions declared misdemeanor.—Any person who, by himself, or as the servant or agent, or as the servant or agent of any other person, shall offer, or expose for sale, sell,
use in the buying or selling of any commodity or thing or for hire or award, or in the computation of any charge for services rendered on the basis of weight or measure, or in the determination of weight or measure, when a charge is made for such determination, or retain in his possession a false weight or measure or weighing or measuring device or any weight or measure or weighing or measuring device which has not been sealed by the State Superintendent, or his deputy, or inspectors, or by a sealer or deputy sealer of weights and measures within one year, or shall dispose of any condemned weight, measure, or weighing or measuring device contrary to law, or remove the tag placed thereon by the State Superintendent, or his deputy, or inspectors, or who shall sell or offer or expose for sale less than the quantity he represents on any commodity, thing, or service, or shall take or attempt to take more than the quantity he represents, when as the buyer, he furnishes the weight, measure, or weighing or measuring device by means of which the amount of any commodity, thing, or service is determined; or who shall keep for the purpose of sale, offer or expose for sale, or sell any commodity or any kind, instruments, mechanical devices for weighing or measuring any other appliances and measuring device in a manner contrary to law; or who shall violate any provisions of this article for which a specific penalty has not been provided; or who shall sell or offer for sale, or use or have in his possession for the purpose of selling or using any device or instrument to be used to, or calculated to, falsify any weight or measure, shall be guilty of a misdemeanor, and shall be punished by fine of not less than ten dollars or more than two hundred dollars, or by imprisonment for not more than three months, or by both such fine and imprisonment, upon a first conviction in any court of competent jurisdiction; and upon a second or subsequent conviction in any court of competent jurisdiction he shall be punished by a fine of not less than fifty dollars or more than five hundred dollars, or by imprisonment in the county jail for not more than one year, or by both such fine and imprisonment. (1927, c. 261, s. 19.)

§ 81-19. “Person” construed.—The word “person” as used in this article shall be construed to impart both the plural and singular as the case demands and shall include corporations, companies, societies and associations. (1927, c. 261, s. 20.)

§ 81-20. “Weights, measures, weighing or measuring devices” construed.—The words “weights, measures, or (and) weighing or (and) measuring devices” as used in this article, shall be construed to include all weights, scales, beams, measures of every kind, instruments, mechanical devices for weighing or measuring any other appliances and accessories connected with any or all such instruments. The words “sale or sell” as used in this act shall be construed to include barter and exchange. (1927, c. 261, s. 21.)

§ 81-21. Transfer of division of weights and measures to department of revenue.—The governor of North Carolina is hereby authorized by executive order to transfer the superintendent of weights and measures, as set up by this article, to the department of revenue.

In the case of the transfer of the superintendent of weights and measures as set forth in this section, the governor, together with the commissioner of revenue, is hereby authorized and empowered to promulgate and enforce such rules and regulations as he or they may deem necessary or advisable to effectuate this article, and all appointive and elective authority now vested in the commissioner of agriculture by this article pertaining to weights and measures, is hereby transferred to the governor of North Carolina; and the governor is specifically authorized and empowered to appoint a superintendent of weights and measures to serve at the will of the governor. (1933, c. 533, ss. 1, 2.)

§ 81-22. Certain measures regulated. — Whenever any commodity now named in § 81-24, shall be quoted or sold by the bushel, the bushel shall consist of the number of pounds stated in said section; and whenever quoted or sold in subdivisions of the bushel, the number of pounds shall consist of the fractional part of the number of pounds as set forth therein for the bushel; and when sold by the barrel shall consist of the number of pounds constituting 3.281 bushels. (1933, c. 523, s. 3.)

Art. 2. Establishment and Use of Standards.

§ 81-23. Standard weights and measures, exception; penalty.—The standard weight of the following seeds and other articles named shall be as stated in this section, viz:

- Alfalfa shall be 60 lbs. per bu.;
- apples, dried, shall be 24 lbs. per bu.;
- apple seed shall be 40 lbs. per bu.;
- barley shall be 48 lbs. per bu.;
- beans, castor, shall be 46 lbs. per bu.;
- beans, dry, shall be 60 lbs. per bu.;
- beans, green in pod, shall be 30 lbs. per bu.;
- beans, soy, shall be 60 lbs. per bu.;
- beef, net, shall be 200 lbs. per bbl.;
- beets shall be 50 lbs. per bu.;
- blackberries shall be 48 lbs. per bu.;
- blackberries, dried, shall be 28 lbs. per bu.;
- bran shall be 20 lbs. per bu.;
- broomcorn shall be 44 lbs. per bu.;
- buckwheat shall be 50 lbs. per bu.;
- cabbage shall be 50 lbs. per bu.;
- canary seed shall be 60 lbs. per bu.;
- carrots shall be 50 lbs. per bu.;
- cherries, with stems, shall be 56 lbs. per bu.;
- cherries, without stems, shall be 64 lbs. per bu.;
- clover seed, red and white, shall be 60 lbs. per bu.;
- clover, burr, shall be 8 lbs. per bu.;
- clover, German, shall be 60 lbs. per bu.;
- clover, Japan, Lespedeza, shall be, in hull 25 lbs. per bu.;
- corn, shelled, shall be 56 lbs. per bu.;
- corn, Kaffir, shall be 50 lbs. per bu.;
- corn, pop, shall be 70 lbs. per bu.;
- cotton seed shall be 40 lbs. per bu.;
- cotton seed, Sea Island, shall be 44 lbs. per bu.;
- cucumbers shall be 48 lbs. per bu.;
- fish shall be 100 lbs. per ½ bbl.;
- flax seed shall be 56 lbs. per bu.;
- grapes, with stems, shall be 48 lbs. per bu.;
- grapes, without stems, shall be 60 lbs. per bu.;
- gooseberries shall be 48 lbs. per bu.;
- grass seed, Bermuda, shall be 14 lbs. per bu.;
- grass seed, blue, shall be 14 lbs. per bu.;
- grass seed, Hungarian, shall be 48 lbs. per bu.;
- grass seed, Johnson, shall be 25 lbs. per bu.;
- grass seed, Italian rye, shall be 20 lbs. per bu.;
- grass seed, orchard, shall be 14 lbs. per bu.;
- grass seed, tall meadow and tall fescue, 24 lbs. per bu.;
- grass seed, all meadow and fescue except tall, 14 lbs. per bu.;
- grass seed, perennial rye, shall be 14 lbs. per bu.;
- grass seed, timothy, shall be 45 lbs. per bu.;
- grass seed, velvet, shall be 7 lbs. per bu.;
- grass, red top, shall be 14 lbs. per bu.;
- hemp seed shall be 44 lbs.
per bu.; hominy shall be 62 lbs. per bu.; horse-
radish shall be 50 lbs. per bu.; liquids shall be 42
gals. per bbl.; meat, corn, whether bolted or un-
bolted, 48 lbs. per bu.; melon, cantaloupe, shall be
50 lbs. per bu.; millet shall be 50 lbs. per bu.;
mustard shall be 50 lbs. per bu.; nuts, but not nuts,
shall be 50 lbs. per bu.; nuts, hickory, without
hulls, shall be 50 lbs. per bu.; nuts, walnuts with-
cut hulls, shall be 50 lbs. per bu.; oats, seed, shall
be 32 lbs. per bu.; onions, button sets, shall be 32
lbs.; onions, top buttons, shall be 28 lbs. per bu.;
onions, matured, shall be 57 lbs. per bu.; osage
orange seed shall be 33 lbs. per bu.; peaches, ma-
tured, shall be 50 lbs. per bu.; peaches, dried, shall
be 25 lbs. per bu.; peanuts shall be 22 lbs. per bu.;
peach seed shall be 50 lbs. per bu.; peanuts,
Spanish, shall be 30 lbs. per bu.; parsnips shall
be 50 lbs. per bu.; pears, matured, shall be 56 lbs.
per bu.; pears, dried, shall be 26 lbs. per bu.; peas,
dry, shall be 60 lbs. per bu.; peas, green, shall be,
in hull 30 lbs. per bu.; pieplant shall be 50 lbs. per
bu.; plums shall be 64 lbs. per bu.; pork, net,
shall be 200 lbs. per bbl.; potatoes, Irish, shall be
56 lbs. per bu.; potatoes, sweet, green, shall be
56 lbs. per bu.; and the dry weight 47 lbs. per bu.;
quinces, matured, shall be 48 lbs. per bu.; rasp-
berries shall be 48 lbs. per bu.; rice, rough, shall
be 44 lbs. per bu.; rye seed shall be 56 lbs. per bu.;
sage shall be 4 lbs. per bu.; salads, mustard,
spinach, turnips, kale 10 lbs. per bu.; salt shall be
50 lbs. per bu.; sorghum molasses shall be 12 lbs. per
gal.; strawberries shall be 48 lbs. per bu.; sun-
flower seed shall be 24 lbs. per bu.; teosinte shall be
50 lbs. per bu.; tomatoes shall be 56 lbs. per bu.;
turnips shall be 50 lbs. per bu.; wheat shall be 60
lbs. per bu.; cement shall be 80 lbs. per bu.; char-
coal shall be 22 lbs. per bu.; coal, stone, shall be
80 lbs. per bu.; coke shall be 40 lbs. per bu.; hair,
plastering, shall be 8 lbs. per bu.; land plaster
shall be 100 lbs. per bu.; lime, unslaked, shall be
80 lbs. per bu.; lime, slaked, shall be 40 lbs. per bu.
It shall be unlawful to purchase or sell, or barter
or exchange, any article named in this section on
any other basis than as stated herein: Provided,
however, that any and/or all such articles may be
sold by weight, avoirdupois standard.

§ 81-25. Area of acre.—The measure of an acre
of land shall be equal to a rectangle of sixteen
poles or perches in length and ten in breadth,
and shall contain one hundred and sixty square
perches or poles, or four thousand eight hundred
and forty square yards, six hundred and forty
such acres being contained in a square mile.

§ 81-26 to 81-35: Repealed by Session Laws
1943, c. 513.

§ 81-36. Definitions.—Any person, either for
himself or as a servant or agent of any other per-
son, firm, or corporation, who is elected by pop-
ular vote, who shall weigh, or measure, or count,
or who shall ascertain from, or record the indica-
tions or readings of, a weighing, or measuring, or
recording, device or apparatus for any other per-
son, firm or corporation, and declare the weight,
or measure, or count, or reading or recording to
be the true weight, or measure, or count, or read-
ing, or recording of any commodity, thing, article,
or product upon which the purchase, or sale, or
exchange, is based, and make a charge for, or col-
lect pay, a fee, or any other compensation for such
act and shall issue a certificate of weight, or meas-
ure, or count, in accordance with the provisions
of this article, shall be licensed and shall be known
as a public weigh master in the state of North
Carolina. (1939, c. 285, s. 1.)

§ 81-37. Application for license permit.—Any
person desiring to be a public weigh master in this
state shall apply for and obtain license permit
from the state superintendent of weights and measures
by filing formal application as follows:

I, ..., a citizen of the United States, residing at ..., county of ..., have familiarized myself with the law and with full knowledge of the provisions contained there-
in relative to licensing of public weigh master, do hereby file application for license permit to be is-
 sued accordingly.

I certify that I am of sound mind and am physi-
cally fit to perform the duties imposed upon a
public weigh master and that I will, if licensed,
abide by and enforce all laws, rules and regula-
tions relating to the public weigh master Act to
the best of my knowledge and ability.

I, ..., being a citizen of this State
Name address ) and of good moral charac-
I, ......... ) ter, not related to the ap-
Name address ) licant by blood or mar-
I, ......... ) riage, do hereby certify
Name address ) that the statement of ap-
Editor’s Note.—The Act of 1931 amended this section as follows:

§ 81-24. Congressional standards adopted.—No
trader or other person shall buy or sell, or other-
wise use in trading, any other weights and
measures than are made and used according to the
standard prescribed by the congress of the United
States: Provided, that this chapter shall not prevent
the citizens of the state from buying

and selling grain by measure as may be agreed
upon between the parties. (Rev., s. 3063; Code,
s. 3837; R. C., c. 117, s. 1; 1741, c. 32, s. 2; 1866,
c. 125; C. S. 8061.)


§ 81-25. Area of acre.—The measure of an acre
of land shall be equal to a rectangle of sixteen
poles or perches in length and ten in breadth,
and shall contain one hundred and sixty square
perches or poles, or four thousand eight hundred
and forty square yards, six hundred and forty
such acres being contained in a square mile.

§ 81-26 to 81-35: Repealed by Session Laws
1943, c. 513.

Art. 4. Public Weigh Masters.

§ 81-36. Definitions.—Any person, either for
himself or as a servant or agent of any other per-
son, firm, or corporation, who is elected by pop-
ular vote, who shall weigh, or measure, or count,
or who shall ascertain from, or record the indica-
tions or readings of, a weighing, or measuring, or
recording, device or apparatus for any other per-
son, firm or corporation, and declare the weight,
or measure, or count, or reading or recording to
be the true weight, or measure, or count, or read-
ing, or recording of any commodity, thing, article,
or product upon which the purchase, or sale, or
exchange, is based, and make a charge for, or col-
lect pay, a fee, or any other compensation for such
act and shall issue a certificate of weight, or meas-
ure, or count, in accordance with the provisions
of this article, shall be licensed and shall be known
as a public weigh master in the state of North
Carolina. (1939, c. 285, s. 1.)

For comment on this enactment, see 17 N. C. Law Rev.
338.

§ 81-37. Application for license permit.—Any
person desiring to be a public weigh master in this
state shall apply for and obtain license permit
from the state of North Carolina through the
state superintendent of weights and measures by
filing formal application as follows:

I, ..., a citizen of the United States, residing at ..., county of ..., have familiarized myself with the law and with full knowledge of the provisions contained there-
in relative to licensing of public weigh master, do hereby file application for license permit to be is-
 sued accordingly.

I certify that I am of sound mind and am physi-
cally fit to perform the duties imposed upon a
public weigh master and that I will, if licensed,
abide by and enforce all laws, rules and regula-
tions relating to the public weigh master Act to
the best of my knowledge and ability.

I, ..., being a citizen of this State
Name address ) and of good moral charac-
I, ......... ) ter, not related to the ap-
Name address ) licant by blood or mar-
I, ......... ) riage, do hereby certify
Name address ) that the statement of ap-

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§ 81-38. Forms of certificates of weight, etc., to be approved by state superintendent of weights and measures.—It shall be the duty of every public weigh master licensed by this article to issue a certificate of weight, measure, count, reading, or recording on forms approved by the state superintendent of weights and measures, and to enforce the provisions of this article, together with rules and regulations relating thereto. Said public weigh master shall not receive compensation from the state for the duties so performed. (1939, ch. 285, s. 3.)

§ 81-39. Official seal of public weigh masters.—It shall be the duty of every public weigh master so licensed by this article, to obtain from the state department of weights and measures an official seal, which seal shall have inscribed thereon the following words: “North Carolina Public Weigh Master” and such other design and/or legend as the state superintendent of weights and measures may deem appropriate. The seal shall be stamped or impressed upon each and every weight, measure, numerical count, reading or recording certificate issued by such public weigh master, and when so applied the certificate shall be recognized and accepted as a declaration of the commodity, product, or article weighed, or measured, or counted within the tolerance allowed by the “Uniform Weights and Measures Act” of this state: Provided, however, that the weighers of tobacco in "Leaf Tobacco Warehouses" may use, in lieu of said seal, a signature, which signature shall also appear, in ink or other indelible substance on the Weigh Master’s Formal Application, and again, posted in a conspicuous and accessible place in the tobacco warehouse where he is acting as weigh master. (1939, c. 285, s. 4; 1941, c. 317, s. 1.)

Editor’s Note.—The 1941 amendment directed that a color be established for the period at the end of the section and the proviso added.

§ 81-40. Violations of provisions by weigh masters made misdemeanor.—Any public weigh master who shall refuse to issue a certificate as prescribed by this article, or who shall issue a certificate giving a false weight, or measure, or count, or reading, or recording, or who shall misrepresent the weight, or measure, or count, or reading or recording of the quantity of any commodity, produce or article to any person, firm or corporation, or who shall otherwise violate any of the provisions of this article shall be guilty of misdemeanor and upon conviction thereof shall be punished by a fine of not less than ten dollars ($10.00) nor more than five hundred dollars ($500.00), or by imprisonment for not more than three months, or by both such fine and imprisonment in the discretion of the court. (1939, c. 285, s. 6.)

§ 81-42. Certificates of weigh masters presumed accurate and correct.—When a public weigh master certificate is used in the sale, or purchase, or barter, or exchange of any commodity, product, or article, the certified weight, or measure, or count or reading or recording shall be deemed to be the true, accurate and undisputed weight, or measure, or count, or reading or recording at time said commodity, product, or article is put into the natural channels of trade, which is, at the time of sale or purchase or barter or exchange: Provided, however, that reasonable variations, or tolerances shall be permitted as established by rules and regulations as provided for by Uniform Weights and Measures Act. (1939, c. 285, s. 7; 1941, c. 317, s. 2.)

Editor’s Note.—The 1941 amendment struck out from the end of the section the words: “And provided, further, that there is no written contract or agreement to the contrary.”

§ 81-43. Duty of custodian of product during time intervening between weighing and issuance of certificate.—If any commodity, product or article is to be offered for sale, or sold and is weighed or measured or counted by any public weigh master and a certificate issued prior to sale, or acceptance of such commodity, product or article by the purchaser, his agent, or consignee or, if any commodity product or article is offered for sale, sold, and/or delivered pending the weighing or measuring or counting of such commodity, product or article, by any weigh master, by whom the issuance of a certificate, the person, firm or corporation in whose custody said commodity, product or article is, shall keep, protect and prevent any increase or decrease in weight, measure or count, in the interim so that the declaration of weight, or measure, or count shall be true in accordance with § 81-42. The term “interim” as used in this section shall be construed to mean the time intervening between the weighing and issuance of certificate and the sale or purchase; and the time intervening between the sale or purchase and the presentation of such commodity, product, or article to the public weigh master for weighing, or measuring or counting, and the issuance of certificate. Any loss sustained in the...

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§ 81-44. Complaints to weigh master or state superintendent of weights and measures.—When doubt or difference arises as to the correctness of weight, or measure, or count, or reading, or recording of any amount or part of any commodity, produce, or article while in custody, shall be borne by the person, firm or corporation in whose custody said commodity, produce, or article is. (1939, c. 285, s. 8.)

§ 81-45. Approval by state superintendent of weights and measures of devices used.—It shall be unlawful for any public weigh master to use any weights or measures, or weighing or measuring or recording device, which has not been tested and/or approved by the state superintendent of weights and measures, or his assistant or deputy or inspector in accordance with the “Uniform Weights and Measures Act” and/or the rules and regulations governing same. (1939, c. 285, s. 10.)

§ 81-46. Annual license for public weigh masters.—Public weigh masters shall be licensed for a period of one year beginning on the first day of July and ending on the thirtieth day of June, next, and a fee of five dollars ($5.00) shall be paid by each person so licensed to the state superintendent of weights and measures, or his assistant or deputy or inspector in accordance with the “Uniform Weights and Measures Act” and/or the rules and regulations governing same. (1939, c. 285, s. 9; 1941, c. 317, s. 3.)

Editor’s Note.—The 1941 amendment inserted the provisions referring to §§ 81-42 and 81-43 and made other changes.

§ 81-47. Use of fees collected.—All monies collected by this article shall be used exclusively for the enforcement of this and the Uniform Weights and Measures Act. (1939, c. 285, s. 12.)

§ 81-48. Seal obtained from state superintendent of weights and measures.—Each public weigh master licensed under this article shall obtain from the state superintendent of weights and measures the seal, as provided for by this article, and pay the sum of two dollars and fifty cents ($2.50), which sum shall be for the use of said seal, and no additional charges shall be made as long as the public weigh master is licensed in accordance with the provisions of this article. Monies collected under this section shall be deposited with the state treasurer of North Carolina and expended for the purposes of this article under the terms of the Executive Budget Act. The state superintendent of weights and measures shall issue to the public weigh master the said seal upon receipt of said sum. All seals as issued to the public weigh masters shall be paid for out of the special uniform weights and measures fund. (1939, c. 285, s. 13.)

§ 81-49. Seal declared property of state.—The seal herein provided for shall be the property of the state of North Carolina and shall be forfeited and returned to the state superintendent of weights and measures upon termination of the performance of duties herein described as being the duties of a public weigh master. Failure or refusal of a person licensed as a public weigh master under this article to return, turn over, or surrender the seal furnished by the state superintendent of weights and measures upon expiration of term of license or for malfeasance in office, shall be a misdemeanor and any person convicted thereof shall forfeit the amount paid for use of such seal and shall be punished by a fine of not less than ten dollars ($10.00) nor more than two hundred dollars ($200.00), or by imprisonment for not more than three months, or both such fine and imprisonment, in the discretion of the court. (1939, c. 285, s. 14.)

Art. 5. Scale Mechanics.

§ 81-50. Cotton weighing.—If any weigher or purchaser of cotton shall make any deduction from the weight of any bag, bale, or package of lint cotton, for or on account of the draft, turn, or break of the scales, steelyards, or other implement used in weighing the same, or for any other cause except as herein allowed, the person so offending shall be guilty of a misdemeanor, and fined three hundred dollars or imprisoned, in the discretion of the court: Provided, however, that deductions may be made by the weigher for water, dirt, or other foreign substances on such bag, bale [ 773 ]
or package of cotton, or for other just cause; but, if such deductions are made, the nature of such deductions shall be indicated upon the principal weight ticket which shall also show the gross weight of the cotton, the amount deducted as tare, and the net weight of said cotton. (Rev., s. 3816; Code, s. 1007; 1811-5, c. 58, ss. 1, 3; 1943, c. 762, s 2; C. S. 5030.)

Editor's Note.—The 1943 amendment rewrote the proviso.

§ 81-51: Repealed by Session Laws 1943, c. 543.

§ 81-52. Purpose of act.—The purpose and intent of this act shall be:
(a) To protect the owners and/or users of scales in this state against the practices of the unscrupulous, incompetent and fraudulent, "self-named" "scale mechanic."
(b) To provide honest, efficient and competent scale service.
(c) To protect the honest, efficient and competent "scale mechanic" in the practice of his profession. (1941, c. 237, s. 1.)

Editor's Note.—For comment on this act, see 19 N. C. L. Rev. 47.

§ 81-53. Definition of "scale mechanic;" act not applicable to certain apprentices or helpers.—Any person who is skilled in installing, adjusting, maintaining and repairing scales and/or weighing devices and who acts as such for hire or award and who is registered, shall be known as a "scale mechanic," provided, conditions as hereinafter stipulated are complied with; and provided further that the provisions of this act shall not apply to an apprentice or helper when working with a registered "scale mechanic." (1941, c. 237, s. 2.)

§ 81-54. Prerequisites for "scale mechanic."—A "scale mechanic," as defined in § 81-53 shall have the following prerequisites:
(a) A thorough working knowledge of scale mechanics.
(b) Be endorsed by three reputable citizens of this state, not related to "scale mechanic" by blood or marriage, for whom said "scale mechanic" has rendered satisfactory scale repair service.
(c) Shall furnish the state superintendent of weights and measures satisfactory proof of his ability to comply with the provisions of this act and any and all rules and/or regulations promulgated in accordance therewith.
(d) Shall apply for, and be registered as such, with the state superintendent of weights and measures. (1941, c. 237, s. 3.)

§ 81-55. Requirements for registration.—In order to be registered a "scale mechanic" must:
(a) Give satisfactory proof of prerequisites a, b and c as set forth in § 81-54, to the state superintendent of weights and measures.
(b) Have sufficient tools and test weights or equipment as may be necessary to render satisfactory scale service and be able to test counter scales up to thirty pounds and platform scales up to twenty-five per cent of capacity.
(c) Conform and/or comply with such rules and regulations as provided for by § 81-57. (1941, c. 237, s. 4.)

§ 81-56. Issuance of certificate of registration; annual renewal.—Upon compliance with the provisions of § 81-55, the state superintendent of weights and measures is authorized to issue a certificate of registration to such "scale mechanic," which certificate shall be renewed annually on the first day of July and the state superintendent of weights and measures shall have the power and authority to refuse to renew such certificate if it appears to his satisfaction that such "scale mechanic" has secured the original certificate of registration by false representation as to his ability or has failed to comply with the provisions of this act and any and all rules and/or regulations promulgated in accordance therewith. (1941, c. 237, s. 5; 1943, c. 543.)

Editor's Note.—The 1943 amendment inserted after the word "annually" in the fifth line the words "on the first day of July."

§ 81-57. Rules and regulations.—Such rules and regulations as are necessary to carry out the purpose and intent of this act shall be made and published by the state superintendent of weights and measures by and with the advice of his advisory board. (1941, c. 237, s. 6.)

§ 81-58. Impersonation of registered "scale mechanic" and violation of rules.—Any person who shall impersonate in any way a registered "scale mechanic" as herein provided or for violate any of the provisions or related rules or regulations of this act, shall be guilty of a misdemeanor and punished by a fine of not less than ten dollars and not more than five hundred dollars or by imprisonment not exceeding thirty days or by both such fine and imprisonment upon conviction in any court of competent jurisdiction. (1941, c. 237, s. 7.)

Art. 6. Surveys.

§ 81-59. Standard surveyor's chain; tests.—The standard measure for a surveyor's chain shall be twenty-two standard yards, a standard half or one-pole chain shall be eleven standard yards, a standard quarter or one-half chain shall be five and one-half standard yards, but every person using a surveyor's chain, half-chain, or quarter-chain for measuring land shall every two years test the same in the manner hereinafter provided. (Rev., s. 3075; 1889, c. 409; 1899, c. 665; C. S. 8074.)

Cross Reference.—As to official survey base, see §§ 102-1 to 102-11.

§ 81-60. Using untested chain misdemeanor.—If any person shall use any chain for measuring land without having the same first measured and sealed by the state superintendent of weights and measures, his deputy or inspector, or shall use the same for a longer period than two years without bringing it to the state superintendent of weights and measures, his deputy or inspector, and having the same measured and sealed by him, he shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding ten dollars. (Rev., s. 3684; 1889, c. 409, s. 2; 1943, c. 543; C. S. 5075.)

Editor's Note.—The 1943 amendment inserted the words "for measurement of weights and measures, his deputy or inspector."

§ 81-61. Tests for magnetic variation and for chain.—Every surveyor operating in any of the counties of this state with magnetic instruments, whether in a public or private capacity, shall, between the first day of January and thirty-first day of December in each and every year, carefully test his needle upon the official meridian monu-
ments in the county in which he resides or the nearest county in which such monuments have been erected, by adjusting his instrument over the intersection of the lines cut into the top of one of the meridian monuments so established and sighting to the intersection of the lines cut into the top of the other meridian monument, noting the variation of the magnetic from the true meridian and the direction thereof, and shall test the chain or other instrument of linear measure upon the distance from center to center as indicated by intersecting lines of the two beams, tablets, or other official monuments set at or near the county courthouse for this purpose, noting the error of such instrument as compared with the standard of the monuments. (Rev. s. 3076; 1899, c. 665, s. 1; 1901, c. 642; C. S. 8076.)

§ 81-62. Magnetic variation to be recorded with survey.—On every official record of a survey of lands made after the first day in July, nineteen hundred and one, in any county in which meridian monuments have been erected, there shall be entered by the surveyor making such survey a record as to the date of testing the magnetic instrument used, and the amount of declination or variation of the magnetic needle indicated at such test. (Rev. s. 3076; C. S. 8077.)

§ 81-63. Surveys in another county; data as to variation recorded.—Before making surveys in any county other than the one in which the magnetic instrument and instruments for linear measure to be used have already been tested, said surveyor shall procure in writing from the register of deeds of the county in which said monuments have been established, nearest to the point where the survey is to be made, a statement giving the declination of the magnetic needle for the year in which it was last determined, and the rate and direction of the variation of said magnetic needle since that time, and this data shall be recorded as a part of the record of his survey. But no surveyor shall be required to go outside of the county in which he resides for the purpose of testing the instruments herein named. (Rev. s. 3077; 1899, c. 665, s. 1; C. S. 8078.)

§ 81-64. Tests returned to register; records kept.—Such tests and the correction, if any, resulting therefrom shall be returned by the surveyor in writing and under oath to the register of deeds for the county in which such meridian is situated within ten days from the taking of the observations, setting forth the name of the surveyor, his residence, the character of the instrument tested, the date of the observations, the declination east or west of the magnetic needle from the true meridian, together with a fee of ten cents for filing and registering the same; and such return shall be filed and registered by the register of deeds in a book properly ruled and lettered, to be furnished by the board of commissioners of the county, to be used for such purpose exclusively and entitled “The Meridian Record.” (Rev. s. 3078; 1899, c. 665, s. 1; C. S. 8079.)

§ 81-65. Meridian monuments protected by county commissioners.—It shall be the duty of the board of county commissioners to maintain and protect the meridian monuments and tablets or monuments for the testing of chains or other instruments of linear measure established by the state, or national surveys cooperating with the county authorities, in good order and condition as the official standards of the county. (Rev. s. 3079; 1899, c. 665, s. 2; C. S. 8080.)

§ 81-66. Defacing meridian monuments misdeemeanor.—If any person shall in any manner injure, deface, remove, or destroy any meridian monument or tablets, or any part thereof, or shall fail, neglect, or refuse to do and perform any act, matter, or thing by law required of him to be done in connection with such monuments or tablets, he shall be guilty of a misdemeanor, and upon conviction thereof shall pay a fine or be imprisoned, or both, at the discretion of the court. (Rev. s. 3743; 1899, c. 665, s. 3; 1893, c. 283, s. 4; C. S. 8081.)

Art. 7. Standard Weight Packages of Grits, Meal and Flour.

§ 81-67. Corn meal.—It shall be unlawful for any person or persons to pack for sale, sell, or offer for sale in this state corn meal except in packages containing one pound, two pounds, three pounds, five pounds, twenty-five pounds, fifty pounds, or one hundred pounds, and whether the meal is bolted or unbolted shall be stated on the package. (1921, c. 170, s. 1; C. S. 8081(a).)

Local Modification.—Clay, Lenoir, Transylvania, Swain: 1911, c. 299; Jackson: 1931, c. 122; Macon: 1913, c. 82.

Cross References.—As to other sections regulating the sale of grits, meal and flour, see §§ 106-203 to 106-209. As to act establishing uniform weights and measures in general, see §§ 81-1 to 81-22.

§ 81-68. Hominy or grits.—It shall be unlawful for any person or persons to pack for sale, sell, or offer for sale any hominy or grits except in packages of one pound, one and one-half pounds, two pounds, three pounds, five pounds, ten pounds, twenty-five pounds, fifty pounds, or one hundred pounds, or multiples of one hundred pounds. (1921, c. 170, s. 2; 1933, c. 162; C. S. 8081(b).)

Cross Reference.—See note to § 81-68.

Editor's Note.—Public Laws of 1933, c. 162, added “two pounds” and “twenty-five pounds” to the list of weights enumerated in this section.

§ 81-69. Flour; sales from bulk.—It shall be unlawful for any person or persons to pack for sale, sell, or offer for sale in this state flour, except in packages containing six pounds, twelve pounds, twenty-four pounds, forty-eight pounds, ninety-eight pounds, or one hundred and ninety-six pounds of flour, and the net weight of all grits, meal, or flour shall be stated on the package of such meal, flour, or grits, with the name and address of the maker or jobber: Provided, the provisions of this article shall not apply to the retailing of grits, meal or flour distributed to customers from bulk, when the same is priced and delivered by actual weight. (1921, c. 170, s. 3; C. S. 8081(c).)

Cross Reference.—As to similar section regulating the sale of flour, see § 106-203. As to act establishing uniform weights and measures in general, see §§ 81-1 to 81-22.

§ 81-70. Packages of corn meal, grits or flour weighing five pounds or less.—The provisions of the above three sections shall not apply to pack-
 worries of corn meal, grits and/or flour weighing five pounds or less but same may be packed for sale, sold or offered for sale when and if the said packages are plainly and conspicuously marked, which said marking must show the net contents by avoirdupois weight, and said packages must be so filled that the size will not tend to deceive or aid in the perpetration of fraud in the sale thereof. (1935, c. 269.)

Cross References.—See § 106-203. As to act establishing uniform weights and measures in general, see §§ 81-1 to 81-22.

§§ 81-71, 81-72: Repealed by Session Laws 1943, c. 543.

Chapter 82. Wrecks.

Sec. 82-11. Proceeds of sale to be paid to clerk of superior court.

82-12. Disposition of proceeds of sale by clerk.

82-13. Proof of ownership of property sold.

82-14. Stranded property to be reported; failure to report misdemeanor.

82-15. Expenses to be deducted from proceeds of sales.

82-16. Violation of chapter a misdemeanor.

82-17. Commissioner violating chapter liable for double damages and guilty of a misdemeanor.

82-18. Interfering with commissioner in the discharge of his duties.

§ 82-1. Number and boundaries of wreck districts.—The counties of Currituck, Dare, Hyde, Carteret, Onslow, Brunswick, and New Hanover are hereby divided into the following wreck districts, namely:

Currituck.—The first to extend from the Virginia state line to Judy’s cove; the second to extend from the Judy’s cove to Josephus Baum’s fish house; the third to extend from Josephus Baum’s fish house to the county line of Dare.

Dare.—The first to extend from the county line of Currituck to the north point of Oregon inlet; the second to extend from the north point of Oregon inlet to the south point of New inlet; the third to extend from the south point of New inlet to the patrol house between Gull Shoal and Little Kennakeet life-saving stations; the fourth to extend from the last named patrol house to the patrol house between Big Kennakeet and Cape Hatteras life-saving stations; the fifth to extend from the last named patrol house to Creed’s Hill life-saving stations; the sixth to extend from Creed’s Hill life-saving stations to the county line of Hyde county.

Hyde.—The county of Hyde shall constitute one wreck district, which shall extend from the county line to the Carteret county line.

Carteret.—The first from the Hyde county line to Core Banks life-saving station; the second from Core Banks life-saving station to Old Topsail inlet; the third from Old Topsail inlet to the Onslow county line.

Onslow.—The first from Bogue inlet to New River inlet; the second from New River inlet to the New Hanover county line.

New Hanover and Brunswick.—To extend from the Onslow county line to the South Carolina state line. (Rev., s. 5440; 1899, c. 79, ss. 1-9; 1903, c. 85; 1905, c. 199; 1915, c. 42; C. S. 8082.)

Editor’s Note.—In the early case of Etheridge v. Jones, 30 N. C. 100, the question arose as to the right of the commissioners to take possession of a stranded ship without the consent of the master. It was held in that case that the commissioners did not have exclusive control of a wrecked vessel and the master or owner could take control of and dispose of a wrecked vessel without any responsibility to the commissioners.

The case of Hitfield v. Baum, 35 N. C. 394, 395, lays down the rule that there is an easement or right of way reserved by necessity for any person to enter over the land of another for the purpose of reaching and carrying away the cargo of a wrecked vessel.
office, shall go before some officer duly authorized to administer oaths and take an oath to perform faithfully the duties of his office, and the oaths to support the constitution of the state and of the United States. (Rev., s. 5441; 1899, c. 79, s. 11; C. S. 8085.)

§ 82-5. Duty of commissioners.—Upon the earliest intelligence given that any ship or vessel is stranded, it shall be the duty of the commissioner in whose district the same is stranded, or his duly authorized agent, to repair at once to such wrecked ship or vessel, and upon the permission of its master to summon immediately a sufficient number of men who, acting under the direction of the commissioner or his agent, shall at once proceed to save the cargo and material of such wrecked vessel. As soon as any such stranded property is saved it shall be immediately placed under guard, one guard to be selected by the commissioner or owner representing the same, and one other guard to be selected by the salvors. Such goods or stranded property shall be kept under strict guard until sold or the salvors are paid as provided in this chapter. (Rev., s. 5442; 1899, c. 79, s. 14; 1901, c. 175; C. S. 8056.)

§ 82-6. Salvage to be paid, or its payment secured, before release of goods.—Every person who assists in saving such cargo or material shall, within thirty days after saving the same, be paid a reasonable reward by the owner or master of the stranded vessel, or by the merchant whose vessel or goods are saved. In default of payment of a reasonable compensation the goods or other property so saved shall remain in the joint custody of the commissioner and salvors until all such charges are paid, or until the payment thereof is secured to the satisfaction of the parties saving such goods or other property. (Rev., s. 5443; 1899, c. 79, ss. 14, 15; C. S. 8057.)

§ 82-7. Adjustment of salvage when the parties cannot agree.—If the parties shall disagree touching the amount of reward or salvage to be paid to the persons employed, the commander, owner, or commissioner who represents the property saved shall choose one disinterested person, and the salvors shall nominate one other, who shall adjust and ascertain the same. If the persons thus chosen cannot agree, they shall choose one other indifferent person as umpire to decide between them: Provided, that the amount to be paid the salvors shall be determined and agreed upon before sale is made of such property. (Rev., s. 5444; 1899, c. 79, s. 16; C. S. 8088.)

§ 82-8. Sale of wrecked property for salvage; compensation of commissioner.—If the owner of the vessel, or the property which has been saved, shall fail for thirty days after the salvage has been ascertained, either by agreement or as provided for in § 82-7, to pay such salvage, it shall be the duty of the commissioner of wrecks in charge of such stranded or wrecked vessel or other property to sell the same at public sale, after first advertising such sale in the same manner as is required for sales of personal property under execution. Each commissioner shall provide himself with books and shall record in them all such sales by him made. He shall receive for selling any such wrecked or stranded property five per centum on the amount of sales, and in addition thereto he shall receive his actual expenses incurred in going to and returning from the place of the wreck, or where the property is stranded, to be paid out of the gross amount of such sales. At any public sale of stranded property, the salvors may select one person and the commissioner one other, who shall keep an accurate account of the sales, make the collections, settle with the commissioner his fees, and pay to the salvors the amount agreed on or awarded by the referees. (Rev., s. 5445; 1899, c. 79, s. 17; 1901, c. 178; 1905, c. 66; C. S. 8089.)

§ 82-9. Compensation of commissioner when there is no sale.—If any owner or merchant shall remove any such goods or other stranded property from the custody of any commissioner without a sale, then such commissioner shall receive, in addition to his actual expenses incurred for the purposes mentioned in § 82-8, two and one-half per centum on the amount of the value of such property, which amount shall be ascertained in the same manner as is provided for ascertaining the amount of the reward to be paid salvors in those cases where such reward cannot be determined by agreement. No commissioner shall receive any salvage or other reward except the commission prescribed in this chapter. (Rev., s. 5446; 1899, c. 79, ss. 17, 18; 1905, c. 66; C. S. 8090.)

§ 82-10. Sale of unclaimed property.—Whenever any vessel, cargo, or material of any ship or vessel or any other property shall be cast ashore or taken up at sea and brought to shore, and no person is present to claim the same as owner, it shall be the duty of the commissioner of the district where the same is brought or cast ashore to take charge of such property and to proceed to advertise and sell it at public sale, first giving twenty days notice of such sale at three public places. On making any such sale the commissioner shall, out of the gross proceeds thereof, retain a commission of five per centum as his compensation and the amount awarded to the salvors pursuant to the provisions of this chapter. (Rev., s. 5447; 1899, c. 79, ss. 19, 20; C. S. 8091.)

§ 82-11. Proceeds of sale to be paid to clerk of superior court.—When any commissioner shall undertake to sell any property where no person is or has been present to claim the same, it shall be his duty to notify the clerk of the superior court of his county of such sale. After any such sale is made, the commissioner shall forward to such clerk the proceeds of the sale, after deducting his commission of five per centum and paying the salvors the amount awarded to them as provided in this chapter. (Rev., s. 5448; 1899, c. 79, s. 21; C. S. 8092.)

§ 82-12. Disposition of proceeds of sale by clerk.—It shall be the duty of the clerk of the superior court to make a record and keep an account of all moneys received by him from any commissioner of wrecks, and he shall advertise in some weekly newspaper published in North Carolina the amount so received, giving a true description of the marks, numbers, and kinds of goods or other stranded property, for which the same was sold. Each commissioner shall give the clerk of the superior court all necessary information for the
§ 82-13. Proof of ownership of property sold. — If any person shall claim to be the owner of any property sold as provided in § 82-10 and shall present his claim to the clerk holding the money arising from the sale of such property, it shall be the duty of such person to prove his title to the satisfaction of the clerk. If any person making a claim to such property be unknown to the clerk, then the clerk shall submit such claim to the consideration of three disinterested persons, one of whom shall be chosen by the claimant, and the decision of such referees shall always be final. (Rev., s. 5450; 1899, c. 79, s. 23; C. S. 8094.)

§ 82-14. Stranded property to be reported; failure to report misdemeanor. — If any person shall find any wrecked or stranded property on or near the seashore, no person being present to claim the same, he shall as soon as possible give information thereof to the nearest commissioner of wrecks, who shall advertise and sell the same as provided in this chapter. If such finder shall refuse to report the goods so found, he shall be guilty of a misdemeanor, and upon conviction he shall be fined not more than fifty dollars, or imprisoned not more than thirty days. (Rev., ss. 3548, 5451; 1899, c. 79, s. 24; C. S. 8095.)

§ 82-15. Expenses to be deducted from proceeds of sales. — All necessary expenses shall be deducted from the gross proceeds of any sales made under this chapter. Such necessary expenses shall include only the cost of advertising, guarding, and surveying, when a survey is called. (Rev., s. 5452; 1899, c. 79, s. 19; C. S. 8096.)

§ 82-16. Violation of chapter a misdemeanor. — If any person shall violate any of the provisions of this chapter he shall be guilty of a misdemeanor. (Rev., s. 3562; 1899, c. 79, s. 26; C. S. 8097.)

§ 82-17. Commissioner violating chapter liable for double damages and guilty of a misdemeanor. — If any commissioner of wrecks shall by fraud or wilful neglect violate any of the provisions of this chapter, or abuse the trust reposed in him, he shall forfeit and pay double the amount of damages to the party aggrieved. He shall also be guilty of a misdemeanor, and upon conviction he shall forfeit his office and shall thereafter be incapable of acting as commissioner. (Rev. s. 3563; 1899, c. 79, s. 25; C. S. 8098.)

§ 82-18. Interfering with commissioner in the discharge of his duties. — If any person shall wilfully and unlawfully resist, delay, or obstruct any commissioner of wrecks in discharging or attempting to discharge his duties as such commissioner, he shall be guilty of a misdemeanor. (Rev., s. 3564; 1905, c. 66, s. 2; C. S. 8099.)
Division XII. Occupations.

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Chapter 83.

Architects.

83-10. Examination fees; expenses of board.
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§ 83-1. Architecture defined.—For the purpose of this chapter, the practice of architecture consists of rendering or offering to render for compensation design and/or related supervision services, of an aesthetic and/or structural nature, for the construction of buildings, structures or projects, wherein the safeguarding of life, health, and property and the promotion of the public welfare may be involved. An architect is a person who practices architecture as herein defined; provided that nothing herein shall prevent a building contractor from drafting designs and plans without compensation for use by him in constructing or repairing buildings for the owner. (1915, c. 270, s. 9; 1941, c. 369, s. 3; C. S. 4985.)

Editor’s Note.—The 1941 amendment inserted the above in place of the former section.

For comment on this amendment, see 19 N. C. Law Rev. 446.

§ 83-2. State board of architectural examination and registration; creation; membership; vacancies.—There shall be a state board of architectural examination and registration, consisting of five members, to be appointed by the governor in the following manner, to wit: Within thirty days after the ninth day of March, one thousand nine hundred and fifteen, the governor shall appoint five persons who are reputable architects residing in the state of North Carolina, who have been engaged in the practice of architecture at least ten years. The five persons so appointed by the governor shall constitute the board of architectural examination and registration, and they shall be appointed for one, two, three, four, and five years, respectively. Thereafter, in each year, the governor in like manner shall appoint one licensed architect to fill the vacancy caused by the expiration of the term of office, the term of such new members to be for five years. If vacancy shall occur in the board for any cause, the same shall be filled by the appointment of the governor. (1915, c. 270, s. 1; C. S. 4986.)

§ 83-3. Oath of members.—Each member of the state board of architectural examination and registration shall, before entering upon the discharge of the duties of his office, take and file with the secretary of state an oath in writing to properly perform the duties of his office as a member of said board, and to uphold the constitution of North Carolina and the constitution of the United States. (1915, c. 270, s. 2; C. S. 4987.)

§ 83-4. Organization of board; officers; treasurer's bond.—The said board shall, within thirty days after its appointment by the governor, meet in the city of Raleigh, at a time and place to be designated by the governor, and organize by electing a president, vice-president, secretary, and treasurer, each to serve for one year. Said board shall have power to make such by-laws, rules, and regulations as it shall deem best, provided the same are not in conflict with the laws of North Carolina. The treasurer shall give bond in such sum as the board shall determine, with such security as shall be approved by the board, said bond to be conditioned for the faithful performance of the duties of his office and for the faithful accounting of all moneys and other property as shall come into his hands. (1915, c. 270, s. 1; C. S. 4988.)

§ 83-5. Seal of board.—The board shall adopt a seal for its own use. The seal shall have the words “Board of Architectural Examination and Registration, State of North Carolina,” and the Secretary shall have charge, care, and custody thereof. (1915, c. 270, s. 5; C. S. 4989.)

§ 83-6. Meeting of board; quorum.—The board shall meet once a year in July of each succeeding year, for the purpose of electing officers and transacting such other business as may properly come before it. Due notice of such annual meeting, and the time and place thereof, shall be given to each member by letter, sent to his last postoffice address at least ten days before the meetings, and thirty days notice of such annual meeting shall be given in some newspaper published in the city of Raleigh, at least once a week for four weeks preceding such meeting. Three members of the board shall constitute a quorum. (1915, c. 270, s. 1; C. S. 4990.)

§ 83-7. Record of proceedings and of registration.—The secretary shall keep a record of the proceedings of the board and registration for all applicants for registration and admission to practice architecture, giving the name and location of the institution or place of training where the applicant was prepared for the practice of architecture, and such other information as the board may deem proper and useful. This registration shall be prima facie evidence of all matters recorded therein. (1915, c. 270, s. 1; C. S. 4991.)

§ 83-8. Examination and certificate of applicant.—Any person hereafter desiring to be reg-
§ 83-9. Refusal, revocation, or suspension of certificates.— Said board may refuse to grant certificate to any person convicted of a felony, or who, in the opinion of the board, has been guilty of gross, unprofessional conduct, or who is addicted to habits of such character as to render him unfit to practice architecture. The board of architectural examination and registration may suspend for a period or revoke the certificate of admission to practice, and forbid practice by any architect upon conviction, after a fair and impartial trial, of any dishonest practice, unprofessional conduct, or incompetence. For the purpose of such trial, the board shall have full power to subpoena and examine witnesses under oath as to the facts of the case. Any architect against whom charges are preferred shall have not less than sixty days notice before the trial of his case, and shall have the right to have witnesses subpoenaed in his behalf, and of being heard in person and by counsel. Any such trial shall be open to the public. (1915, c. 270, s. 3; 1919, c. 336, s. 1; C. S. 4992.)

§ 83-10. Examination fees; expenses of board. — All examination fees shall be paid in advance to the treasurer of said board of architectural examination and registration. The state of North Carolina shall not be liable for the compensation of any members or officers of said board. All expenses incurred by said board in the necessary discharge of their duties shall be paid out of funds derived from examination fees herein provided for, and shall be paid by the treasurer upon warrant drawn by the secretary and approved by the president. The said board shall have the power to determine what are necessary expenses and to fix the salaries of the respective officers. (1915, c. 270, s. 5; 1919, c. 336, s. 3; C. S. 4993.)

§ 83-11. Annual renewal of certificate; fee.— Every architect continuing his practice in the state shall, on or before the first day of July in each year, obtain from the board of architectural examination and registration a renewal of his certificate for the ensuing year upon the payment of a fee of five dollars, and upon failure to do so shall have his certificate of admission to practice revoked, but such certificate may be renewed at any time within one year upon the payment of a fee of ten dollars. (1919, c. 336, s. 2; C. S. 4995.)

§ 83-12. Holding out as architect without having certificate, provisos.— Any person not registered under this chapter who shall advertise or put up a sign or card or other device, or in any other way hold himself out to the public as an architect, or practice architecture as herein defined, shall be guilty of a misdemeanor and punished by a fine not exceeding fifty dollars. Provided, however, that nothing herein shall prevent any person from making plans or data for buildings for themselves: Provided, further, that nothing in this chapter shall prevent any person from selling or furnishing plans for the construction of residence or farm or commercial buildings of a value not exceeding fifteen thousand dollars; provided, further, that nothing in this chapter shall prevent any registered engineer duly licensed in this state from furnishing design or supervision services for plants or structures which are elements of engineering projects or utilities: And provided further, that nothing in this chapter shall prevent the procuring of plans and specifications from an architect residing outside of this state. Nonresident architects who come within the state to do business shall be subject to the same examination and upon same terms and conditions as resident applicants, unless such nonresident architects are permitted to engage in business in this state under the terms of the preceding section. (1915, c. 270, s. 4; 1941, c. 369, ss. 1, 2; C. S. 4996.)

Editor’s Note.—The 1941 amendment inserted in the first sentence the words “or practice architecture as herein defined.” It also inserted the second and third provisos and made changes in the first proviso.

§ 83-13. Seal of registered architect; plans to bear seal.— Every architect who shall have obtained from said board a certificate, shall have a seal which must contain the name of the architect, his place of business, and the words “Registered Architect, of North Carolina,” and he shall stamp all drawings and specifications issued from his office, for use in this state, with an impression of said seal. (1915, c. 270, s. 7; C. S. 4997.)

§ 83-14. County record of registered architects; fees.— Every person holding a certificate of said board to practice architecture shall have said certificate recorded in the office of the clerk of the superior court of the county in which he resides or has his principal office. Said clerk shall record the same in a book to be kept by him, entitled “Record of Architecture,” and the clerk shall be entitled to a fee of one dollar for recording such certificate: Provided, however, that in any counties where the clerk is on a salary and not on a fee basis, then the said fee of one dollar shall be paid into the county treasury. It shall be unlawful for any person to hold himself out as an architect until said certificate shall have been recorded, and any person found guilty of holding himself out as an architect without registration of his certificate, as aforesaid, shall be guilty of a misdemeanor, and fined not more than fifty dollars, in the discretion of the court. (1915, c. 270, s. 8; C. S. 4998.)
Chapter 84. Attorneys at Law.

Art. 1. Qualifications of Attorney; Unauthorized Practice of Law.

§ 84-1. Oaths taken in open court. — Attorneys before they shall be admitted to practice law shall, in open court before a justice of the supreme or judge of the superior court, take the oath prescribed for attorneys, and also the oath of allegiance to the state, and to support the constitution of the United States, prescribed for all public officers, and the same shall be entered on the records of the court; and, upon such qualification had, and oath taken, may act as attorneys during their good behavior. (Rev., ss. 209; Code, s. 19; R. C., c. 9, s. 3; 1777, c. 115, s. 8; C. S. 197.)

Non-Resident Attorneys. — As this section requires the oath of allegiance to the state, it debars a citizen of another state from obtaining a license to practice law and a non-resident attorney does not acquire the right to practice habitually in this state by having been previously allowed, through the courtesy of the courts, to appear in special cases. Manning v. Roanoke, etc., R. Co., 122 N. C. 824, 828, 28 S. E. 963.

§ 84-2. Persons disqualified. — No clerk of the superior or supreme court, nor deputy or assistant clerk of said courts, nor register of deeds, nor sheriff, nor any justice of the peace, nor county commissioner shall practice law. Persons violating this provision shall be guilty of a misdemeanor and fined not less than two hundred dollars. This section shall not apply to Confederate soldiers. (Rev., ss. 210, 3641; Code, ss. 27, 28, 110; 1870-1, c. 90; 1883, c. 496; 1871-2, c. 120; 1880, c. 43; C. C. P., s. 424; 1919, c. 205; 1933, c. 15; 1941, c. 177; 1943, c. 543; C. S. 198.)

Local Modification. — Burke: 1933, c. 15; Madison: 1935, c. 214.

Editor's Note. — Registers of deeds were, by Public Laws 1933, c. 15, added to the list of these excluded from practice. The 1963 amendment made the former second paragraph of this section into a new section designated as § 84-21. That paragraph had been added by the 1941 amendment.

§ 84-2.1. “Practice law” defined. — The phrase “practice law” as used in this chapter is defined to be performing any legal service for any other person, firm or corporation, with or without compensation, specifically including the preparation of deeds, mortgages, wills, trust instruments, reports of guardians, trustees, administrators, or executors, abstracting or passing upon titles, the preparation and filing of petitions for use in any court, or assisting by advice, counsel, or otherwise in any such legal work; and to advise or give and out of the state to whom a certificate has been issued under this chapter. (1919, c. 336, s. 3; C. S. 4993.)
opinion upon the legal rights of any person, firm or corporation: Provided, that the above reference to particular acts which are specifically included within the definition of the phrase "practice law" shall not be construed to limit the foregoing general definition of such term, but shall be construed to include the foregoing particular acts, as well as all other acts within said general definition. (Rev., ss. 210, 3641; Code, ss. 27, 28, 110; 1870-1, c. 90; 1883, c. 406; 1871-2, c. 120; 1880, c. 43; C. C. P., s. 424; 1919, c. 205; 1933, c. 15; 1941, c. 177; 1943, c. 543; C. S. 198.)

Editor's Note.—Prior to the 1943 amendment this section appeared as the second paragraph of § 84-2. It had been added as a said paragraph by the 1941 amendment. For comment on the 1941 act, see 19 N. C. L. Rev. 454.

What Constitutes Practicing Law.—To constitute a practicing of law, within the prohibition of this section, it is necessary that the person charged with its violation shall have customarily or habitually held himself out to the public as a lawyer, or that he demanded compensation for his services as such. State v. Bryan, 98 N. C. 644, 4 S. E. 532.

The fact that a person on one occasion acted as an attorney for a party to an action, is some evidence for the jury to consider, but is not conclusive of the question. Id.

§ 84-3. Officers of inferior courts disqualified in certain cases.—No judge or prosecuting attorney of any recorder's, municipal, or county court shall appear in any other court on behalf of the defendant in a criminal action, where such criminal action has been tried in the court of such officer. Any person violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding one hundred dollars. (1917, c. 213; C. S. 190.)

Local Modification.—Iredell: 1917, c. 213, s. 3.

§ 84-4. Corporations and persons other than members of state bar prohibited from practicing law; exceptions.—It shall be unlawful for any corporation or any person or association of persons, except members of the bar of the state of North Carolina admitted and licensed to practice as attorneys at law, to appear as attorney or counsellor-at-law in any action or proceeding in any court in this state or before any judicial body or the North Carolina industrial commission or the unemployment compensation commission; to maintain, conduct, or defend any court action on behalf of the defendant in a criminal action, where such criminal action has been tried in the court of such officer. Any person violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding one hundred dollars. (1917, c. 213; C. S. 190.)

§ 84-5. Further prohibition as to practice of law by corporation; exceptions.—It shall be unlawful for any corporation or any person or association of persons, except members of the bar of the state of North Carolina admitted and licensed to practice as attorneys at law, to appear as attorney or counsellor-at-law in any action or proceeding in any court in this state or before any judicial body or the North Carolina industrial commission or the unemployment compensation commission; to maintain, conduct, or defend any court action on behalf of the defendant in a criminal action, where such criminal action has been tried in the court of such officer. Any person violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding one hundred dollars. (1917, c. 213; C. S. 190.)

Cross Reference.—As to officers disqualified to practice law, see § 84-3.

Editor's Note.—The act from which this section was codified became effective April 1, 1931, and provided that it should not apply to or affect "litigation now pending in any court."

The 1937 amendment inserted the words "or the unemployment compensation commission" immediately preceding the first semicolon in this section.

This section is constitutional and valid, the right to practice law being subject to legislative regulation within constitutional restrictions and limitations, and the statute not being in contravention of any provision of the state or federal constitutions. Seawell v. Carolina Motor Club, 209 N. C. 624, 184 S. E. 540.

The right to practice law is personal and may not be exercised by a corporation either directly or indirectly by employing a practicing lawyer. Seawell v. Carolina Motor Club, 209 N. C. 624, 184 S. E. 540.

What Is Deemed Practice of Law.—The practice of law as hereinafter defined consists of the conduct of cases in court, or the representation of parties, in writing legal documents, or as being engaged in advising or giving legal advice or counsel, or in furnishing the services of a lawyer or lawyers; and it shall be unlawful for any person or association of persons, except members of the bar of the state of North Carolina admitted and licensed to practice as attorneys at law, to appear as attorney or counsellor-at-law, or in furnishing the services of a lawyer or lawyers; and it shall be unlawful for any person or association of persons, except members of the Bar, for a fee or any consideration, to or- ganize corporations or prepare for another person, firm or corporation, any other legal documents similar to those of a will, except life insurance trusts, or, for a fee or any consideration, to organize corporations or prepare for another person, firm or corporation, any other legal document. Provided, that nothing herein shall pro-hibit any person from conferring with a person, firm or corporation with respect to the creation of a fiduciary capacity from transacting the necessary cler- ical business incidental to the routine or usual ad- ministration of estates, trusts, guardianships, or other similar fiduciary capacities, such as offering wills for probate in common form, securing au-thority to expend principal as guardian or trustee,
§ 84-6. Exacting fee for conducting foreclosures prohibited to all except licensed attorneys. — It shall be unlawful to exact, charge, or receive any attorney's fee for the foreclosure of any mortgage under power of sale, unless the foreclosure is conducted by a licensed attorney at law of North Carolina, and unless the full amount charged as attorney's fee is actually paid to and received by such attorney, without being directly or indirectly shared with or rebated to any one else, and it shall be unlawful for any such attorney to make any showing that he has received such a fee unless he has received the same, or to share with or rebate to any other person, firm, or corporation such fee or any part thereof received by him; but such attorney may divide such fee with another licensed attorney at law maintaining his own place of business and not an officer or employee of the foreclosing party, if such attorney has assisted in performing the services for which the fee is paid, or resides in a place other than that where the foreclosure proceedings are conducted, and has forwarded the case to the attorney conducting such foreclosure. (1931, c. 157, s. 3.)

§ 84-7. Solicitors, upon application, to bring injunction or criminal proceedings. — The solicitor of any of the superior courts shall, upon the application of any member of the Bar, or of any bar association, of the State of North Carolina, bring such action in the name of the State as may be proper to enjoin any such person, corporation, or association of persons who it is alleged are violating the provisions of §§ 84-4 to 84-8, and it shall be the duty of the solicitor of the State to indict any person, corporation, or association of persons upon the receipt of information of the violation of the provisions of §§ 84-4 to 84-8. (1931, c. 157, s. 4.)

Cross Reference. — As to the power of the North Carolina State Bar to investigate and enjoin unauthorized practice of law, see § 84-37.

§ 84-8. Punishment for violations; legal clinics of law schools excepted. — Any person, corporation, or association of persons violating the provisions of §§ 84-4 to 84-8 shall be guilty of a misdemeanor and punished by a fine or imprisonment, or both, in the discretion of the court. Provided, that §§ 84-4 to 84-8 shall not apply to any law school or law schools conducting a legal clinic and receiving as their clientage only those persons unable financially to compensate for legal advice or services rendered. (1931, c. 157, s. 5; 1931, c. 347.)

§ 84-9. Unlawful for any one except attorney to appear for creditor in insolvency or certain other proceedings. — It shall be unlawful for any corporation, or any firm or other association of persons other than a law firm, or for any individual other than an attorney duly licensed to practice law, to appear for another in any bankruptcy or insolvency proceeding, or in any action or proceeding for or growing out of the appointment of a receiver, or in any matter involving an assignment for the benefit of creditors, to present or vote any claim of another, whether under an assignment or transfer of such claim or in any other manner, in any of the actions, proceedings or matters hereinabove set out. (1931, c. 208, s. 2.)

Cross Reference. — As to unlawful solicitation of claims of creditors in insolvent proceedings, see § 23-46.

§ 84-10. Violation of preceding section a misdemeanor. — Any individual, corporation, or firm or other association of persons violating any provision of § 84-9 shall be guilty of a misdemeanor. (1931, c. 208, s. 3.)

Art. 2. Relation to Client.

§ 84-11. Authority filed or produced if requested. — Every attorney who claims to enter an appearance for any person shall, upon being required so to do, produce and file in the clerk's office of the court in which he claims to enter an appearance, a power or authority to that effect signed by the persons or some one of them for whom he is about to enter an appearance, or by some person duly authorized in that behalf, otherwise he shall not be allowed so to do; Provided, that an attorney claims to enter an appearance by virtue of a letter to him directed (whether such letter purport a general or particular employment), and it is necessary for him to retain the letter in his own possession, he shall, on the production of said letter setting forth such employment, be allowed to enter his appearance, and the clerk shall make a note to that effect upon the docket. (Rev. s. 213; Code, s. 29; R. C., c. 31, s. 57; C. S. 200.)

Cross Reference. — As to general and specific appearances, see § 1-11.

Sufficiency of Writing. — The power of attorney which a lawyer may be required to file, pursuant to this section, is some writing addressed to him by the client or an agent for the client. Therefore, letters written by the client to third persons expressing qualification because of the employment of a particular attorney will not suffice to supply the want of power. Day v. Adams, 63 N. C. 254.

A power of attorney, signed by the purchaser of a note, in the name of the payee, is sufficient authority under this section for an attorney at law to appear in a cause in court, although the agent has no written authority to make the power. Johnson v. Sikes, 49 N. C. 70.

A power of attorney, given by a married woman, under this section to an attorney at law to appear in a cause in court, is some writing addressed to him by the client or an agent for the client. Therefore, letters written by the client to third persons expressing qualification because of the employment of a particular attorney will not suffice to supply the want of power. Day v. Adams, 63 N. C. 254.

Time of Demand for Authority. — In Reesee v. Reece, 66 N. C. 377 it is held that the defendant has the right, because of this section, to demand the authority at the return term of a summons.
If the demand for the power of attorney be made at the return term, it is the practice and within the discretion of the judge to extend the time; if, however, such demand is not made at the proper time, and before the right to appear has been recognized, it costs too late, unless there be peculiar circumstances tending to excuse the party for not making it in apt time. Reece v. Reece, 60 N. C. 237.

After an attorney has entered an appearance and has been recognized by the court as attorney in the cause, no written authority can be required of him at a subsequent time. This evidently means that the opposite party shall not be in question his authority unless he does so within the time and in accordance with the provision of this section. New Bern v. Jones, 63 N. C. 606, 607; Day v. Adams, 63 N. C. 254, 256.

When Client Present. — If a written authority be required under this section the attorney must produce the same, even if his client is present at the bar of the court. Day v. Adams, 63 N. C. 254, 256.

Authority to Dismiss Action. — Upon special appearance of the attorneys of a husband whose property has been attached by the wife, for the purpose of dismissing the action, the court should, on motion made, require them to file their written authority under this section. Walton v. Walton, 178 N. C. 73, 100 S. E. 176.

§ 84-12. Failure to file complaint, attorney liable for costs.—When a plaintiff is compelled to pay the costs of his suit in consequence of a failure on the part of his attorney to file his complaint in proper time, he may sue such attorney for all the costs by him so paid, and the receipt of the clerk may be given in evidence in support of such claim. (Rev., s. 214; Code, s. 22; R. C., c. 9, s. 5; 1786, c. 253, s. 6; C. S. 201.)

Power of Courts to Compel Payment. — This section is not exhaustive, and the courts have power to order counsel to pay costs of cases in which they have been guilty of gross negligence (even of a kind not included in this section) such conduct being a sort of contempt. Ex parte Robins, 63 N. C. 399.

§ 84-13. Fraudulent practice, attorney liable in double damages.—If any attorney commits any fraudulent practice, he shall be liable in an action to the party injured, and on the verdict passing against him, judgment shall be given for the plaintiff to recover double damages. (Rev., s. 215; Code, s. 23; R. C., c. 9, s. 6; 1743, c. 37; C. S. 202.)

Aliens Prevented from Practicing. — In Ex parte Townsend, 10 N. C. 355, 362, the court said “No one should be presented to the public under the panoply of such a license (to practice law), against whom an injured suitor may have the full benefit of such legal remedy as the laws of the state provide, in the event of fraudulent or negligent practice.” Hence the court reasoned that an alien could not be admitted to practice, as actions under this section would be removable to the United States courts.

Presumption of Fraud. — The relation of attorney and client is one of a fiduciary character, and gives rise to a presumption of fraud when the former, in dealing with the latter, obtains an advantage. Egerton v. Logan, 81 N. C. 172.

Art. 3. Arguments.

§ 84-14. Court's control of argument.—In all trials in the superior courts there shall be allowed two addresses to the jury for the state or plaintiff and two for the defendant, except in capital felonies, when there shall be no limit as to number. The Judges of the Superior Court are authorized to limit the time of argument of Counsel to the jury on the trial of actions, civil and criminal, and felony. No time shall be allowed to address the jury on the side in misdemeanors and appeals from Justices of the peace; to not less than two hours on each side in all other civil actions and in felonies less than capital; in capital felonies, the time of argument of Counsel may not be limited otherwise than by content, except that the court may limit the number of those who may address the jury to three Counsel on each side. Where any greater number of addresses or any extension of time are desired, motion shall be made, and it shall be in the discretion of the judge to allow the same or not, as the interests of justice may require. In jury trials the whole case as well of law as of fact may be argued to the jury. (Rev., s. 216; 1903, c. 433; 1927, ch. 52; C. S. 203.)

Discretion of Court. — The trial judge has a large discretion in controlling and directing the argument of Counsel, but, under this section, this does not include the right to deprive a litigant of the benefit of his Counsel's argument when it is confined within proper bounds and is addressed to the material facts of the case. Puett v. Caldwell, etc., R. Co., 141 N. C. 352, 53 S. E. 852; Irvin v. Southern R. Co., 164 N. C. 5, 17, 80 S. E. 78.

It is the duty of the judge to interfere when the remarks of Counsel are not warranted by the evidence and are calculated to mislead or prejudice the jury. State v. Howley, 235 N. C. 365, 18 S. E. 2d (20) 705.

Arguing Law and Fact. — It is reversible error for the trial judge not to permit attorneys to argue to the jury the law and facts as limited by the decisions of the court as provided by this section. Howard v. Western Union Tel. Co., 170 N. C. 495, 87 S. E. 313.

Failure to charge upon a certain point is reversible error especially when the Counsel are shown to have argued the case well of law as of fact" as is permitted by this section. Nichols v. Fibre Co., 190 N. C. 1, 128 S. E. 471. It is the duty of the trial judge to instruct the jury upon the law, and he may correctly tell them to disregard the law as argued to them by counsel. Sears, Roebuck & Co. v. Banking Co., 191 N. C. 500, 132 S. E. 468.

Same—Reading and Commenting on Reported Cases. — An attorney has the right under this section to argue "the whole case as well as law as of fact," they may read to the jury reported cases and comment thereon; but the facts as argued to the jury in the cases cannot be read as a substitute for evidence of their existence in another case. Horah v. Knox, 87 N. C. 483.

Reading Dissenting Opinion as Law of Case.—It is not permissible for the trial judge to read and comment on a dissenting opinion, and to apply in the argument the decisions of the court as provided by this section. Teasley v. Burwell, 199 N. C. 18, 20, 153 S. E. 471.

Limitation of Argument under Former Section. — See State v. Miller, 75 N. C. 73.


§ 84-15. Creation of North Carolina State Bar as an agency of the state.—There is hereby created as an agency of the State of North Carolina, for the purposes and with the powers hereinafter set forth, the North Carolina State Bar. (1933, c. 210, s. 1.)

Editor's Note.—For a review of this section and those immediately following, see 11 N. C. Law Rev. 191.

Quoted in In re Parker, 39 N. C. 693, 184 S. E. 532.

§ 84-16. Membership and privileges.—The membership of the North Carolina state bar shall consist of three classes, active, honorary and inactive.

The active members shall be all persons who shall have heretofore obtained, or who shall hereafter obtain, a license or certificate, which shall at the time be valid and effectual, enabling them to practice law in the state of North Carolina, and shall at the time be valid. The whole case as provided hereinafter specified, unless classified as an inactive member by the council as hereinafter provided. No person other than a member of the
North Carolina state bar shall practice in any court of the state, except foreign attorneys as provided by statute.

The honorary members shall be (a) the chief justice and associate justices of the supreme court of North Carolina; (b) the judges of the superior courts of North Carolina; (c) all former judges of the above-named courts resident in North Carolina, but not engaged in the practice of law; (d) judges of the district courts of the United States and of the circuit court of appeals resident in North Carolina.

Inactive members shall be all persons found by the Council to be not engaged in the practice of law and not holding themselves out as practicing attorneys and not occupying any public or private positions in which they may be called upon to give legal advice or counsel or to examine the law or to pass upon the legal effect of any act, document, or law.

Only active members shall be required to pay annual membership fees, and shall have the right to vote. A member shall be entitled to vote at all annual or special meetings of the North Carolina state bar, and at all meetings of and elections held by the bar of each of the judicial districts in which he resides: Provided, that if he desires to vote with the bar of some district in which he practices, other than that in which he resides, he may do so upon filing with the resident judge of the district in which he desires to vote, and with the resident judge of the district in which he resides (and, after the North Carolina state bar shall have been organized as hereinafter set forth, with the secretary-treasurer of the North Carolina state bar), his statement in writing that he desires to vote in such other district: Provided, however, that in no case shall he be entitled to vote in more than one district.

For comment on the 1939 amendatory act, see 17 N. C. Law Rev. 330 et seq.

§ 84-18. Election of councillors.—Within thirty days after this article shall have gone into effect the judge of each judicial district shall, by notice posted at the front door of each courthouse within his district and by such other means as he shall think desirable, call a meeting of the attorneys residing within his district, and any others who may declare in writing their desire to be affiliated with that district, as hereinabove provided, for the purpose of organizing the bar of the district, the said meeting to be held at a place deemed by the judge to be convenient, on a day fixed, not less than twenty nor more than thirty days from posting of notice. At that meeting such attorneys as attend shall constitute a quorum, and shall forthwith form such organization herein referred to as the "district bar," as they may deem advisable, of which organization all active members of the North Carolina state bar entitled to vote in that district shall be members. The district bar shall be the subdivision of the North Carolina state bar for that judicial district, and shall be subject to, and subject to all of the rules, regulations, and by-laws adopted by the district bar. In case the judge of any judicial district, by reason of physical disability or otherwise, shall fail to call the meeting aforesaid within thirty days after this article shall have gone into effect, the same may be called within thirty days thereafter by any two attorneys residing in said district, by written notice signed by them and delivered to the clerk of the court of each such district to be posted at the front door of each courthouse as aforesaid, the said meeting to be held on a day fixed not less than twenty nor more than thirty days after the posting of said notice; and thereupon the same
proceedings shall take place as though the meeting had been called by the judge as aforesaid. Any clerk to whom any such notice shall be delivered to be signed, shall immediately post the same and shall write upon the said notice the exact date and time when the same is so posted. In case more than one notice shall be posted hereunder by different groups of attorneys, that posted first in point of time shall prevail and be deemed to be the notice provided for under this article. Pending the organization of the council as hereinafter provided, notification of the election of each councillor shall be sent within five days after such election by the secretary of the district bar to the clerk of the supreme court of North Carolina; but after the organization of the council such notices shall be sent to its secretary-treasurer. In case neither the judge nor any two members shall call a meeting as aforesaid, a councillor for the said district, residing therein, shall be named at a meeting of such members of the council as shall have been elected in accordance herewith, to serve until such district bar shall be organized under the provisions of this article (except as to the time for calling meetings), either on the call of the judge of the district court or of two members of the bar, and shall have elected a councillor to serve for the unexpired term of the councillor so named. (1933, c. 210, s. 4.)

§ 84-19. Change of judicial districts.—In the event that a new district shall hereafter be carved-out of an existing district, the councillor for the old district shall remain in office and continue to represent the district constituting that portion of the old district in which he resides or with which he has elected to be affiliated; and within thirty days after the division of the old district shall have become effective, or so soon thereafter as practicable, the same procedure shall be followed for the organization of the North Carolina state bar, constituting the remaining and unrepresented portion of the old district, and for the election of a councillor to represent the same, as is provided in § 84-18, and if a new district or more than one new district shall be formed by a recombination or reallocation of the counties in more than one existing district, the same procedure shall be followed as is prescribed by § 84-18, in said new district, or in each of them if there be more than one, within thirty days after the election or appointment of the judge or judges thereof; but in that event the office of councillor for each of the old districts the counties in which shall have been so recombined into or reallocated to such new district or districts shall cease, determined, and become vacant so soon as the new or bars of such new district, or all of such new districts if there shall be more than one, shall have been organized and shall have elected a councillor or councillors therefor, but not earlier: Provided, that if at such time any councillor whose office shall thus become vacant be actually serving upon a committee before which there is pending any trial of a case of professional misconduct or malpractice, he shall, notwithstanding the election of a new councillor, continue to serve as councillor for the purpose of trying such case until judgment shall have been rendered therein. (1933, c. 210, s. 5.)
sented to the chief justice of the supreme court or any judge thereof, until any such defects in the organization of the council shall have been corrected, at which time a new certificate of organization shall be presented and the same course taken as hereinafter provided, and so on until a correct certificate showing the proper organization of the council shall have been presented, and the organization of the council accordingly completed. Upon (a) the entry of an order upon the minutes of the court that the requirements of this article have been complied with, or (b) if for any reason the chief justice or judge should not act thereon within thirty days, then, after the lapse of thirty days from the presentation to the chief justice or judge, as the case may be, of any certificate of organization hereinafter required to be presented by the secretary-treasurer, without either the entry of an order or the return of said certificate with a statement showing the respects in which this article has not been complied with, the organization of the council shall be deemed to be complete, and it shall be vested with the powers herein set forth; and the certificate of organization shall thereupon forthwith be spread upon the minutes of the court. A copy of the certificate of organization, as spread upon the minutes of the court, shall be published in the next ensuing volume of the North Carolina Reports. The rules and regulations set forth in the certificate of organization, and all other rules and regulations which may be adopted by the council under this article, may be amended by the council from time to time in any manner not inconsistent with this article. Copies of all such rules and regulations adopted subsequently to the filing of the certificate of organization, and of all amendments of the certificate of organization, shall be certified to the chief justice of the supreme court of North Carolina, entered by it upon its minutes, and published in the next ensuing number of the North Carolina Reports: Provided, that the court may decline to have so entered upon its minutes any of such rules, regulations and amendments which in the opinion of the chief justice are inconsistent with this article. (1933, c. 210, s. 7.)

§ 84-22. Officers and committees of the North Carolina State Bar.—The officers of the North Carolina State Bar shall be a president, a first vice-president, a second vice-president, and a secretary-treasurer, who shall be deemed likewise to be the officers, with the same titles, of the council. Their duties shall be prescribed by the council. The president and vice-presidents shall be elected by the members of the North Carolina State Bar at its annual meeting, and the secretary-treasurer shall be elected by the council. All officers shall hold office for one year and until their successors are elected and qualified. The officers need not be members of the council. (1933, c. 210, s. 8; 1941, c. 344, ss. 4, 5.)

Editor's Note.—Prior to the 1941 amendment there was only one vice-president.

§ 84-23. Powers of council.—Subject to the superior authority of the general assembly to legislate thereon by general laws, and except as herein otherwise limited, the council is hereby vested, as an agency of the state, with the control of the discipline, disbarment and restoration of attorneys practicing law in this state: Provided, that from any order suspending an attorney from the practice of law and from any order disbarring an attorney, pending appeal, the council may determine, but no change in the time or place shall become effective within one year from the date upon which the change is determined.

The board of law examiners shall elect a member of said board as chairman thereof, who shall hold office for such period as said board may determine.

The examination shall be held in such manner and at such times as the board of law examiners may determine, but no change in the time or place shall become effective within one year from the date upon which the change is determined.

The board of law examiners, subject to the approval of the council, shall by majority vote, from time to time, make, alter and amend such rules and regulations for admission to the bar and for the furtherance of the purposes of this article as are necessary to the furtherance of the purposes of this article as are necessary to the furtherance of the purposes of this article.

Editor's Note.—The words "and restoration" were inserted by the amendment of 1935. Prior to the 1937 amendment an appeal lay "as of right" to the regular superior court judge. In State v. Hollingsworth, 206 N. C. 739, 175 S. E. 99, construing former § 205, it was held that the court was without authority to set aside a judgment of disbarment on motion, especially since the enactment of this and subsequent sections.

Plea of Guilt.—Where an attorney has confessed his guilt in open court to four crimes, all involving moral turpitude, and the bar of North Carolina had refused to disbar him, the Supreme Court of the United States, disbarment must ultimately result regardless of this and the following sections. In re British, 224 N. C. 95, 96, 197 S. E. 705.

§ 84-24. Admission to practice.—The provisions of the law now obtaining with reference to admission to the practice of law, as amended, and the rules and regulations prescribed by the supreme court of North Carolina with reference thereto, shall continue in force until superseded, changed or modified by or under the provisions of this article.

For the purpose of examining applicants and providing rules and regulations for admission to the bar including the issuance of license therefor, there is hereby created the board of law examiners, which shall consist of seven members of the bar, elected by the council of the North Carolina state bar, who need not be members of the council. No teacher in any law school, however, shall be eligible. The members of the board of law examiners elected from the bar shall each hold office for a term of three years: Provided, that the members first elected shall hold office, two for one year, two for two years, and two for three years.

The secretary of the North Carolina state bar shall be the secretary of the board, and serve without additional pay. The board of law examiners shall elect a member of said board as chairman thereof, who shall hold office for such period as said board may determine.

The examination shall be held in such manner and at such times as the board of law examiners may determine, but no change in the time or place shall become effective within one year from the date upon which the change is determined.

The board of law examiners, subject to the approval of the council, shall by majority vote, from time to time, make, alter and amend such rules and regulations for admission to the bar as in their judgment shall promote the welfare of the state and the profession: Provided, that any change in the educational requirements for admission to the bar shall not become effective within two years from the date of the adoption of such change.

All such rules and regulations, and modifications, alterations and amendments thereof, shall
be recorded and promulgated as provided in § 84-21 in relation to the certificate of organization and the rules and regulations of the council. Whenever the Council shall order the restoration of license to any person as authorized by § 84-32, it shall be the duty of the Board of Law Examiners to issue a written license to such person, noting thereon that the same is issued in compliance with an order of the Council of The North Carolina State Bar, whether the license to practice law was issued by the Board of Law Examiners or the Supreme Court in the first instance. (1933, c. 210, s. 10; c. 331; 1935, cc. 33, 61; 1941, c. 344, s. 6.)

Cross References.—As to discipline and disbarment, see § 84-28. As to restoration of license to practice law, see § 28-32.

Editor's Note.—Prior to the amendments of 1935, this section provided that a member of the supreme court should act as a member of the board of law examiners. Public Laws 1935, c. 61, struck out this provision and changed the number of members of the bar serving on the board from six to seven. Public Laws 1935, c. 33, repealed provisions relative to fees of applicants and to compensation of the board, previously included in this section, by enacting new and different provisions. These subjects are now provided for in another purpose.

The 1941 amendment added the paragraph at the end of this section.

§ 84-25. Fees of applicants.—All applicants for examination before the board of law examiners for license to practice law in North Carolina shall pay a filing fee of one dollar and fifty cents ($1.50) and shall deposit with the secretary of the board of law examiners the sum of twenty-two and 9/100 ($22.00) dollars, of which sum two dollars shall be a deposit to pay for license, if issued. Any applicant who shall fail to pass examination shall receive a refund of twelve dollars from said twenty-two dollars deposit. (1935, c. 33, s. 1.)

§ 84-26. Pay of board of law examiners.—Each member of the board of law examiners shall receive the sum of fifty dollars for his services in connection with each examination and shall receive his actual expenses of travel and subsistence while engaged in duties assigned to him, provided that for transportation by the use of private automobile the expense of travel shall not exceed five cents per mile. (1935, c. 33, s. 2; 1937, c. 35.)

Editor's Note.—Prior to the 1937 amendment the maximum for subsistence was four dollars per day.

§ 84-27. Surplus received from applicants directed to supreme court library.—After the payment of all expenses incurred in connection with each examination held by the board of law examiners and expenses of said board at such meetings as may be necessary for the performance of its additional duties, the said board of law examiners shall cause to be paid at the end of each fiscal year of the State of North Carolina to the Supreme Court of North Carolina for its use in connection with the maintenance of its library, such surplus then remaining with said board of law examiners from fees received from applicants for examination. (1935, c. 33, s. 3.)

§ 84-28. Discipline and disbarment.—The council or any committee of its members appointed for that purpose shall have jurisdiction to hear and determine all complaints, allegations, or charges of malpractice, corrupt or unprofessional conduct, or the violation of professional ethics, made against any member of the North Carolina state bar; may administer the punishments of private reprimand, suspension from the practice of law for a period not exceeding twelve months, and disbarment as the case shall in their judgment warrant, for any of the following causes: 1. Commission of a criminal offense showing professional unfitness; 2. Detention without a bona fide claim thereto of property received or money collected in the capacity of attorney; 3. Soliciting professional business; 4. Conduct involving willful deceit or fraud or any other unprofessional act; 5. Detention without a bona fide claim thereto of property received or money collected in any fiduciary capacity; 6. The violation of any of the canons of ethics which have been adopted and promulgated by the council of the North Carolina state bar; may invoke the processes of the courts in any case in which they deem it desirable to do so, and shall formulate rules of procedure governing the trial of any such person which shall conform as near as may be to the procedure now provided by law for hearings before referees in compulsory references. Such rules shall provide for due process of law, and shall provide an opportunity to be heard; for a complete record of the proceedings for purposes of appeal to the superior court of the county wherein the attorney involved resides on the record made before the council or the committee as the case may be. Upon such appeal to the superior court the accused attorney shall have the right to a trial by jury of the issues of fact arising on the pleadings, but such trial shall be only upon the written evidence taken before the trial committee or council. From the decision of the superior court the council and the accused attorney shall each have the right of appeal to the supreme court of North Carolina. Trial before the committee appointed for that purpose by the council shall be held in the county in which the accused member resides: Provided, however, that the committee conducting the hearing shall have power to remove the same to any county in which the offense, or any part thereof, was committed, if in the opinion of such committee the ends of justice or convenience of witnesses require such removal. The procedure herein provided shall apply in all cases of discipline or disbarments arising under this section. (1933, c. 210, s. 11; 1937, c. 51, s. 3.)

Cross References.—As to restoration of license, see § 84-32. As to issuance of written license upon restoration of license, see § 84-24. The cases treated under this section were decided under those sections which appeared in Michie's Code of 1931 as §§ 204 and 205, the provisions of which were substantially re-enacted in the 1935 act.

Constitutionality. — This section, and the other sections of this article, taken from the act of 1871, are constitutional. Ex parte Schenck, 65 N. C. 353.

The aforesaid act does not take away any of the inherent rights which are absolutely essential in the administration of justice. Id.

Civil Action. — Proceedings brought under this section are of a civil nature. In the Matter of Ebbs, 150 N. C. 44, 59 S. E. 190.

Not an "Enabling Act." — The act of 1871, upon which this and the other sections of this article are based, was not an "Enabling Act." It did not confer any power formerly invested in the courts, and so is a disabling statute. Kane v. Haywood, 66 N. C. 1; In the Matter of Ebbs, 150 N. C. 44, 63 S. E. 190.

Disbarment Is to Protect Public.—An order disbarring an attorney upon his conviction of a felony is not entered as...
additional punishment, but as a protection to the public. State v. Spivey, 213 N. C. 45, 195 S. E. 1.

Indictment Necessary. — By a proper construction of this section, the court is shorn of its power to disburse an attorney unfit for practice. In re Spence, 212 N. C. 574, 191 S. E. 611. Conviction or Confession of Guilt. — The words "conviction" and "confession," as used in the section, must be construed to convey the idea that the party has been convicted by a jury or has in open court declined to take issue by the plea of not guilty, and confessed himself guilty. Kane v. Haywood, 66 N. C. 1, 2.

So the party in answer to a rule to show cause why he should not be attached for contempt for failure to pay money into court, not being voluntary, is not a confession in open court as contemplated by this section. Id.

Same — Conviction in Foreign State. — This section does not confer upon the court the power to disbar an attorney because he has been "convicted" in the courts of another state or of the United States. In the Matter of Ebbs, 150 N. C. 44, 63 S. E. 190.

Nature of Offense. — Under the acts of 1871, upon which this section is based, conviction or confession of a felony showing untrustworthiness was sufficient basis for disbarment; but by the act of 1907 conviction of a felony was necessary; construing these provisions to give effect to the language of both provisions), and further stated that the conviction of a criminal offense—the illegal sale of liquor—is sufficient grounds for disbarment as showing the attorney unfit for practice. See also State v. Johnson, 174 N. C. 345, 93 S. E. 847.

In the instant case it having appeared to the court that the defendant was guilty of an infamous misdemeanor, convicted of a felony by §§ 14-1, 14-3, the court by virtue of its inherent power was authorized to order his name stricken from the rolls of attorneys and his license to practice law in the state of North Carolina returned to the supreme court which issued it. State v. Spivey, 213 N. C. 45, 48, 195 S. E. 1.

Confession of a Felony. — A plea of guilty to an indictment charging defendant with willfully, feloniously, secretly, and maliciously giving aid and assistance to his codefendant by manufacturing evidence, altering and destroying original records in the office of the Commissioner of Revenue, etc., was held a confession of a felony, and ground for disbarment if defendant is a practicing attorney under former sections of the act, now § 84-29. Concerning evidence and witness fees. — Any investigation of charges of professional misconduct the council or any committee thereof shall have power to summon and examine witnesses under oath, and to compel their attendance, and the production of books, papers, and other documents or writings deemed by it necessary or material to the inquiry. Each summons or subpoena shall be issued under the hand and seal of the secretary-treasurer or the president of the council or the chairman of the committee appointed to hear the charges, and shall have the force and effect; restoration of licenses. — Whenever charges shall have been presented against any member of the bar, and the council shall have directed a hearing upon the charges, it shall also designate some member of the bar to prosecute said charges in such hearings as may be held, including hearing upon appeals in the superior and supreme courts. The council may allow the attorney performing such services at its request such compensation as it may deem proper. (1933, c. 210, s. 14.)

§ 84-32. Records and judgments and their effects; restoration of licenses. — In the case of persons charged with an offense cognizable by the council or any committee thereof, a complete record of the proceedings and evidence taken before the council or any committee thereof shall be made and preserved in the office of the secretary-treasurer, but the council may, upon sufficient cause shown and with the consent of the person so charged, cause the same to be expunged and destroyed. Final judgments of suspension or disbarment shall be entered upon the judgment docket of the superior court of the county wherein the accused resides, and also upon the minutes of the supreme court of North Carolina; and such judgment shall be effective throughout the state. Whenever any attorney has been deprived of his license, the council, in its discretion, may restore said license upon due notice being given and hearing had and satisfactory evidence produced of proper reformation of the licentiate before restoration. (1933, c. 210, s. 15; 1935, c. 74, s. 2.)

Cross Reference.—As to issuance of written license upon reeducation to practice, see § 84-28.

Editor's Note.—The amendment of 1935 struck out the words "under the provisions of this article" after the word "license" in line two of the second paragraph.

§ 84-33. Annual and special meetings. — There shall be an annual meeting of the North Carolina state bar, open to all members in good standing, to be held at such place and time after such no-
tice (but not less than thirty days) as the coun-
cil may determine, for the discussion of the af-
fairs of the bar and the administration of justice; and special meetings of the North Carolina state bar may be called, on not less than thirty days' notice, by the council, or on the call, addressed to the council, of not less than twenty-five per cent of the active members of the North Carolina state bar; but at special meetings no subjects shall be dealt with other than those specified in the no-
tice. Notice of all meetings, whether annual or special, may be given by publication in such
newspapers of general circulation as the council may select, or, in the discretion of the council,
by mailing notice to the secretary of the several district bars or to the individual active members
of the North Carolina state bar. The North Car-
olina state bar shall not take any action in re-
spect of any decision of the council or any com-
nitee thereof relating to admission, exclusion,
discipline or punishment of any person or other
action, save after notice in writing of the action
of the council or committee proposed to be di-
rected to be made, which notice shall be given
to the secretary-treasurer thirty days before the
meeting, who shall give, by mail, at least fifteen
days notice to the members of the North Caro-
lina state bar, and unless at the meeting two-
thirds of the members present and voting shall
favor the motion to direct or overrule. At any
annual or special meeting ten per cent of the ac-
tive members of the bar shall constitute a quo-
rum; but there shall be no voting by proxy.

§ 84-34. Membership fees and list of mem-
bers.—Every active member of the North Caro-
lina State Bar shall on or before the first day of
January, nineteen hundred and thirty-four, pay
to the secretary-treasurer, in respect of the calen-
dar year nineteen hundred and thirty-four,
dollars, and shall thereafter, prior to the first day
of July of each year, beginning with and includ-
ing the year nineteen hundred and thirty-four,
pay to the secretary-treasurer, in respect of the calen-
dar year in which such payment is herein
directed to be made, an annual membership fee
of three dollars, and shall thereafter, prior to the
first day of July of each year, beginning with the
calendar year one thousand nine hundred and
thirty-nine, pay to the secretary-treasurer, in re-
spect to the calendar year in which such payment
is herein directed to be made, an annual membership
fee of five dollars; and in every case the mem-
ber so paying shall notify the secretary-treasurer
of his correct post-office address. The said mem-
bership fee shall be regarded as a service charge
for the maintenance of the several services pre-
scribed in this article, and shall be in addition to all
fees now required in connection with admissions to
practice, and in addition to all license taxes now
or hereafter required by law. The said fee shall
not be prorated: Provided, that no fee shall be
required of an attorney licensed after this article
shall have gone into effect until the first day of
July of the second calendar year (a "calendar
year" for the purposes of this article being treated
as the period from January first to December
thirty-first) following that in which he shall have
been licensed; but this proviso shall not apply to
attorneys from other states admitted on certifi-
cate. The said fees shall be disbursed by the
secretary-treasurer on the order of the council.
The secretary-treasurer shall annually, at a time
and in a law magazine or daily newspaper to be
prescribed by the council, publish an account of
the financial transactions of the council, in a
form to be prescribed by it. The secretary-treas-
urer shall compile and keep currently correct from
the names and post-office addresses forwarded to
him and from any other available sources of in-
formation a list of members of the North Carolina
state bar and furnish to the clerk of the superior
court in each county, not later than the first day
of October in each year, a list showing the name
and address of each attorney for that county who
has not complied with the provisions of this arti-
cle. The name of each of the active members
who shall be in arrears in the payment of mem-
bership fees for one or more calendar years shall
be furnished to the presiding judge at the next
term of the superior court after the first day of
October of each year, by the clerk of the superior
court of each county wherein said member or
members reside, and the court shall thereupon
take such action as is necessary and proper. The.
information and list of membership fees so certi-

§ 84-35. Saving as to North Carolina Bar As-

association.—Nothing in this article contained shall
be construed as affecting in any way the North
Carolina Bar Association, or any local bar associa-
tion. (1933, c. 210, s. 18.)

§ 84-36. Inherent powers of courts unaffected.

—Nothing contained in this article shall be
construed as disabling or abridging the inherent
powers of the court to deal with its attorneys.
(1937, c. 51, s. 4.)

C. S., 204, 205, restricting the power of courts to disbar
attorneys, were repealed by § 20, ch. 210, Public Laws of
1933, and the statutory method of disbarment, provided by
the Act of 1933, is not exclusive, but to the contrary rec-
ognizes the inherent power of the courts, and the courts
have jurisdiction to order the disbarment of an attorney
upon his conviction of an infamous misdemeanor, converted
to a felony by §§ 14-1 and 14-3. State v. Spivey, 213 N.
C. 45, 195 S. E. 1; State v. Johnson, 174 N. C. 345, 93 S.
E. 847.

§ 84-37. State bar may investigate and enjoin
unauthorized practice.—The council or any com-
mittee of its members appointed for that purpose
may inquire into and investigate any charges or
complaints of unauthorized or unlawful practice
of law. The council may bring or cause to be
brought and maintain in the name of the North
Carolina state bar an action or actions, upon in-
formation or upon the complaint of any private
person or of any bar association against any per-
son, partnership, corporation or association and
any employee, agent, director, or officer thereof
who engages in rendering any legal service or
makes it a practice or business to render legal services which are unauthorized or prohibited by law or statutes relative thereto. No bond for cost shall be required in such proceeding.

(a) In an action brought under this section the final judgment if in favor of the plaintiff shall perpetually restrain the defendant or defendants from the commission or continuance of the act or acts complained of. A temporary injunction to restrain the commission or continuance thereof may be granted upon proof or by affidavit, that the defendant or defendants have violated any of the laws or statutes applicable to unauthorized or unlawful practice of law. The provisions of statute or rules relating generally to injunctions as provisional remedies in actions shall apply to such a temporary injunction and the proceedings thereunder.

(b) The venue for actions brought under this section shall be the superior court of any county in which such acts constituting unauthorized or unlawful practice of law are alleged to have been committed or in which there appear reasonable grounds that they will be committed or in the county where the defendants in such action reside.

c) The plaintiff in such action shall be entitled to examination of the adverse party and witnesses before filing his complaint and before trial in the same manner as provided by law for the examination of parties.

d) This section shall not repeal or curtail any remedy now provided in cases of unauthorized or unlawful practice of law, and nothing contained herein shall be construed as disabling or abridging the inherent powers of the court in such matters. (1939, c. 281.)

Cross Reference.—As to the power of any solicitor of any of the superior courts to bring injunction or criminal proceedings, see § 84-7.

Editor's Note.—For comment on this enactment, see 17 N. C. Law Rev. 342.

Chapter 85. Auctions and Auctioneers.

Art. 1. In General.

§ 85-1. Application of article.


§ 85-3. Requirements of law and of commissioner of revenue; false statement.

§ 85-4. Punishment for violation of law.

§ 85-5. License tax by counties and municipalities.

§ 85-6. Account semiannually; pay over moneys received.

§ 85-7. Acting without appointment; penalty.

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Art. 2. Auction Sales of Articles Containing Hidden Value.

§ 85-10. Application of article.


§ 85-12. Licensing of auction merchants.


§ 85-14. Conduct of sales by licensed auctioneer required.

Art. 1. In General.

§ 85-1. Application of article.—The provisions of this article shall apply only to sales of jewelry and silverware at public auction, and to the auctioneers conducting or engaged in such sales. This article does not affect any sale of jewelry or silverware (1) by auction of jewelry or silverware made pursuant to and in execution of any order, decree, or judgment of the courts of the United States or of this state; or (2) made in consequence of any assignment of property and estate for benefit of creditors; or (3) made by executors, administrators, collectors, or guardians; or (4) made pursuant to any law touching the collection of any tax or duty, or sale of any wrecked goods. (Rev., s. 220; Code, s. 2284; R. C., c. 10, s. 6; 1923, c. 243, s. 1; C. S. 4999.)

Editor's Note.—The Act of 1923, ch. 243 takes auction sales other than sales of jewelry and silverware, and auctioneers engaged in such sales out of the provisions of this article. Auctioneer is the agent of both buyer and seller, and the entry on his lists, taken in connection with the advertisement, is a compliance with the statute of frauds. Cherry v. Long, 61 N. C. 466; Woodruff v. Trust Co., 173 N. C. 546, 92 S. E. 496; Dickerson v. Summons, 141 N. C. 325, 53 S. E. 850.

Authority of auctioneer to vary conditions of sale confirmed as agent of hirer. Satterfield v. Smith, 33 N. C. 60.

Authority of Auctioneer to Explain Conditions.—An advertisement of a sale of property by an auctioneer may be explained at the time of sale. Rankin v. Matthews, 29 N. C. 296.

Liability of Surety.—Since it is the duty of an auctioneer to pay over to his employer the proceeds of sales made by him, sureties on his official bond, which is conditioned that he will do whatever the law requires, are liable to his employers for proceeds of sale which he withholds. Comm'r v. Holloway, 10 N. C. 234.

Bidders presumed to be acquainted with terms when the terms of auction are advertised or otherwise published. Christmas v. Jenkins, 3 N. C. 395.
§ 85-2. Appointment; bond.—No person shall exercise or conduct the trade or business of an auctioneer in this state or offer to conduct any such trade or business described in this article unless such person shall hold a license issued by the commissioner of revenue, and no license shall issue to any person who is not a resident of the state of North Carolina, and who has not been a bona fide resident for at least two years prior to the date when such application for license is filed with the Department of Revenue. The license shall issue only upon the filing of a bond in the sum of five thousand dollars ($5,000.00), with such conditions and sureties as may be required and approved by the commissioner of revenue. The license shall expire on the first day of April following, unless the authority is sooner revoked by the Commissioner of Revenue, and such authority shall be subject to revocation at any time by such officer for the causes and in the manner set forth in § 85-9. The fees for each license shall be two hundred dollars ($200.00). (Rev., s. 217; Code, s. 2281; 1889, c. 40; 1891, c. 576; R. C., c. 10, s. 1; 1923, c. 243, s. 1; 1941, c. 131; C. S. 5000.)

Editor's Note.—The act of 1923, ch. 243 made two years bona fide residence a prerequisite to application for a license; raised the bond required to $5,000 and the license fee to $200. The insurance commissioner was given power to revoke a license for failure to comply with the terms of the act, or for other cause. See 1 N. C. Law Rev. 302.

§ 85-3. Requirements of law and of commissioner of revenue; false statement.—No person who shall conduct the business of an auctioneer in the state shall fail to comply with any provision of the law or any requirement of the commissioner of revenue pursuant to the law, and no such person shall make or cause to be made any false statement in any report required of him, and upon any violation of any section of this article, the commissioner of revenue may revoke his license to do business in this state. (1923, c. 243, s. 2; 1941, c. 131; 1941, c. 230, s. 2; C. S. 5000(a).)

§ 85-4. Punishment for violation of law.—Any person violating any of the provisions of this article shall be punished by a fine not exceeding two hundred dollars or by imprisonment in jail or worked on the roads for not exceeding two years, or by both such fine and imprisonment. (1923, c. 243, s. 3; C. S. 5000(b).)

§ 85-5. License tax by counties and municipalities.—Nothing in this article shall be construed to take away from the counties, cities or towns of the state the right or rights which they may now have, or may hereafter have, to levy a license tax on persons exercising or conducting the trade or business of an auctioneer. (1923, c. 243, s. 4; C. S. 5000(c).)

§ 85-6. Account semiannually; pay over moneys received.—It is the duty of such auctioneers on the first days respectively of October and April, to render to the clerks of the superior court of their respective counties a true and particular account in writing of all the moneys made liable to duty by law, for which any jewelry or silverware may have been sold at auction, and also at private sale, where the price of the jewelry and silverware sold at private sale was fixed or agreed upon or governed by any previous sale at auction of any jewelry and silverware of the same kind; which account shall contain a statement of the gross amount of sales by them made for each particular person or company at one time, the date of each sale, the names of the owners of the jewelry and silverware sold, and the amount of the tax due thereon, which tax they shall pay as directed by law. The statement shall be subscribed by them and sworn to before the clerk of the said court, who is hereby authorized to administer the oath. And it is their further duty to account with and pay to the person entitled thereto the moneys received on the sales by them made. (Rev., s. 218; Code, s. 2282; R. C., c. 10, s. 2; C. S. 5001.)

§ 85-7. Acting without appointment; penalty.—No person shall exercise the trade or business of an auctioneer by selling any jewelry or silverware by auction or otherwise and make a mode of sale whereby the best or highest bidder is deemed to be the purchaser, unless such person is appointed an auctioneer pursuant to this article, on pain of forfeiting to the state for every such sale the sum of two hundred dollars, which shall be prosecuted to recovery by the solicitor of the district. (Rev., s. 219; Code, s. 2283; R. C., c. 10, s. 5; C. S. 5002.)

§ 85-8. Commissions; one per cent to town.—Auctioneers are entitled to such compensation as may be agreed upon, not exceeding two and a half per cent on the amount of sales; and auctioneers of incorporated towns shall retain and pay one per cent of the gross amount of sales to the commissioners or other authority of their respective towns. (Rev., s. 221; Code, s. 2285; R. C., c. 10, s. 7; C. S. 5003.)

Auctioneer's Fee Payable out of Trustee's Commissions.—See Duffy v. Smith, 132 N. C. 38, 43 S. E. 501.

§ 85-9. Power of Commissioner of Revenue to revoke licenses of auctioneers.—The Commissioner of Revenue of the State of North Carolina shall have power to revoke an auctioneer's license, upon the conviction of the auctioneer by any court of competent jurisdiction of the State of North Carolina of any of the offenses hereinafter set out, or upon a finding by the Commissioner of Revenue that such auctioneer is guilty of any of the offenses hereinafter set out, to wit: (1) fraud; (2) failing to account for or to remit any money or properties coming into his possession which belong to others; (3) forgery, embezzlement, obtaining money under false pretense, larceny, conspiracy to defraud, or like offense; (4) false representations as to the origin, genuineness, cost to seller, value, or other matters relating to the sale of any property then or thereafter to be offered for sale at auction; (5) conviction of any crime involving moral turpitude either in this State or any other state; (6) making any false statement in the application for license; (7) violating any of the provisions of the laws of this State relating to sales at auction. Provided, that no license shall be revoked upon a finding by the Commissioner of Revenue except by charges preferred. The accused shall be furnished a written copy of such charges and given not less than twenty days' notice of the time and place when
Art. 2. Auction Sales of Articles Containing Hidden Value.

§ 85-10. Application of article.—The provisions of this article shall relate to all persons, firms and corporations who shall sell or offer to sell any of the goods, wares and merchandise hereinafter enumerated by means of auction sale of same conducted either by themselves or licensed auctioneers, except that it shall not apply to receivers, trustees in bankruptcy, trustees acting under a bona fide mortgage or deed of trust, trustees acting under the provisions of a will, any person acting under orders of any court, or to administrators or to executors while acting as such or to the bona fide holder of an article pledged to secure a debt. (1941, c. 371, s. 1.)

§ 85-11. Sale of certain articles in violation of article prohibited.—It shall be unlawful for any person, firm or corporation to offer for sale or sell to the highest bidder at an auction sale furs, objects of art, artware, glassware, silver plated ware, chinaware, gold, silver, precious or semi-precious stones, jewelry, watches, clocks, or gems of any kind, except as hereafter provided. (1941, c. 371, s. 1.)

§ 85-12. Licensing of auction merchants.—Before selling or offering for sale any of the articles hereinafter mentioned, the person, firm or corporation which is to conduct such auction sale shall apply to and obtain from the revenue department of the state of North Carolina a license or permit to engage in the activity covered by this article and pay therefor to the commissioner of revenue the sum of five thousand dollars ($5,000.00), executed by a corporate surety licensed to do business in North Carolina or by two individual sureties who own real property in the state of North Carolina of a net value of twice the amount of such bond and who shall have justified on such bond before the clerk of the superior court of the county in which such individual sureties reside. Said bond shall be kept in full force and effect during the period for which such license is issued and for a period of one year thereafter. The conditions of said bond are to provide that the surety or sureties are irrevocably appointed as process agents on whom any process issued against the person, firm or corporation conducting such sale may be served, and shall further provide that the person, firm or corporation conducting said sale will pay all valid judgments secured against such person, firm or corporation on causes of action arising out of such sales by auction. (1941, c. 371, s. 4.)

§ 85-13. Bond prerequisite for license.—Before any person, firm or corporation shall offer for sale or sell at public auction any of the goods hereinafore described, such person, firm or corporation shall obtain the permit provided in § 85-12 and shall file with the commissioner of revenue a good and sufficient bond in the penal sum of five thousand dollars ($5,000.00), executed by a corporate surety licensed to do business in North Carolina or by two individual sureties who own real property in the state of North Carolina of a net value of twice the amount of such bond and who shall have justified on such bond before the clerk of the superior court of the county in which such individual sureties reside. Said bond shall be kept in full force and effect during the period for which such license is issued and for a period of one year thereafter. The conditions of said bond are to provide that the surety or sureties are irrevocably appointed as process agents on whom any process issued against the person, firm or corporation conducting such sale may be served, and shall further provide that the person, firm or corporation conducting said sale will pay all valid judgments secured against such person, firm or corporation on causes of action arising out of such sales by auction. (1941, c. 371, s. 3.)

§ 85-14. Conduct of sales by licensed auctioneer required.—An auctioneer duly licensed as such by the state of North Carolina shall be present and in charge of any such auction sale. (1941, c. 371, s. 5.)

§ 85-15. Regulation of bidding at sales.—At any such auction sale, no person interested either directly or indirectly as seller, and no person employed by any person interested either directly or indirectly as seller, shall bid on any articles offered for sale, and no person shall act as a fictitious bidder, or what is commonly known as a "capper," "booster," "by-bidder" or "shiller," and no person shall bid or offer to bid or pretend to buy an article sold or offered for sale at any such auction by prearranged agreement with any person interested in the sale directly or indirectly as seller. (1941, c. 371, s. 6.)

§ 85-16. Written description of articles purchased furnished to purchaser upon demand.—At any such auction sale any person who shall purchase any article may have the right to demand of the person, firm or corporation conducting such sale, at the time the sale is made or within forty-eight hours thereafter, a written description of the merchandise so purchased, which description shall be accurate and full, and shall give the name of the manufacturer or producer of such merchandise, if known; shall state whether the merchandise is an original, a copy, a reproduction, new or used, genuine or artificial, and shall also incorporate all representations made to induce persons to bid on such merchandise; such statement shall be deemed to be the representations upon which the merchandise is purchased, and upon a refusal to give such statement as herein provided, the sale may, at the option of the purchaser, be rescinded, in which event the purchaser shall have the privilege of demanding a return of all sums paid on account of such purchase. A notice of the right of a purchaser to demand such a statement shall be conspicuously displayed in each room where such auction shall take place. (1941, c. 371, s. 7.)
§ 85-17. Application of Fair Trade Act.—No sale shall be made at such auction sales which shall violate the provisions of the North Carolina Fair Trade Act. (1941, c. 371, s. 8.)

§ 85-18. Presence of merchant at sales required; responsibility for auctioneer's acts.—At all sales by auction conducted under the provisions of this article, the person, firm or corporation conducting such sale shall be present at all times in person or by an agent duly authorized in writing to represent such person, firm or corporation, and the person, firm or corporation conducting such sale shall be responsible for acts done and words spoken by the auctioneer or his assistants in furthering the sales by auction. (1941, c. 371, s. 9.)

§ 85-19. Statements in advertisements deemed representations; merchandise not as advertised.—At all such auction sales, all statements contained in the advertising of such sales shall be considered and deemed representations inducing purchasers to bid on and buy the merchandise advertised, and in the event any such merchandise shall not be as advertised, the purchaser thereof shall, at his option, be entitled to rescind such sale and have the right, upon such rescission, to demand and receive any sums paid by him on account of such purchase. (1941, c. 371, s. 10.)

§ 85-20. False and fraudulent advertising, labeling, etc., prohibited.—No person, firm or corporation conducting any such sale shall advertise any merchandise falsely or fraudulently, either by word of mouth, written or published advertisement, or other forms of advertisement, nor shall any such person, firm or corporation permit any article to be displayed or offered for sale which shall be falsely tagged, labeled or branded. (1941, c. 371, s. 11.)

§ 85-21. False statements as to value or costs prohibited.—No person, firm or corporation conducting any such sale shall allow or permit any false statement to be made by any person connected with such sale, either directly or indirectly, as to the value of such merchandise being sold or as to the cost to the seller of any such merchandise being sold. (1941, c. 371, s. 12.)

§ 85-22. Application of article to agents.—The provisions of this article shall apply to the person, firm or corporation conducting such sale, whether such person, firm or corporation is the owner of the merchandise being sold, or selling such merchandise for others. (1941, c. 371, s. 13.)

§ 85-23. Violation made misdemeanor.—Any person violating any of the provisions of this article shall be guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine of not less than twenty-five ($25.00) dollars nor more than five hundred ($500.00) dollars, or imprisoned for not more than six months, or both, in the discretion of the court, and shall be permanently enjoined from thereafter participating in the conducting of any such auction sale, either directly or indirectly. (1941, c. 371, s. 14.)

§ 85-24. Church and civic organizations not prevented from holding auctions.—Nothing in this article shall be construed as preventing church and civic organizations from holding auction sales of antiques for charitable purposes. (1941, c. 371, s. 15.)

§ 85-25. Purpose of article.—It is the purpose of this article to provide for the protection of the public in purchasing articles containing a hidden value, which is not and cannot be determined except by persons having special knowledge thereof, when such articles are sold at public auction, where there is not ample time for deliberation and appraisal of such merchandise, and where the purchaser, by reason of the manner of sale, of necessity must rely principally upon the representations made by the seller as to value of said merchandise. (1941, c. 371, s. 18.)

§ 85-26. Rights and privileges conferred by article are additional to rights, etc., under other laws.—The rights and privileges herein granted to any purchaser shall be in addition to all other rights, privileges or remedies which such purchaser might otherwise have under the laws of North Carolina, and the provisions of this article shall not be deemed to deprive any such purchaser of any rights or remedies which he otherwise would have had. (1941, c. 371, s. 19.)

Chapter 86. Barbers.

Sec.
86-1. Necessity for certificate of registered barber or apprentice.
86-3. Qualifications for issuance of certificates of registration.
86-4. Registered apprentice must serve under Registered Barber and take examination before opening shop.
86-5. Period of apprenticeship; affidavit; qualifications for certificate as Registered Barber.
86-6. State Board of Barber Examiners; appointment and qualifications; governor; term of office and removal.
86-7. Office; seal; officers and secretary; bond.
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86-15. Fees.
86-16. Persons exempt from provisions of chapter.
86-17. Sanitary rules and regulations; inspection.
§ 86-1. Necessity for certificate of registered barber or apprentice.—No person or combination of persons shall, either directly or indirectly, practice or attempt to practice barbering as hereinafter defined in the State of North Carolina without a Certificate of Registration either as a Registered Apprentice or as a Registered Barber issued pursuant to the provisions of this chapter by the State Board of Barber Examiners hereinafter established. (1929, c. 119, s. 1; 1941, c. 375, s. 1.)

Editor’s Note.—The 1941 amendment struck out the words “for pay” formerly appearing after the word “shall” in line two.

For comment on the 1941 amendment, see 19 N. C. L. Rev. 291.

Constitutionality.—This chapter, known as the Barber’s Act, relates to the public health and is constitutional as a valid exercise of the police power of the State. State v. Lockey, 198 N. C. 551, 152 S. E. 693.

Application.—The provisions of this chapter apply to proprietor barbers, as in this case the owner and operator of a one-chair barber shop. State v. Lockey, 198 N. C. 551, 152 S. E. 693.

Cited in James v. Denny, 214 N. C. 470, 199 S. E. 617.

§ 86-2. What constitutes practice of barbering.—Any one or combination of the following practices shall constitute the practice of barbering in the purview of this chapter:

(a) Shaving or trimming the beard, or cutting the hair.
(b) Giving facial or scalp massages, or treatments with oils, creams, lotions and other preparations either by hand or mechanical appliances.
(c) Singeering, shampooing or dyeing the hair or applying hair tonics.
(d) Applying cosmetic preparations, antiseptics, powders, oils, clays and lotions to the scalp, neck or face. (1929, c. 119, s. 2; 1941, c. 375, s. 2.)

Editor’s Note.—The 1941 amendment struck out the words “when done for pay” formerly appearing after the word “practices” in line two.

§ 86-3. Qualifications for issuance of certificates of registration.—No person shall be issued a certificate of Registration as a Registered Apprentice by the State Board of Barber Examiners, hereinafter established

(a) Unless such person is at least seventeen years of age.
(b) Unless such person passes a satisfactory physical examination prescribed by said Board of Barber Examiners.
(c) Unless each person has completed at least a six months’ course in a reliable Barber School or College approved by said Board of Barber Examiners.
(d) Unless such person passes the examination prescribed by the Board of Barber Examiners and pays the required fees hereinafter enumerated. (1929, c. 119, s. 3.)

§ 86-4. Registered apprentice must serve under Registered Barber and take examination before opening shop.—No Registered Apprentice, registered under the provisions of this chapter, shall operate a barber shop in the State, but must serve his period of apprenticeship under the direct supervision of a Registered Barber, as required by § 86-5.

Every Registered Apprentice when eligible shall take the examination to receive a certificate of registration as a Registered Barber. No Registered Apprentice shall be permitted to practice for a period of more than three years without passing the required examination to receive a certificate of registration as a Registered Barber. (1929, c. 119, s. 4; 1941, c. 375, s. 3.)

Editor’s Note.—The 1941 amendment added the paragraph at the end of this section.

§ 86-5. Period of apprenticeship; affidavit; qualifications for certificate as Registered Barber.—Any person to practice barbering as a Registered Barber, must have worked as a Registered Apprentice for a period of at least eighteen months under the direct supervision of a Registered Barber, and this fact must be demonstrated to the Board of Barber Examiners by the sworn affidavit of three Registered Barbers, or such other methods of proof as the Board may prescribe and deem necessary. A Certificate of Registration as a Registered Barber shall be issued by the Board hereinafter designated, to any person who is qualified under the provisions of this chapter, or meets the following qualifications:

(a) Who is qualified under the provisions of § 86-3;
(b) Who is at least nineteen years of age;
(c) Who passes a satisfactory physical examination as prescribed by said Board;
(d) Who has practiced as a Registered Apprentice for a period of eighteen months, under the immediate personal supervision of a Registered Barber; and
(e) Who has passed a satisfactory examination, conducted by the Board, to determine his fitness to practice barbering, such examination to be so prepared and conducted, as to determine whether or not the applicant is possessed of the requisite skill in such trade, to properly perform all the duties thereof, including the ability of the applicant in his preparation of tools, shaving, hair-cutting, and all the duties and services incident thereto, and has sufficient knowledge concerning diseases of the face, skin and scalp, to avoid the aggravation and spreading thereof in the practice of said trade. (1929, c. 119, s. 5.)

§ 86-6. State Board of Barber Examiners; appointment and qualifications; governor; term of office and removal.—A board to be known as the State Board of Barber Examiners is hereby established to consist of three members appointed by the Governor of the State. Each member shall be an experienced barber, who has followed the practice of barbering for at least five years in the State. The members of the first Board appointed shall serve for six years, four years and two years, respectively, after appointed, and members appointed thereafter shall serve for six
§ 86-7. Office; seal; officers and secretary; bond.—The Board shall maintain a suitable office in Raleigh, North Carolina, and shall adopt and use a common seal for the authentication of its orders and records. Said Board shall elect its own officers, and in addition thereto, shall elect a full time Secretary, which Secretary shall receive an annual salary not to exceed three thousand dollars, such salary as well as all other expenses of said Board, to be paid only out of the revenue derived from fees collected under the provisions of this chapter. Said full time Secretary, before entering upon the duties of his office, shall execute to the State of North Carolina a satisfactory bond with a duly licensed bonding company in this State as surety or other acceptable surety; such bond to be in the penal sum of not less than ten thousand dollars ($10,000.00) and conditioned upon the faithful performance of the duties of his office and the true and correct accounting of all funds received by him. Said full time secretary shall turn over to the State Treasurer to be credited to the State Board of Barber Examiners all funds collected or received by him under this chapter, such funds to be held and expended under the supervision of the Director of the Budget, exclusively for the enforcement and administration of the provisions of this chapter, subject to the limitations hereof. Provided, however, that nothing herein shall be construed to authorize any expenditure in excess of the amount available from time to time in the hands of the State Treasurer derived from fees collected under the provisions of this chapter and received by the said State Treasurer in the manner aforesaid. (1929, c. 119, s. 7; 1941, c. 375, s. 4; 1943, c. 53, s. 1.)

Editor's Note.—The 1943 amendment rewrote the provisions relating to the secretary, thereby omitting the sentence added by the 1941 amendment which provided that the board should employ such agents, assistants, and attorneys as it might deem necessary.

§ 86-8. Salary and expenses; employees; audit; annual report to Governor.—Each member of the Board of Barber Examiners shall receive for his services an annual salary of three thousand dollars ($3,000.00), payable in equal monthly installments, and shall be reimbursed for his actual expenses, and shall receive not less than five cents (5c) per mile for the distance traveled in performance of his duties, salaries and expenses and all other salaries and expenses in connection with the administration of this chapter, shall be paid upon warrant drawn on the State Treasurer, solely from the funds derived from the fees collected and received under this chapter. The board shall employ such agents, assistants and attorneys as it may deem necessary. Each member of the Board of Barber Examiners, and each of its agents and assistants who collect any moneys or fees in the discharge of their duties, shall execute to the State of North Carolina a bond in the sum of one thousand dollars ($1,000.00) conditioned upon the faithful performance of his duties of office, and the true accounting for all funds collected. There shall be annually made by the State Auditing Department, a complete audit and examination of the receipts and disbursements, and the State Board of Barber Examiners shall report annually to the Governor a full statement of its receipts and expenditures, and also a full statement of its work during the year, together with such recommendations as it may deem expedient. (1929, c. 119, s. 8; 1943, c. 53, s. 2.)

Editor's Note.—The 1943 amendment rewrote this section.

§ 86-9. Application for examination; payment of fee.—Each applicant for an examination shall: (a) Make application to the Board on blank forms prepared and furnished by the full-time Secretary, swearing an oath to contain proof of the particular qualifications of the applicant. (b) Pay to the Board the required fee. All applications for said examination must be filed with the full-time Secretary at least thirty days prior to the actual taking of such examination by applicants. (1929, c. 119, s. 9.)

Purpose of Fees—Constitutionality.—The fees prescribed for barbers who are subject to the provisions of this chapter are for the expenses and enforcement of the act, which is necessary to the public health and welfare, and not an annual occupation tax imposed for revenue, and the payment of the barber's license tax under the Revenue Act does not affect the obligation to pay the fees prescribed by the Barber's Act, and assessment of the fees thereunder is constitutional. State v. Lockey, 196 N. C. 551, 552, 152 S. E. 693.

§ 86-10. Board to conduct examinations not less than four times each year.—The Board shall conduct examinations of applicants for Certificates of Registration to practice as Registered Barbers, and of applicants for Certificate of Registration to practice as Registered Apprentices, not less than four times each year, at such times and places as will prove most convenient, and as the Board may determine. The examination of applicants for Certificates of Registration as Registered Barbers and Registered Apprentices shall include such practical demonstration and oral and written tests as the Board may determine. (1929, c. 119, s. 10.)

§ 86-11. Issuance of certificates of Registration.—Whenever the provisions of this chapter have been complied with, the Board shall issue, or have issued, a Certificate of Registration as a Registered Barber or as a Registered Apprentice, as the case may be. (1929, c. 119, s. 11.)

§ 86-12. Barbers from other states; temporary permits.—Persons who have practiced barbering in another state or county for a period of not less than two years, and who move into this State, shall prove and demonstrate their fitness to the Board of Barber Examiners, as herein created, before they will be issued a Certificate of Registration to practice barbering, but said Board may issue such temporary permits as are necessary. (1929, c. 119, s. 12; 1941, c. 375, s. 5.)

Editor's Note.—The 1941 amendment inserted the words "for a period of not less than two years."

§ 86-13. Procedure for registration.—The procedure for the registration of present practitioners of barbering shall be as follows: (a) If such person has been practicing barbering for a shorter period of time than eighteen months, he shall, upon paying the required fee, and making an affidavit to that effect to the
Board of Barber Examiners, be issued a Certificate of Registration as an Apprentice.

(b) If such person has been practicing barbering in the State of North Carolina for more than eighteen months, he shall upon paying the required fee and making an affidavit to that effect, to the Board of Barber Examiners, be issued a Certificate of Registration as a Registered Barber.

(c) All persons, however, who are not actively engaged in the practice of barbering, at the time this chapter is enacted into law, shall be required to take the examination herein provided, and otherwise comply with the provisions of this chapter before engaging in the practice of barbering. (1929, c. 119, s. 13.)

§ 86-14. Procedure for registration of barbers not registered under section 86-13.—The procedure for the registration of present practitioners of barbering who were not registered under § 86-13, shall be as follows:

(a) If such person has been practicing barbering in the State of North Carolina for more than eighteen months and is actively engaged in the practice of barbering at the time this bill is enacted into law, he shall, upon making affidavit to that effect and paying the required fee to the Board of Barber Examiners, be issued a certificate of registration as a registered barber.

(b) All persons, however, who do not make application prior to January 1, 1938, shall be required to take the examination prescribed by the State Board of Barber Examiners, and otherwise comply with the provisions of this chapter before engaging in the practice of barbering. (1937, c. 138, s. 3.)

§ 86-15. Fees.—The fee to be paid by applicant for examination to determine his fitness to receive a certificate of registration, as a registered apprentice, shall be five ($5.00) dollars, and such fee must accompany his application. The annual license fee of an apprentice shall be three ($3.00) dollars. The fee to be paid by an applicant for an examination to determine his fitness to receive a certificate of registration as a registered barber shall be fifteen ($15.00) dollars, and such fee must accompany his application. The annual license fee of a registered barber shall be five ($5.00) dollars. All licenses, both for apprentices and for registered barbers, shall be renewed as of the thirtieth day of June of each and every year, and such renewals for apprentices shall be three ($3.00) dollars, and for registered barbers five ($5.00) dollars. The fee for restoration of an expired certificate for registered barbers shall be seven ($7.00) dollars, and restoration of expired certificate of an apprentice shall be four ($4.00) dollars: Provided, the difference between the fees being charged on March 13, 1937, and the fees herein provided for shall be used exclusively for the employment of additional inspectors and the payment of their necessary expenses of inspection, it being the purpose of this chapter to provide as nearly as possible equal inspection throughout the state of North Carolina. The fees herein set out are not to be increased by the board of barber examiners, but said board may regulate the payment of said fees and prorate the license fees in such manner as it deems expedient. (1929, c. 119, s. 14; 1937, c. 138, s. 4.)

Editor's Note.—The 1937 amendment increased the fees charged under this section and inserted the provision as to use of additional fees.

§ 86-16. Persons exempt from provisions of chapter. — The following persons are exempt from the provisions of this chapter while engaged in the proper discharge of their professional duties as follows:

(a) Persons authorized under the laws of the State to practice medicine and surgery.

(b) Commissioned medical or surgical officers of the United States Army, Navy, or Marine Hospital Service.

(c) Registered nurses.

(d) Students in schools, colleges and universities, who follow the practice of barbering upon the school, college, or university premises, for the purpose of making a part of their school expenses.

(e) Undertakers.

(f) Persons practicing hair dressing and beauty culture exclusively for females. The provisions of this chapter shall apply to all persons except those persons specifically exempted by this section and § 86-24. (1929, c. 119, s. 15; 1937, c. 138, s. 2; 1941, c. 375, s. 6.)

Editor's Note.—The 1941 amendment substituted “exclusively for females” in subsection (f) for the former “in hair dressing and beauty shops patronized by women.”

§ 86-17. Sanitary rules and regulations; inspection.—(a) Each barber and each owner or manager of a barber shop, barber school or college, or any other place where barber service is rendered, shall comply with the following sanitary rules and regulations:

1. Inspection.—All barber shops, or any other place where barber service is rendered, shall be open for inspection at all times during business hours to any members of the board of barber examiners, or its agents or assistants.

2. Proper Quarters.—Every barber shop, or any other place where barber service is rendered, shall be located in buildings or rooms of such construction that the same may be easily cleaned.

3. Barber Shops.—Every barber shop, or any other place where barber service is rendered, shall be well-lighted, well-ventilated, and kept in a clean, orderly and sanitary condition.

4. Position of Barber Shops.—Any room or place for barbering is prohibited which is used for other purposes, unless such a substantial partition or wall of ceiling height, separates such portion used for barber shops, or any place where barber service is rendered. However, this rule shall apply to sanitation only as determined by the discretion of the inspector.

5. Walls and Floors.—The floors, walls, and ceiling of all barber shops, or any other place where barber service is rendered, must be kept clean and sanitary at all times.

6. Fixture Conditions.—Work stands or cabinets, and chairs and fixtures of all barber shops, or any other place where barber service is rendered, must be kept clean and sanitary at all times. All lavatories, towel urns, paper jars, cuspidors,
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and all receptacles containing cosmetics of any nature must be kept clean at all times.

7. Tools and Instruments.—Every owner or manager of each barber shop shall supply a separate tool cabinet, having a door as near air-tight as possible, for himself and each barber employed. All tools and instruments shall be kept clean and sanitary at all times and shall be kept in tool cabinets, and shall not be placed in drawers or on work stands. Cabinets shall be of such construction as to be easily cleaned and shall be clean and sanitary at all times.

8. Water.—(1) All barber shops, or any other place where barber service is rendered, located in towns or cities having a water system shall be required to connect with said water system. Running water, hot and cold, shall be provided, and lavatories shall be located at a convenient place in each barber shop.

9. Water.—(2) All barber shops or any other place where barber service is rendered, not located in cities or towns having water systems must supply hot and cold water under pressure in tank to hold not less than five gallons, and said tanks must be connected with a lavatory. Tanks and lavatory shall be of such construction that they may be easily cleaned. Said lavatory must have a drain pipe to drain all waste water out of the building. The dipping of shaving mugs and towels, etc., into water receptacles is prohibited.

10. Styptic Pencil and Alum.—No person serving as a barber shall, to stop the flow of blood, use alum or other material unless the same be used in liquid or powder form with clean towels. The use of common styptic pencil or lump alum shall not be permitted for any purpose.

11. Instruments.—Each person serving as a barber, shall, immediately before using razors, tweezers, combs, contact cup or pad of vibrator or massage machine, sterilize same by immersing in a solution of fifty per cent (50%) alcohol, five per cent (5%) carbolic acid, twenty per cent (20%) formaldehyde, or ten per cent (10%) lysol. Every owner or manager of each barber shop shall supply a separate container for each barber adequate to provide for a sufficient supply of the above solutions.

12. Hair Brushes and Combs.—Each barber shall maintain combs and hair brushes in clean and sanitary manner at all times, and each hair brush shall be thoroughly washed with hot water and soap before each separate use.

13. Mugs and Brushes.—Each barber shall thoroughly clean mug and lather brush before each separate use and same must be kept clean and sanitary at all times.

14. Headrest.—The headrest of every barber chair shall be protected with fresh, clean paper or clean laundered towel before its use for any person.

15. Towels.—Each and every person serving as a barber shall use a clean freshly laundered towel for each patron. This applies to every kind of towel, dry-towel, steam-towel, or washcloth. All clean towels shall be placed in closed cabinets until used. Receptacles composed of material that can be washed and cleansed, shall be provided to receive used towels and all used towels must be discarded in said receptacles until laundered. Towels shall not be placed in a sterilizer or tank or rinsed or washed in the barber shop. All wet and used towels must be removed from the work stand or lavatory after serving each patron.

16. Haircloths.—Whenever a haircloth is used in cutting the hair, shampooing, etc., a newly laundered towel or paper neck strap shall be placed around the neck so as to prevent the haircloth from touching the skin. Haircloths shall be discarded when soiled.

17. Baths and Toilets.—Baths and toilets must be kept in a clean and sanitary manner at all times.

18. Barber Hands.—Every person serving as a barber shall thoroughly cleanse his or her hands immediately before serving each customer.

19. Barber Appearance.—Each person working as a barber shall be clean, both as to person and dress.

20. Health Certificate.—No person having an infectious or communicable disease shall practice as a barber in the state of North Carolina. Each and every barber practicing the profession in North Carolina shall furnish the state board of barber examiners a satisfactory health certificate, including Wassermann Test, at such times as the board of barber examiners may deem necessary, signed by a physician in good standing and licensed by the North Carolina board of medical examiners.

21. Diseases.—No barber shall serve any person having an infectious or communicable disease, and no barber shall undertake to treat any infectious or contagious disease.

22. Rules Posted.—The owner or manager of any barber shop, or any other place where barber service is rendered, shall post a copy of these rules and regulations in a conspicuous place in said shop.

(b) Any member of the board and its agents and assistants shall have authority to enter upon and inspect any barber shop or barber school, or other place where barber service is rendered, at any time during business hours in performance of the duties conferred and imposed by this act. A copy of the sanitary rules and regulations set out in this section shall be furnished by the board to the owner or manager of each barber shop or barber school, or any other place where barber service is rendered in the state, and such copy shall be posted in a conspicuous place in each barber shop or barber school. (1929, c. 119, s. 16; 1931, c. 32; 1933, c. 95, s. 5; 1941, c. 375, s. 7.)

Editor's Note.—The 1941 amendment struck out the former section and inserted the above in lieu thereof.

§ 86-18. Certificates to be displayed.—Every holder of a Certificate of Registration shall display it in a conspicuous place adjacent to or near his work chair. (1929, c. 119, s. 17.)

§ 86-19. Renewal or restoration of certificates. —Every registered barber and every registered apprentice who continues in practice or service shall annually, on or before June thirtieth of each year, renew his certificate of registration and furnish such health certificate as the board may prescribe and pay the required fee. Every certificate of registration shall expire on the thirtieth day of June in each and every year. A registered barber or a registered apprentice whose certificate of registration has expired may have his certificate re-
stored immediately upon paying the required restoration fee and furnishing health certificate prescribed by the board: Provided, however, that registered barber or registered apprentice whose certificate has expired for a period of three years shall be required to take the examination prescribed by the state board of barber examiners, and otherwise comply with the provisions of this chapter before engaging in the practice of barbering. (1929, c. 119, s. 18; 1937, c. 138, s. 5.)

Editor's Note.—The 1937 amendment added the provisions as to furnishing health certificate and taking examination.

§ 86-20. Disqualifications for certificate.—The Board may either refuse to issue or renew, or may suspend or revoke, any Certificate of Registration for any one or combination of the following causes:

1. Conviction of a felony shown by certified copy of the record of the court of conviction.
2. Gross malpractice or gross incompetency.
3. Continued practice by a person knowingly having an infectious or contagious disease.
4. Advertising by means of knowingly false or deceptive statements.
5. Habitual drunkenness or habitual addiction to the use of morphine, cocaine or other habit-forming drugs.
6. The commission of any of the offenses described in § 86-22, sub-divisions three, four and six.
7. The violation of any one or a combination of the sanitary rules and regulations.
8. The violation of any of the provisions of § 86-4. (1929, c. 119, s. 19; 1941, c. 375, s. 8.)

Editor's Note.—The 1941 amendment added subsections 7 and 8.

§ 86-21. Notice; public hearing; appeal.—The Board may neither refuse to issue nor refuse to renew, nor suspend, or revoke any Certificate of Registration, however, for any of these causes, unless the person accused has been given at least thirty days' notice in writing of the charge against him and a public hearing by the Board.

Upon the hearing of any such proceeding, the Board may administer oaths and may procure by its subpoena, the attendance of witnesses and the production of relevant books and papers. Any barber in the State whose case has been passed upon by the Board of Barber Examiners shall have the right and is hereby given the right to appeal to the Superior Court of the State, which Court may in its discretion reverse or modify any order made by the said Board of Barber Examiners. (1929, c. 119, s. 20; 1939, c. 218, s. 1.)

Cross Reference.—For uniform procedure for suspension or revocation of licenses, see §§ 150-1 to 150-8.

§ 86-22. Misdemeanors.—Each of the following constitutes a misdemeanor, punishable upon conviction by a fine of not less than ten dollars, nor more than fifty ($50.00) dollars, or thirty days in jail or both:

1. The violation of any of the provisions of § 86-1.
2. Permitting any person in one's employ, supervision or control to practice as an apprentice unless that person has a certificate of registration as a registered apprentice.
3. Permitting any person in one's employ, supervision or control, to practice as a barber unless that person has a certificate as a registered barber.
4. Obtaining or attempting to obtain a certificate of registration for money other than required fee, or any other thing of value, or by fraudulent misrepresentations.
5. Practicing or attempting to practice by fraudulent misrepresentations.
6. The wilful failure to display a certificate of registration as required by § 86-18.
7. The violation of the reasonable rules and regulations adopted by the State board of barber examiners for the sanitary management of barber shops and barber schools.
8. The violation of any of the provisions of § 86-5.
9. The refusal of any owner or manager to permit any member of the board, its agents, or assistants to enter upon and inspect any barber shop, or barber school, or any other place where barber service is rendered, at any time during business hours.
10. The violation of any one or a combination of the sanitary rules and regulations.
11. Practicing or attempting to practice barbering during the period of suspension or revocation of any certificate of registration granted under this chapter. Each day's operation during such period of suspension or revocation shall be deemed a separate offense, and, upon conviction thereof, shall be punished as prescribed in this section. (1929, c. 119, s. 21; 1933, c. 95, s. 1; 1937, c. 138, s. 6; 1941, c. 375, ss. 9, 10.)

Editor's Note.—Public Laws of 1933, c. 95, changed in subsection 7 the words "State Board of Health" to "State Board of Barber Examiners."
The 1937 amendment inserted the words "or thirty days in jail or bath" in the first paragraph, and struck out the words "wilful and continued" formerly appearing before the word "violation" in subsection 7. It also inserted subsection 1(a) and 1(b). The 1941 amendment changed subsection 7 and added subsection 8.

§ 86-23. Board to keep record of proceedings; data on registrants.—The Board shall keep a record of its proceedings relating to the issuance, refusal, renewal, suspension, and revocation of Certificates of Registration. This record shall contain the name, place of business and residence of each Registered Barber and Registered Apprentice, and the date and number of his Certificate of Registration. This record shall be open to public inspection at all reasonable times. (1929, c. 119, s. 22.)

§ 86-24. Barbering among members of same family.—This chapter shall not prevent a member of the family from practicing barbering on a member of his or her family. (1941, c. 375, s. 12.)
Chapter 87. Contractors.

Sec. 87-1. Contractor defined.—For the purpose of this article a general contractor is defined to be one who, for a fixed price, commission, fee or wage, undertakes to bid upon or to construct or superintend the construction of any building, highway, sewer, grading or any improvement or structure where the cost of the undertaking is ten thousand dollars or more; and anyone who shall bid upon or engage in constructing or superintending the construction of any structures or any undertakings or improvements above mentioned in the state of North Carolina costing ten thousand dollars or more, shall be deemed and held to have engaged in the business of general contracting in the state of North Carolina. (1925, c. 318, s. 1; 1931, c. 62, s. 1; 1937, c. 429, s. 1.)

Editor's Note.—The 1937 amendment made this section applicable to bidding upon construction.
§ 87-2. Licensing board; organization.—There shall be a State licensing board for contractors consisting of five members who shall be appointed by the Governor within sixty days after March 10, 1925. At least one member of such board shall have as a larger part of his business the construction of highways; at least one member of such board shall have as the larger part of his business the construction of public utilities; one member shall have as the larger part of his business the construction of buildings. The members of the first board shall be appointed for one, two, three, four and five years respectively, their terms of office expiring on the thirty-first day of December of the said years. Thereafter in each year the Governor in like manner shall appoint to fill the vacancy caused by the expiration of the term of office a member for a term of five years. Each member shall hold over after the expiration of his term until his successor shall be duly appointed and qualified. If vacancies shall occur in the board and the Governor chooses the same shall be filled by the appointment of the Governor and the Governor may remove any member of the board for misconduct, incompetency or neglect of duty. (1925, c. 318, s. 2.)

§ 87-3. Members of board to take oath.—Each member of the board shall, before entering upon the discharge of the duties of his office, take and file with the Secretary of State an oath in writing to properly perform the duties of his office as a member of said board and to uphold the Constitution of North Carolina and the Constitution of the United States. (1925, c. 318, s. 3.)

§ 87-4. First meeting of board; officers; secretary-treasurer and assistants.—The said board shall, within thirty days after its appointment by the Governor, meet in the city of Raleigh, at a time and place to be designated by the Governor, and organize by electing a chairman, a vice chairman, and a secretary-treasurer, each to serve for one year. Said board shall have power to make such by-laws, rules and regulations as it shall deem best, provided the same are not in conflict with the laws of North Carolina. The secretary-treasurer shall give bond in such sum as the board shall determine, with such security as shall be approved by the board, said bond to be conditioned for the faithful performance of the duties of his office and for the faithful accounting of all moneys and other property as shall come into his hands. The secretary-treasurer need not be a member of the board, and the board is hereby authorized to employ a full time secretary-treasurer, whose salary shall not exceed thirty-six hundred dollars ($3600.00) per annum, and such other assistants and make such other expenditures as may be necessary to the proper carrying out of the provisions of this article. (1925, c. 318, s. 4; 1941, c. 257, s. 4.)

Editor's Note.—The 1941 amendment added the last sentence.

§ 87-5. Seal of board.—The board shall adopt a seal for its own use. The seal shall have the words "Licensing Board for Contractors, State of North Carolina," and the secretary shall have charge, care and custody thereof. (1925, c. 318, s. 5.)

§ 87-6. Meetings; notice; quorum.—The board shall meet twice each year, once in April and once in October, for the purpose of transacting such business as may properly come before it. At the April meeting in each year the board shall elect officers. Special meetings may be held at such times as the board may provide in the by-laws it shall adopt. Due notice of each meeting and the time and place thereof shall be given to each member in such manner as the by-laws may provide. Three members of the board shall constitute a quorum. (1925, c. 318, s. 6.)

§ 87-7. Records of board; disposition of funds.—The secretary-treasurer shall keep a record of the proceedings of the said board and shall receive and account for all moneys derived from the operation of this article. Any funds remaining in the hands of the secretary-treasurer to the credit of the board after the expenses of the board for the current year have been paid shall be paid over to the Greater University of North Carolina for the use of its engineering department. The board has the right, however, to retain at least ten per cent of the total expense it incurs for a year's operation to meet any emergency that may arise. (1925, c. 318, s. 7.)

§ 87-8. Records; roster of licensed contractors.—The secretary-treasurer shall keep a record of the proceedings of the board and a register of all applicants for license showing for each the date of application, name, qualifications, place of business, place of residence, and whether license was granted or refused. The books and register of this board shall be prima facie evidence of all matters recorded therein. A roster showing the names and places of business and of residence of all licensed general contractors shall be prepared by the secretary of the board during the month of January of each year; such roster shall be printed by the board out of funds provided by the provision of § 87-7. On or before the first day of March of each year the board shall submit to the governor a report of its transactions for the preceding year, and shall file with the secretary of state a copy of such report, together with a complete statement of the receipts and expenditures of the board, attested by the affidavits of the chairman and the secretary, and a copy of the said roster of licensed general contractors. (1925, c. 318, s. 8; 1937, c. 439, s. 2.)

Editor's Note.—The 1937 amendment eliminated the requirement for mailing roster of contractors to clerks.

§ 87-9. Compliance with federal highway act, etc.; contracts financed by federal road funds.—Nothing in this article shall operate to prevent the state highway and public works commission from complying with any act of congress and any rules and regulations promulgated by the United States secretary of agriculture for carrying out the provisions of the Federal Highway Act, or shall apply to any person, firm or corporation proposing to submit a bid or enter into contract for any work to be financed in whole or in part with federal aid road funds in such manner as will conflict with any act of congress or any such rules and regulations of the United States secretary of agriculture. (1939, c. 230.)

§ 87-10. Application for license; examination; [803]
§ 87-11. CH. 87. CONTRACTORS—GENERAL § 87-11

certificate; renewal.—Anyone hereafter desiring to be licensed as a general contractor in this state shall make and file with the board, forty days prior to the regular or special meeting thereof, a written application on such form as may then be by the board prescribed for examination by the board, which application shall be accompanied by the sum of sixty dollars ($60.00) if the application is for an unlimited license, or forty dollars ($40.00) if the application is for an intermediate license, or twenty dollars ($20.00) if the application is for a limited license; the holder of an unlimited license shall be entitled to engage in the business of general contracting in North Carolina but shall not be entitled to engage therein with respect to any single project of a value in excess of one hundred thousand dollars ($100,000.00), the holder of a limited license shall be entitled to engage in the practice of general contracting in North Carolina but the holder shall not be entitled to engage therein with respect to any single project of a value in excess of seventy-five thousand dollars ($75,000.00), the holder of a limited license shall be entitled to engage in the practice of general contracting in North Carolina but shall not be entitled to engage therein with respect to any single project of a value in excess of three hundred thousand dollars ($300,000.00), the holder of a limited license shall be entitled to engage in the practice of general contracting in North Carolina but the holder shall not be entitled to engage therein with respect to any single project of a value in excess of one hundred thousand dollars ($100,000.00), the holder of a limited license shall be entitled to engage in the practice of general contracting in North Carolina but shall not be entitled to engage therein with respect to any single project of a value in excess of seventy-five thousand dollars ($75,000.00), the holder of a limited license shall be entitled to engage in the practice 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the holder of a limited license shall be entitled to engage in the practice of general contracting in North Carolina but shall not be entitled to engage therein with respect to any single project of a value in excess of three hundred thousand dollars ($300,000.00).
§ 87-12. Certificate evidence of license.—The issuance of a certificate of license or limited license by this board shall be evidence that the person, firm, or corporation named therein is entitled to all the rights and privileges of a licensed or limited license by this board shall be evidence that the person, firm, or corporation named therein is entitled to all the rights and privileges of a licensed or limited license. (1925, c. 318, s. 10; 1937, c. 429, s. 4.)

Cross Reference.—As to uniform procedure for suspension or revocation of licenses, see §§ 150-1 to 150-8.

Editor's Note.—The 1937 amendment so changed this section that a comparison here is not practical.

§ 87-12. Certificate evidence of license.—The issuance of a certificate of license or limited license by this board shall be evidence that the person, firm, or corporation named therein is entitled to all the rights and privileges of a licensed or limited licensed general contractor while the said license remains unrevoked or unexpired. (1925, c. 318, s. 11; 1937, c. 429, s. 5.)

Editor's Note.—The 1937 amendment inserted the words "or limited license" in this section.

§ 87-13. Unauthorized practice of contracting; impersonating contractor; false certificate; giving false evidence to board; penalties.—Any person, firm or corporation not being duly authorized who shall contract for or bid upon the construction of any of the projects or works enumerated in § 87-1, without having first complied with the provisions hereof, or who shall attempt to practice general contracting in this state, except as provided for in this article, and any person, firm, or corporation presenting or attempting to file as his own the licensed certificate of another or who shall give false or forged evidence of any kind to the board or to any member thereof in maintaining a certificate of license or who falsely shall impersonate another or who shall use an expired or revoked certificate of license, or of any applicant or engineer, who receives or considers a bid from any one not properly licensed under this article, shall be deemed guilty of a misdemeanor and shall for each such offense of which he is convicted be punished by a fine of not less than five hundred dollars or imprisonment of three months, or both fine and imprisonment in the discretion of the court. And the board may, in its discretion, use its funds to defray the expense, legal or otherwise, in the prosecution of any violations of this article. (1925, c. 318, s. 12; 1931, c. 62, s. 3; 1937, c. 429, s. 6.)

Editor's Note.—The 1937 amendment made an insertion in the first part of this section, and added the last sentence.

The reference to architect or engineer was inserted by the 1931 amendment.

§ 87-14. Regulations as to issue of building permits.—Any person, firm or corporation, upon making application to the building inspector or such other authority of any incorporated city, town or village in North Carolina charged with the duty of issuing building or other permits for the construction of any building, highway, sewer, grading or any improvement or structure where the cost thereof is to be ten thousand dollars ($10,000.00) or more, shall, before he be entitled to the issuance of such permit, furnish satisfactory proof to such inspector or authority that he is duly licensed under the terms of this article to carry out or superintend the same, and that he has paid the license tax required by the Revenue Act of the state of North Carolina then in force so as to be qualified to bid upon or contract for the work for which the permit has been applied; and it shall be unlawful for such building inspector or other authority to issue or allow the issuance of such building permit unless and until the applicant has furnished evidence that he is either exempt from the provisions of this article or is duly licensed under this article to carry out or superintend the work for which permit has been applied; and further, that the applicant has paid the license tax required by the State Revenue Act then in force so as to be qualified to bid upon or contract for the work covered by the permit; and such building inspector, or other such authority, violating the terms of this section shall be guilty of a misdemeanor and subject to a fine of not more than fifty dollars ($50.00). (1925, c. 318, s. 13; 1931, c. 62, s. 4; 1937, c. 429, s. 7.)

Editor's Note.—Prior to the 1937 amendment this section related to exemptions from article.

§ 87-15. Copy of article included in specifications; bid not considered unless contractor licensed.—All architects and engineers preparing plans and specifications for work to be contracted in the state of North Carolina shall include in their invitations to bidders and in their specifications a copy of this article or such portions thereof as are deemed necessary to convey to the invited bidder, whether he be a resident or non-resident of this state and whether a license has been issued to him or not, the information that it will be necessary for him to show evidence of a license before his bid is considered. (1925, c. 318, s. 14; 1937, c. 429, s. 8; 1941, c. 257, s. 2.)

Editor's Note.—The 1937 amendment added a second sentence to this section which was stricken out by the 1941 amendment.
shall consist of one member from the Engineering School of the Greater University of North Carolina, one member from the State Board of Health, one member to be a plumbing inspector from some city of the State, one licensed master plumber and one heating contractor, one member from the division of public health of the Greater University of North Carolina, and one member to be a licensed air conditioning contractor. The term of office of said members shall be so designated by the Governor that the term of one member shall expire each year. Thereafter in each year the Governor shall in like manner appoint one person to fill the vacancy on the board thus created. Vacancies in the membership of the board shall be filled by appointment by the Governor for the unexpired term. Whenever the word "board" is used in this article, it shall be deemed and held to refer to the State board of examiners of plumbing and heating contractors. (1931, c. 52, s. 1; 1939, c. 224, s. 1.)

Local Modification.—Carteret, Towns of Morehead City, Beaufort and Atlantic Beach; Moore, Towns of Southern Pine and Angier; New Hanover, Town of Wilmington; Dare: 1935, c. 338; Burke: 1939, c. 297; Surry, Town of Elkin: 1939, c. 297; Anson: 1939, c. 305; Durham and Wake: 1939, c. 281.

Editor's Note.—The 1939 amendment increased the members of the board from five to seven and added the last sentence.

§ 87-17. Removal, qualifications and compensation of members; allowance for expenses.—The Governor may remove any member of the board for misconduct, incompetency or neglect of duty. Each member of the board shall be a citizen of the United States and a resident of this State at the time of his appointment. Each member of the board shall receive ten dollars per day for attending sessions of the board or of its committees, and for the time spent in necessary traveling in carrying out the provisions of this article, and in addition to the per diem compensation. Each member shall be reimbursed by the board from funds in its hands for necessary traveling expenses and for such expenses incurred in carrying out the provisions hereof, as shall be approved by a majority of the members of the board. (1931, c. 52, s. 2.)

§ 87-18. Organization meeting; officers seal; examination of witnesses and taking of testimony.—The board shall within thirty days after its appointment meet in the city of Raleigh and organize, and shall elect a chairman and secretary and treasurer, each to serve for one year. Thereafter said officers shall be elected annually. The secretary and treasurer shall give bond approved by the board for the faithful performance of his duties, in such sum as the board may, from time to time determine. The board shall have a common seal and shall formulate rules to govern its actions. (1931, c. 52, s. 3; 1939, c. 224, s. 2.)

Editor's Note.—The 1939 amendment struck out the following words "and each member of the board shall be empowered to administer oaths and have power to compel the attendance of witnesses, and it may take testimony and proofs concerning all matters within its jurisdiction."

§ 87-19. Regular and special meetings; quorum.—The board after holding its first meeting as hereinbefore provided, shall thereafter hold at least two regular meetings each year. Special meetings may be held at such times and places as the by-laws and/or rules of the board provide; or as may be required in carrying out the provisions hereof. A quorum of the board shall consist of not less than three members. (1931, c. 52, s. 4.)

§ 87-20. Record of proceedings and register of applicants; reports.—The board shall keep a record of its proceedings and a register of all applicants, showing the date of each application, the name, age and other qualifications, place of business and residence of each applicant. The books and records of the board shall be prima facie evidence of the correctness of the contents thereof. On or before the first day of March of each year the board shall submit to the Governor a report of its activities for the preceding year, and file with the Secretary of State a copy of such report, together with a statement of receipts and expenditures of the board attested by the chairman and secretary. (1931, c. 52, s. 5.)

§ 87-21. Definitions; contractors licensed by board; towns excepted.—For the purpose of this article plumbing shall be deemed and held to include the plumbing system of a building consisting of water supply distributing pipes, the fixtures and fixture traps, soil, waste and vent pipes, all with their devices, appurtenances and connections, and all within, adjacent to or connected with the building, however shall not include the repair or installation of water supply pipe from the street to plumbing fixtures not connected with the sewerage or ventilating systems for the repair or replacement of outside water faucets. For the purpose of this article heating shall be deemed and held to include all heating systems of a building requiring the use of high or low pressure steam, vapor, hot water, warm or conditioned air, and all piping, ducts, connections or mechanical equipment appurtenant thereto within, adjacent to or connected with the building. Any person, firm or corporation, who, for a valuable consideration, installs, alters or restores or offers to install, alter or restore either plumbing or heating, or both, as defined in this article, shall be deemed to be engaged in the business of either plumbing or heating contracting, or both, as the case may be. All persons, firms or corporations, whether resident or nonresident of the State of North Carolina, before engaging in either the plumbing or heating contracting business, or both, as defined in this article, shall first apply to the State board of examiners of plumbing and heating contractors for examination and shall procure a license. Each application shall be accompanied by a certified check in the amount of the annual license fee required by this article. In order to promote the health, comfort, and safety of the people of the state of North Carolina in the regulation of the business of plumbing or heating contracting, the board shall give each applicant for license an examination designed to ascertain the technical and practical knowledge of the applicant concerning the analysis of plans and specifications, estimating costs, construction, fundamentals of design and installation, sanitation, fire hazards, and related subjects. Regular examinations shall be given by the board in the months of February and August of each year; and additional exami-
nations may be given at such other time as the board may deem necessary. Any person, firm, or corporation may demand in writing a special examination, and upon payment by the applicant of the cost of holding such examination and the deposit of the amount of the annual license fee, the board in its discretion will fix a time and place for such examination which is favorable to defendant and tends least to interfere with personal liberty. State v. Mitchell, 217 N. C. 244, 7 S. E. (2d) 567.

§ 87-22. License fee based on population; expiration and renewal; penalty.—All persons, firms, or corporations engaged in the business of either plumbing or heating contracting, or both, in cities or towns of ten thousand inhabitants or more shall pay an annual license fee of fifty dollars, and in cities or towns of more than thirty-five hundred and less than ten thousand inhabitants an annual license fee of twenty-five dollars. In the event the board shall refuse to license an applicant, the license fee deposited shall be returned by the board to the applicant. All licenses shall expire on the last day of December in each year following their issuance or renewal. It shall be the duty of the secretary and treasurer to cause to be mailed to every licensee registered hereunder notice to his last known address of the amount of fee required for renewal of license, such notice to be mailed at least one month in advance of the expiration of said license. In the event of failure on the part of any person, firm or corporation to renew the license certificate annually and pay the fee therefor during the month of January in each year, the board shall increase said license fee ten per centum for each month or fraction of a month that payment is delayed; provided that the penalty for nonpayment shall not exceed the amount of the annual fee, and provided, further that no penalty will be imposed if one-half of the annual license fee is paid in January and the remaining one-half in June of each year. (1931, c. 52, s. 7; 1939, c. 224, s. 4.)

Editor's Note.—This section was so changed by the 1939 amendment that a comparison here is not practicable.

§ 87-23. Revocation or suspension of license for cause.—The board shall have power to revoke or suspend the license of any plumbing or heating contractor, or both, who is guilty of any fraud or deceit in obtaining a license, or who fails to comply with any provision or requirement of this article, or for gross negligence, incompetency, or misconduct, or for failure to comply with any provision or requirement of this article, against any plumbing or heating contractor, or both, who is licensed under the provisions of this article. All of such charges shall be in writing and verified by the complainant, and such charges shall be heard and determined by the board within ninety days after the same are received by it. A time and place for such hearing shall be fixed by the board and a copy of said charges together with notice of the time and place of hearing, shall be furnished to the person, firm, or corporation accused at least thirty days before the date fixed for the hearing.
At said hearing the person accused shall have the right to appear personally, or by counsel, and be heard in defense of said charges. Upon the conclusion of said hearing, if the board finds that the license of the accused person should be revoked or suspended for any one or more of the causes set forth in this section, the board shall enter upon its records a resolution revoking or suspending the license and furnish a copy of said resolution to the accused. Any person, firm, or corporation whose license shall be revoked or suspended by the board shall have the right to appeal to the superior court of the county in which the accused maintains his or its principal place of business, said appeal to be perfected within thirty days after receipt of the board’s resolution by the accused, but not thereafter. (1931, c. 52, s. 8; 1939, c. 224, s. 5.)

Cross Reference.—As to uniform procedure for suspension or revocation of licenses, see §§ 150-1 to 150-8.

Editor’s Note.—The 1939 amendment inserted the words “or suspend” near the beginning of the section and made other changes.

Purpose of Law.—The manifest purpose of the law is to promote the health, comfort, and safety of the people by regulating plumbing and heating in public and private buildings. Roach v. Durham, 204 N. C. 587, 591, 169 S. E. 149.

§ 87-24. Re-issuance of revoked licenses; replacing lost or destroyed licenses.—The board may in its discretion re-issue license to any person, firm or corporation whose license may have been revoked: Provided, three or more members of the board vote in favor of such re-issuance for reasons deemed sufficient by the board. A new certificate of registration to replace any license which may be lost or destroyed may be issued subject to the rules and regulations of the board. (1931, c. 52, s. 9.)

§ 87-25. Violations made misdemeanor; employees of licensees excepted.—Any person, firm or corporation who shall engage in or offer to engage in, or carry on the business of either plumbing or heating contracting, or both, as defined in § 87-21, without having been licensed to engage in such business, or businesses, as required by the provisions of this article; or any person, firm or corporation holding a limited heating license under the provisions of this article who shall practice or offer to practice or carry on any type of heating contracting not authorized by said limited license; or any person, firm or corporation who shall give false or forged evidence of any kind to the board, or any member thereof, in obtaining a license, or who shall falsely impersonate any other practitioner of like or different name, or who shall use an expired or revoked license, or who shall violate any of the provisions of this article, shall be guilty of a misdemeanor and upon conviction fined not less than one hundred dollars or imprisoned for not more than three months, or both, in the discretion of the court. Employees, while working under the supervision and jurisdiction of a person, firm or corporation licensed in accordance with the provisions of the article, shall not be construed to have engaged in the business of either plumbing or heating contracting, or both. (1931, c. 52, s. 10; 1939, c. 224, s. 6.)

Editor’s Note.—The 1939 amendment so changed this section that a comparison here is not practicable.

Acts Not Constituting Contracting.—A journeyman plumber, contracting and agreeing with various persons to perform labor required to install certain plumbing at a stipulated lump sum price, and who does not maintain a fixed place of business or sell or contract to furnish materials, supplies or fixtures of any kind, and who fails to obtain a license from the state board of examiners of plumbing and heating contractors, is not guilty of a misdemeanor under the provisions of this section, since his occupation does not constitute carrying on the “business of plumbing and heating contracting” within the meaning of the penal provisions of the statute. State v. Ingle, 214 N. C. 276, 199 S. E. 10.

§ 87-26. Only one person in partnership or corporation need have license.—A corporation or partnership may engage in the business of either plumbing or heating, or both, provided one or more persons connected with such corporation or partnership is registered and licensed as herein required; and provided such licensed person shall execute all contracts, exercise general supervision over the work done thereunder and be responsible for compliance with all the provisions of this article. (1931, c. 52, s. 12; 1939, c. 224, s. 8.)

Editor’s Note.—The 1939 amendment added the part of the section as amended after the words, “or corporation.”

§ 87-27. License fees payable in advance; application of—all license fees shall be paid in advance to the secretary of the board, and by him held as a fund for the use of the board. The compensation and expenses of the members of the board as herein provided, the salaries of its employees, and all expenses incurred in the discharge of its duties under this article shall be paid out of such fund, upon the warrant of the president and secretary and treasurer: Provided, upon the payment of the necessary expenses of the board as herein set out, and the retention by it of twenty-five per centum of the balance of funds collected hereunder, the residue, if any, shall be paid to the state treasurer. (1931, c. 52, s. 13; 1933, c. 57; 1938, c. 294, s. 9.)

Editor’s Note.—Public Laws of 1933, c. 57, made a former proviso applicable in towns of less than 10,000 instead of 5,000, and added a proviso relating to renewals. These provisions were omitted by the 1939 amendment.

It is obvious that the pervading intent of this section is to provide for the maintenance of the board and not to impose a tax as a part of the general revenue of the State and thereby exclude the operation of the police power. It is true that the use of the word “tax” in express words authorizes the exercise of this power, but in our opinion it appears by implication that the exercise of such power was intended. Roach v. Durham, 204 N. C. 587, 591, 169 S. E. 149.

Art. 3. Tile Contractors.

§ 87-28. License required of tile contractors.—In order to protect the health and safety of the people of North Carolina any person, firm or corporation desiring to engage in tile contracting within the state of North Carolina as defined in this article shall make application in writing for license to the North Carolina licensing board for tile contractors: Provided, that the provisions of this article shall not apply to state colleges, hospitals and other state buildings. (1937, c. 86, s. 1; 1941, c. 219, s. 1.)

Editor’s Note.—The first fourteen words of the section were added by the 1941 amendment, which changed the last word in the section from “institutions” to “buildings.”

For comment on 1941 amendment, see 19 N. C. Law Rev. 446.

For comment on 1939 amendment to this article, see 17 N. C. Law Rev. 337.

§ 87-29. Tile contracting defined. — Engaging in tile contracting for the purpose of this article is defined to mean any person, firm or corporation

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§ 87-30. Licensing board created; membership; appointment and removal.—The North Carolina licensing board for tile contractors shall consist of five members, each of whom shall be a reputable tile contractor residing in the state of North Carolina who has been engaged in the business of tile contracting for at least five years. The members of the first board shall be appointed within sixty days after March 1, 1937, for terms of one, two, three, four, and five years by the governor, and the governor in each year thereafter shall appoint one licensed tile contractor to fill the vacancy caused by the expiration of the term of office, the term of such new member to be for five years. If vacancy shall occur in the board for any cause the same shall be filled by appointment of the governor. The governor shall have the power to remove from office any member of said board for incapacity, misconduct, or neglect of duty. (1937, c. 86, s. 3.)

§ 87-31. Oath of office; organization; meetings; authority; compensation.—The members of said board shall qualify by taking an oath of office in writing to be filed with the secretary of state to uphold the constitution of the United States and the constitution of North Carolina and to properly perform the duties of his office. The board shall elect a president, vice-president, and secretary-treasurer. A majority of the members of the board shall constitute a quorum. Regular meetings shall be held at least twice a year, at such place and time as shall be deemed most convenient. Notice of each meeting shall be given to all applicants for license in such manner as the by-laws may provide. The board may prescribe regulations, rules, and by-laws for its own proceedings and government and for the examination of applicants not in conflict with the laws of North Carolina. Special meetings may be held upon a call of three members of the board. Each member of the board shall receive for his services the sum of ten ($10.00) dollars per day for each and every day spent in the performance of his duties, and shall be reimbursed for all necessary expenses incurred in the discharge of his duties. (1937, c. 86, s. 4.)

§ 87-32. Secretary-treasurer, duties and bond; seal; annual report to governor.—It shall be the duty of the secretary-treasurer to keep a record of all proceedings of the board and all licenses issued, and to pay all necessary expenses of the board out of the funds collected, and he shall give such bond as the board shall direct. All funds in excess of the sum of one hundred ($100.00) dollars remaining in the hands of the secretary-treasurer, after all of the expenses of the board for the current year have been paid, shall be paid over to the Greater University of North Carolina for the use of the ceramic engineering department of North Carolina State College to be devoted by it to the development of the safe, proper, and sanitary uses of tile. The board shall adopt a seal to be affixed to all of its official documents, and shall make an annual report of its proceedings to the governor or before the first day of March of each year, which report shall contain an account of all monies received and disbursed. (1937, c. 86, s. 5.)

§ 87-33. Applications for examinations; fee; qualifications of applicants.—Any person desiring to be examined by said board shall at least two weeks prior to the holding of an examination file an application upon the prescribed form to be furnished by the board. Each applicant upon making an application shall pay to the secretary-treasurer of the board an examination fee of twenty-five dollars ($25.00). To qualify and obtain a license such applicant must be a citizen of the United States, or person who has duly declared his intention of becoming such citizen, who shall have had at least two years experience, or its equivalent, next preceding the date of his application for license as a tile, marble and terrazzo student or mechanic, possessing the knowledge to specify the proper kind of tile, marble and terrazzo floors or walls for use in private or public buildings, and the ability to lay, set or install tile, marble and terrazzo in accordance with specifications and blue prints ordinarily used in the tile contracting business. (1937, c. 86, s. 6; 1941, c. 219, s. 6.)

Editor's Note.—The 1941 amendment changed the wording of the first sentence, added the present second sentence and omitted a provision relating to registration and certificate thereof.

§ 87-34. Fee for annual renewal of registration; license revoked for default; penalty for reinstatement.—Every licensed tile contractor who desires to continue in business in this state shall annually, on or before the first day of January of each year, pay to the secretary-treasurer of the board the sum of fifty ($50.00) dollars for which he shall receive a renewal of such registration, and in case of the default of such registration by any person the license shall be revoked. Any licensed tile contractor whose license has been revoked for failure to pay the renewal fee, as herein provided, may apply to have the same regranted upon payment of all renewal fees that should have been paid, together with a penalty of ten ($10.00) dollars. (1937, c. 86, s. 7.)

§ 87-35. Power of board to revoke or suspend licenses; charges; notice and opportunity for hearing; appeal.—The board shall have the power after hearing to revoke or suspend the license of any tile contractor upon satisfactory proof that such license was secured by fraud or deceit practiced upon the board, or upon satisfactory proof that such tile contractor is guilty of gross negligence, incompetency, or inefficiency in carrying on the business of tile contracting. Each charge against any contractor submitted to the board shall be in writing and sworn to by the complainant. Provided, however, that before any license shall be revoked or suspended the holder thereof shall have notice of the specific charge or charges preferred, and at a date specified in said notice, at least thirty days after legal service thereof, be given public hearing, and have an opportunity to appear, cross-examine witnesses, and to produce evidence. Any person being aggrieved by the ac-

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tion of the board shall have the right of appeal to the superior court. (1937, c. 86, s. 8.)

Cross Reference.—As to uniform procedure for suspension or revocation of licenses, see §§ 150-1 to 150-8.

Editor's Note.—While the provision as to examination of applicants refers only to those who were not so engaged at the time the statute went into effect, the provisions as to revocation refer to all. 15 N. C. Law Rev. 335.

§ 87-36. No examination required of present contractors.—All persons, firms or corporations now actively engaged in the tile contracting business in the state of North Carolina shall upon filing affidavit with the board be entitled to and receive a license without examination upon payment of the annual license fee. (1937, c. 86, s. 9; 1939, c. 75, s. 3; 1941, c. 219, s. 9.)

Editor's Note.—The 1939 amendment added a proviso exempting persons entering into contracts where the contract price did not exceed two hundred and fifty dollars. The 1941 amendment inserted the words "be entitled to" and omitted the proviso added by the 1939 amendment.

§ 87-37. License to one member of firm, etc., sufficient; employees exempt; restricted application of article.—Any firm, partnership or corporation may engage in the tile contracting business in this state, provided, one member of said firm, partnership or corporation is a licensed tile contractor actually employed by said firm, partnership or corporation, and personally present in charge of such tile contracting work. No license shall be required of any mechanic or employee of a licensed tile contractor performing duties for the employer. Provided, however, that none of the provisions of this article shall apply to jobs in which the total cost of tile, labor and other materials necessary for laying same is less than one hundred and fifty dollars ($150.00). (1937, c. 86, s. 10; 1941, c. 219, s. 10.)

Editor's Note.—The 1941 amendment made changes in the wording of the first sentence and added the proviso at the end of the section.

§ 87-38. Penalty for misrepresentation or fraud in filing or maintaining license certificate.—Any person, firm, or corporation not being duly licensed to engage in tile contracting in this state as provided for in this article, who engages therein, and any person, firm, or corporation presenting as his own the license certificate of another or who shall give false or forged evidence of any kind to the board or any member thereof in maintaining a certificate of license, or who shall falsely impersonate another, or who shall use an expired or revoked certificate of license, or an architect, engineer or contractor who receives or considers a bid from any one not properly licensed under this article, shall be guilty of misdemeanor, and for each offense of which he is convicted be punished by a fine of not less than two hundred ($200.00) dollars, or by imprisonment of not less than two months or both.

Editor's Note.—The 1941 amendment inserted the words "who engages therein" after the word "article" in line three.

Prior to the amendment it was held that the section failed to define the acts prohibited, the doing of which should constitute a misdemeanor, and that such fatal deficiency could not be supplied by judicial interpolation of words to constitute a criminal offense. State v. Julian, 214 N. C. 574, 200 S. E. 24.

Art. 4. Electrical Contractors.

§ 87-39. Board of examiners created; members appointed and officers; terms; principal office; meetings; quorum; compensation and expenses.—A state board of examiners of electrical contractors is hereby created, which shall consist of the state electrical engineer, who shall act as chairman of the board, the secretary of the association of electrical contractors of North Carolina, and three other members to be appointed by the governor as follows: One from the faculty of the engineering school of the Greater University of North Carolina, one person who is serving as chief electrical inspector of a municipality in the state of North Carolina, and one representative of a firm, partnership or corporation located in the state of North Carolina and engaged in the business of electrical contracting. Of the three appointed members one shall be appointed for a term of one year, one for a term of two years, and one for a term of three years, and until their respective successors are appointed and qualified; and thereafter each appointment shall be for a term of three years. The principal office of the board shall be at such place as shall be designated by a majority of the members thereof. The board of examiners shall hold regular meetings quarterly and may hold special meetings on call of the chairman. They shall annually appoint and at their pleasure remove a secretary-treasurer, who need not be a member of the board, and whose duties shall be prescribed and whose compensation shall be fixed by the board.

Three members of the board shall constitute a quorum. The appointive members of the board shall be entitled to receive the sum of seven dollars ($7.00) and actual and necessary expenses for each day actually devoted to the performance of their duties under this article: Provided, however, that none of the expenses of said board or the compensation or expenses of any officer thereof or any employee shall ever be paid or payable out of the treasury of the state of North Carolina; and neither the board nor any officer or employee thereof shall have any power or authority to make or incur any expense, debt or other financial obligation binding upon the state of North Carolina. (1937, c. 87, s. 1.)

§ 87-40. Board to appoint secretary-treasurer within thirty days; bond required; oath of membership.—The board of examiners of electrical contractors shall within thirty days after its appointment meet at the time and place designated by the chairman and appoint a secretary-treasurer. The secretary-treasurer shall give a bond approved by the board for the faithful performance of his duties in such form as the board may from time to time prescribe. The board shall have a common seal and shall formulate rules to govern its actions and may take testimony and proof concerning all matters within its jurisdiction. Before entering upon the performance of their duties hereunder each member of the board shall take and file with the secretary of state an oath in writing to properly perform the duties of his office as a member of said board, and to uphold the constitution of North Carolina and the constitution of the United States. (1937, c. 87, s. 2.)

§ 87-41. Seal for board; duties of secretary-treasurer; surplus funds; contingent or emergency fund.—The board shall adopt a seal for its own use. The seal shall have inscribed thereon the [810]
words “board of examiners of electrical contractors, state of North Carolina,” and the secretary shall have charge and custody thereof. The secretary-treasurer shall keep a record of the proceedings of said board and shall receive and account for all moneys derived under the operations of this article. Any funds remaining in the hands of the secretary-treasurer to the credit of the board after the expenses of the board for the current year have been paid shall be paid over to the electrical engineering department of the Greater University of North Carolina to be used for electrical experimentations: Provided, however, the board shall have the right to retain as a contingent or emergency fund ten per cent of such gross receipts in each year of its operation. (1937, c. 87, s. 3.)

§ 87-42. Board to give examinations and issue licenses.—It shall be the duty of the board of examiners of electrical contractors to receive all applications for licenses filed by persons, or representatives of firms or corporations seeking to enter upon or continue in the electrical contracting business within the state of North Carolina, as such business is herein defined, and upon proper qualification of such applicant to issue the license applying for; to prescribe the conditions of examination of, and, subject to the provisions of this article, to give examinations to all persons who are under the provisions of this article required to take such examination. (1937, c. 87, s. 4.)

§ 87-43. Persons required to obtain licenses; examination required; licenses for firms or corporations.—No person, firm or corporation shall engage in the business of installing, maintaining, or repairing within the state of North Carolina any electric wiring, devices, appliances or equipment for which a permit is now or may hereafter be required by the statutes of the state of North Carolina, or by municipal or county ordinances in the county in which such work is undertaken, dealing with the erection and inspection of buildings and fire protection and electrical installation unless such person, firm or corporation shall have received from the board of examiners of electrical contractors an electrical contractor’s license: Provided, however, that the provisions of this article shall not apply (a) to the installation, construction, or maintenance of power systems for the generation and primary and secondary distribution of electric current ahead of the customer’s meter; (b) to the installation, construction, maintenance, or repair of telephone, telegraph, or signal systems by public utilities; (c) to any mechanic employed by a licensee of this board; (d) to the installation, construction or maintenance of electrical equipment and wiring for temporary use by contractors in connection with the work of construction; (e) to the installation, construction, maintenance or repair of electrical wiring, devices, appliances or equipment by persons, firms or corporations, upon their own property, who maintain in regular and full-time employment electricians, when such electricians are employed and engaged exclusively by such persons, firms or corporations; (f) to the installation, construction, maintenance or repair of electrical wiring, devices, appliances or equipment by state institutions and private educational institutions which maintain a private electrical department. No license shall be issued by said board without an examination of the applicant for the purpose of ascertaining his qualifications for such work, but no such examination shall be required for the annual renewal of such license: Provided, however, that persons, firms or corporations residing in the state of North Carolina on March 1, 1937, who have paid the license fees required of electrical contractors by the State Revenue Act of one thousand nine hundred and thirty-five, upon proper certification or establishment of such fact, shall be granted a license by the board of examiners under this article without examination. Firms or corporations shall be eligible to secure licenses from the board of examiners provided they have in their respective organizations at least one person duly qualified as an electrical contractor under the provisions of this article. No license or renewal of any license shall be issued to any applicant until the fees herein prescribed shall have been paid. (1937, c. 87, s. 5.)

§ 87-44. Fees for licenses.—Before a license is granted to any applicant, and before any expiring license is renewed, the applicant shall pay to the board of examiners of electrical contractors a fee in such an amount as is herein specified for the license to be granted or renewed as follows: For a Class 1, Electrical Contractor’s License, state-wide ....................... $25.00 For a Class 2, Electrical Contractor's License, for one county only ........... 5.00 (1937, c. 87, s. 6.)

§ 87-45. Licenses expire on June 30th, following issuance; renewal; fees used for administrative expense.—Each license issued hereunder shall expire on June thirtieth following the date of its issuance, and shall be renewed by the board of examiners of electrical contractors upon application of the holder of the license and payment of the required fee at any time within thirty days before the date of such expiration. Licenses renewed subsequent to the date of expiration thereof may in the discretion of the board be subject to a penalty not exceeding ten per cent. The fees collected for licenses under this article shall be used for the expenses of the board of examiners in carrying out the provisions of this article, subject to the provisions herein made with reference to payment of surplus to the electrical engineering department of the Greater University of North Carolina for electrical experimental purposes. (1937, c. 87, s. 7.)

§ 87-46. Examination before local examiner.—In order that applicants for licenses hereunder who are by the provisions of this article required to take an examination before the issuance thereof shall not be subject to any unreasonable inconvenience in connection therewith, the board of examiners of electrical contractors may, and upon the request of the board of commissioners of any county shall delegate to the electrical inspector of the county in which such applicant resides, or if there be no county electrical inspector, then to the electrical inspector of the municipality therein, the authority to conduct examinations of such applicant or applicants residing in such county, such examination, however, to be as prescribed by the board of examiners. In such an event the local examiner hereinafter provided for shall transmit to the board of examiners.
Examiners of electrical contractors the results of such examination, and, if approved by the board, licenses on the basis of such examination shall be issued to the applicants upon the payment of the fees herein prescribed. (1937, c. 87, s. 8.)

§ 87-47. License signed by chairman and secretary-treasurer under seal of board; display in place of business required; register of licenses; records. — Licenses issued hereunder shall be signed by the chairman and the secretary-treasurer of the board of examiners, under the seal of the board. Every holder of license shall keep his certificate of license displayed in a conspicuous place in his principal place of business. The secretary of the board shall keep a register of all licenses to electrical contractors, which said register shall be open during the ordinary business hours for public inspection. The board of examiners shall keep minutes of all of its proceedings and an accurate record of its receipts and disbursements, which record shall be audited at the close of each fiscal year by a certified public accountant, and within thirty days after the close of each fiscal year a summary of its proceedings and a copy of the audit of its books shall be filed with the governor and the treasurer of the state. (1937, c. 87, s. 9.)

§ 87-48. Licenses not assignable or transferable; suspension or revocation.—No license issued in accordance with the provisions of this article shall be assignable or transferable. Any such license may, after hearing, be suspended for a definite length of time or revoked by the board of examiners if the person, firm or corporation holding such license shall wilfully or by reason of incompetence violate any of the statutes of the state of North Carolina, or any ordinances of any municipality or county relating to the installation, maintenance, alteration or repair of electric wiring, devices, appliances or equipment. (1937, c. 87, s. 10.)

§ 87-49. License does not relieve compliance with codes or laws.—Nothing in this article shall relieve the holder or holders of licenses issued under the provisions hereof from complying with the building or electrical codes or statutes or ordinances of the state of North Carolina, or of any county or municipality thereof, now in force or hereafter enacted. (1937, c. 87, s. 11.)

§ 87-50. Responsibility for negligence; non-liability of board.—Nothing in this article shall be construed as relieving any license issued hereunder from responsibility or liability for negligent acts on the part of such holder in connection with electrical contracting work; nor shall the board of examiners of electrical contractors be accountable in damages, or otherwise, for the negligent act or acts of any holder of such license. (1937, c. 87, s. 12.)

§ 87-51. Penalty for violation of article.—Any person, firm or corporation who shall violate any of the provisions of this article, or who shall engage or undertake to engages in the business of electrical contracting as herein defined, without first having obtained a license under the provisions of this article, shall be guilty of a misdemeanor and upon conviction thereof shall be subject to a fine of not less than twenty-five dollars ($25.00) or more than fifty dollars ($50.00) for each offense. Conviction of a violation of this article on the part of a holder of a license issued hereunder shall automatically have the effect of suspending such license until such time as it shall have been reinstated by the board of examiners of electrical contractors. (1937, c. 87, s. 13.)

Chapter 88.

Cosmetic Art.

Sec. 88-15. Compensation and expenses of board members; inspectors; reports; budget; audit.

88-16. Applicants for examination.

88-17. Regular and special meetings of board; examinations.


88-19. Admitting operators from other states.

88-20. Registration procedure.

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§ 88-1. Practice of cosmetology regulated.—On and after June thirtieth, one thousand nine hundred and thirty-three, no person or combination of persons shall for pay, or reward, either directly or indirectly, practice or attempt to practice cosmetic art as hereinafter defined in the state of North Carolina without a certificate of registration, either as a registered apprentice or as a registered "cosmetologist," issued pursuant to the provisions of this chapter by the state board of cosmetic art examiners hereinafter established. (1933, c. 179, s. 1.)

§ 88-2. Cosmetic art.—Any one or a combination of the following practices, when done for pay, or reward, shall constitute the practice of cosmetic art in the meaning of this chapter:

The systematic massaging with the hands or mechanical apparatus of the scalp, face, neck, shoulders and hands; the use of cosmetic preparations and antiseptics; manicuring; cutting, dyeing, cleansing, arranging, dressing, waving, and marcelling of the hair, and the use of electricity for stimulating growth of hair. (1933, c. 179, s. 2.)

§ 88-3. Cosmetologist.—"Cosmetologist" is any person who, for compensation, practices cosmetic art, or conducts, or maintains a cosmetic art shop, beauty parlor, or hairdressing establishment. (1933, c. 179, s. 3.)

§ 88-4. Beauty parlor, etc.—"Cosmetic art shop," "beauty parlor," or "hairdressing establishment" is any building, or part thereof wherein cosmetic art is practiced. (1933, c. 179, s. 4.)

§ 88-5. Manager.—"Manager," or "managing cosmetologist," as used in this chapter, is defined as any person who has direct supervision over operators, or apprentices in a cosmetic art shop, beauty parlor, or hairdressing establishment. (1933, c. 179, s. 5.)

§ 88-6. Operator.—"Operator" is any person who is not a manager, itinerant, or apprentice cosmetologist, who practices cosmetic art under the direction and supervision of a managing cosmetologist. (1933, c. 179, s. 6.)

§ 88-7. Itinerant cosmetologist; application of chapter.—"Itinerant cosmetologist" is any person who practices as a business cosmetic art outside of a cosmetic art shop, beauty parlor, or hairdressing establishment, either in going from house to house or from place to place at regular, or irregular intervals: Provided, this chapter shall not apply to persons attending female institutions of learning, who defray the cost or a part of the cost of such attendance by the occasional practice of cosmetic art as defined herein, or to persons practicing the cosmetic art in rural communities without the use of mechanical appliances. (1933, c. 179, s. 7.)

§ 88-8. Manicurist.—"Manicurist" is any person who does manicuring only, outside of a cosmetic art shop, beauty parlor, or hairdressing establishment, for compensation. (1933, c. 179, s. 8.)

§ 88-9. Apprentice.—"Apprentice" is any person who is not a manager, itinerant cosmetologist, or operator, who is engaged in learning and acquiring the practice of cosmetic art under the direction and supervision of a licensed managing cosmetologist. (1933, c. 179, s. 9.)

§ 88-10. Qualifications for certificate of registration.—No person shall be issued a certificate of registration as a registered apprentice by the state board of cosmetic art examiners, hereinafter established—

(a) Unless such person is at least eighteen years of age.

(b) Unless such person passes a satisfactory physical examination prescribed by the said board of cosmetic art examiners.

(c) Unless such person has completed at least one thousand hours in classes in a reliable cosmetic art school, or training approved by said board of cosmetic art examiners.

(d) Unless such person passes the examination prescribed by the board of cosmetic art examiners and pays the required fees hereinafter enumerated. (1933, c. 179, s. 10; 1941, c. 234, s. 1.)

Editor's Note.—The 1941 amendment substituted "one thousand" for "four hundred and eighty" formerly appearing in subsection (c).

For comment on the 1941 amendment, see 19 N. C. Law Rev. 447.

§ 88-11. When apprentice may operate shop.—No registered apprentice, registered under the provisions of this chapter, shall operate a cosmetic art beauty shop, beauty parlor, or hairdressing establishment in this state, but must serve his or her period of apprenticeship under the direct supervision of a registered managing cosmetologist as required by this chapter: Provided, however, that any apprentice who, on June 30, 1933, is regularly employed for the direct supervision of one who is entitled to registration as a managing cosmetologist under the provisions of § 88-19 shall, upon recommendation of such managing cosmetologist, and upon passing a satisfactory physical examination, be entitled to registration as a registered cosmetologist. (1933, c. 179, s. 11.)

§ 88-12. Qualifications for registered cosmetologist.—Any person to practice cosmetic art as a registered cosmetologist must have worked as a registered apprentice for a period of at least six months under the direct supervision of a registered managing cosmetologist, and this fact must be demonstrated to the board of cosmetic art examiners by the sworn affidavit of three registered cosmetologists, or by such other methods of proof as the board may prescribe and deem necessary. A certificate of registration as a registered cosmetologist shall be issued by the board, hereinafter designated, to any person who is qualified under the provisions of this chapter, or meets the following qualifications:

(a) Who is qualified under the provisions of section ten of this chapter.

(b) Who is at least nineteen years of age.

(c) Who passes a satisfactory physical examination as prescribed by said board.

(d) Who has practiced as a registered apprentice for a period of six months, under the immediate personal supervision of a registered cosmetologist; and

(e) Who has passed a satisfactory examination, conducted by the board, to determine his or her fitness to practice cosmetic art, such examination to be prepared and conducted, as to determine
§ 88-13. State board of cosmetic art examiners created; appointment and qualifications of members; term of office; removal for cause. — A board to be known as the state board of cosmetic art examiners is hereby established, to consist of three members appointed by the governor of the State. Each member shall be an experienced cosmetologist, who has followed the practice of all branches of the cosmetic art in the State of North Carolina for at least five years next preceding his or her appointment, and who, during such period of time, and at the time of appointment, shall be free of connection in any manner with any cosmetic art school or college or academy or training school. The appointment of the governor shall be for a term of three years. The governor, at his option, may remove any member for good cause shown and appoint members to fill unexpired terms. (1933, c. 179, s. 13; 1935, c. 54, s. 2.)

Editor's Note.—Several changes were made in this section by the amendment of 1935. The requirement that the appointee shall be free from connection with a school or college is new as was also the requirement for following "all branches" of the cosmetic art. Prior to the amendment the section provided that the first appointees should serve for three years, two years, and one year respectively.

Relator Must Show Interest in Action to Vacate Office. — It is necessary that a relator in an action to vacate office under this section, have some interest in the action, though it is not required that he be a contestant for the office. State v. Ritchie, 206 N. C. 808, 175 S. E. 308.

Cited in Poole v. State Board of Cosmetic Art Examiners, 221 N. C. 199, 19 S. E. (2d) 635.

§ 88-14. Office in Raleigh; seal; officers and secretary. — The board of cosmetic art examiners shall maintain a suitable office in Raleigh, North Carolina, and shall adopt and use a common seal for the authentication of its orders and records. Said board shall elect its own officers and in addition thereto shall elect a full time secretary, which secretary shall receive an annual salary not to exceed one thousand and eight hundred dollars ($1,800.00). The secretary shall keep and preserve all the records of the board, issue all necessary notices and perform such other duties, clerical and otherwise, as may be imposed upon such secretary by said board of cosmetic art examiners. The secretary shall be subject to the approval of the director of the budget. The said secretary shall be an experienced cosmetic artist, who has followed the practice of all branches of the cosmetic art in the State of North Carolina, and shall be free of connection in any manner with any cosmetic art school or college or academy or training school. The appointment of the governor shall be for a term of three years. The governor, at his option, may remove any member for good cause shown and appoint members to fill unexpired terms. (1933, c. 179, s. 13; 1935, c. 54, s. 2.)

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Cited in Poole v. State Board of Cosmetic Art Examiners, 221 N. C. 199, 19 S. E. (2d) 635.

§ 88-15. Compensation and expenses of board members; inspectors; reports; budget; audit. — Each member of the board of cosmetic art examiners shall receive for such services an annual salary in an amount to be fixed by the director of the budget, and shall be reimbursed for actual necessary expenses incurred in the discharge of such duties, not to exceed five hundred dollars ($500.00) per day for subsistence, plus the actual traveling expenses, or an allowance of five cents (5¢) per mile where such member uses his or her personally owned automobile.

Said board, with the approval of the director of the budget, shall appoint necessary inspectors who shall be experienced in all branches of cosmetic art. The salaries for such inspectors shall be fixed by the board with the approval of the director of the budget of the state of North Carolina. The inspectors or agents so appointed shall perform such duties as may be prescribed by the board. Any inspector appointed under authority of this section or any member of the board shall have the authority at all reasonable hours to examine cosmetic art shops, beauty parlors, hair dressing establishments, cosmetic art schools, colleges, academies or training schools with respect to, and in compliance with, the provisions of this chapter. The inspectors and agents appointed under authority of this chapter shall make such reports to the board of cosmetic art examiners as said board may require. The said board shall on, or before June first of each year, submit a budget to the director of the budget for the ensuing fiscal year, which shall begin July first of each year. The said budget so submitted shall include all estimated receipts and expenditures for the ensuing fiscal year including the estimated compensation and expenses of board members. The said budget shall be subject to the approval of the director of the budget and no expenditures shall be made unless the same shall have been set up in the budget adopted by the board of cosmetic art examiners, and approved by the director of the budget of the state of North Carolina; that all salaries and expenses in connection with the administration of this chapter shall be paid upon a warrant drawn on the state treasurer, said warrants to be drawn by the secretary of the board and approved by the state auditor.

The provisions of the Executive Budget Act and the Personnel Act shall fully apply to the administration of this chapter.

There shall be annually made by the auditor of the state of North Carolina a full audit and examination of the receipts and disbursements of the state board of cosmetic art examiners. The state board shall report annually to the governor a full statement of receipts and disbursements and also

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§ 88-16. Applicants for examination.—Each applicant for an examination shall:

(a) Make application to the board of cosmetic art examiners on blank forms prepared and furnished by the full time secretary, such application to contain proof under the applicant's oath of the particular qualifications of the applicant.

(b) Pay to the secretary of the said board the required examination fee, hereinafter established.

(c) All applications for said examination must be filed with the full time secretary at least thirty days prior to the actual taking of such examination by applicant. (1933, c. 179, s. 16.)

§ 88-17. Regular and special meetings of board; examinations.—The board of cosmetic art examiners shall meet four times a year in the months of January, April, July and October on the first Tuesday in each of said months, for the purpose of transacting all business of the board of cosmetic art examiners and to conduct examinations of applicants for certificates of registration to practice as registered cosmetologists, and of applicants for certificates of registration to practice as registered apprentices, meetings to be held at such places as the board may determine to be most convenient for such examinations. The examinations conducted for applicants for certificates of registration as registered cosmetologists and registered apprentices shall be open to all applicants, and shall include such practical demonstration and oral and written tests as the said board may determine. The chairman of the board is hereby authorized and empowered to call a meeting of said board whenever necessary, said meetings to be in addition to the quarterly meetings hereinbefore provided for. (1933, c. 179, s. 17; 1935, c. 54, s. 1.)

Editor's Note.—The 1941 amendment added subsection (e). Paragraph (a) prescribes a mandatory duty, and the board of examiners has no discretionary power to refuse to issue the certificate in such instance, and therefore a complaint in suit for mandamus alleging full compliance with the provisions of the statute in this respect and the refusal of the board to issue the certificate to plaintiff, is not demurrable. Poole v. State Board of Cosmetic Art Examiners, 221 N.C. 199, 19 S.E.2d 655.

§ 88-18. Certificate of registration.—Whenever the provisions of this chapter have been complied with, the said board shall issue or cause to be issued, a certificate of registration as registered cosmetologist, or as a registered apprentice to the applicant, as the case may be. (1933, c. 179, s. 18.)

§ 88-19. Admitting operators from other states.—Persons who have practiced cosmetic art in another state and who move into this state shall prove and demonstrate his, or her fitness, physical and otherwise, as set out in §§ 88-10 and 88-12, to the board of cosmetic art examiners, as herein created, and as herein provided, before they will be issued a certificate of registration to practice cosmetic art, but said board may issue such temporary permits as are necessary. (1933, c. 179, s. 19.)

§ 88-20. Registration procedure.—The procedure for the registration of present practitioners of cosmetic art shall be as follows:

(a) Every person who has been practicing cosmetic art in North Carolina and who is practicing such art on June 30, 1933, upon making an affidavit to that effect, and complying with the provisions of this chapter as to physical fitness, and upon paying the required fee to the board of cosmetic art examiners shall be issued a certificate of registration as a registered cosmetologist.

(b) Any person who, on June 30, 1933, is operating a shop as a managing cosmetologist, shall, upon making an affidavit to that effect, and complying with the provisions of this chapter as to physical fitness and upon paying the required fee to the board of cosmetic art examiners be issued a certificate of registration as a managing cosmetologist.

(c) Any person who, on June 30, 1933, is regularly employed under a person who has registered as a managing cosmetologist shall be entitled to register as a cosmetologist as provided in § 88-11.

(d) All persons who are not actively engaged in the practice of cosmetic art on June 30, 1933, shall be required to comply with all of the provisions of this chapter.

(e) All persons, however, who do not make application prior to January 1, 1942, shall be required to take the examination prescribed by the State Board of Cosmetic Art Examiners and otherwise comply with the provisions of this chapter, as amended, before engaging in the practice of cosmetic art. (1933, c. 179, s. 20; 1941, c. 234, s. 3.)

Editor's Note.—Prior to the amendment of 1935 this section provided for examination at least three times each year. The last sentence of the section was added by the amendment.

§ 88-21. Fees required.—The fee to be paid by an applicant for a certificate of registration to practice cosmetic art as an apprentice shall be three dollars. The fee to be paid by an applicant for examination to determine his or her fitness to receive a certificate of registration as a registered cosmetologist shall be five dollars. The annual license fee of a registered cosmetologist shall be three dollars fifty cents, while the annual license fee of a registered apprentice shall be two dollars fifty cents. All licenses, both for apprentices and registered cosmetologists, shall be renewed as of the 30th day of June each and every year; such renewals for apprentices shall be two dollars fifty cents, and for registered cosmetologists three dollars fifty cents. The fees herein set out shall not be increased by the board of cosmetic art examiners, but said board may regulate the payment of said fees and pro-rate the license fees in such manner as it deems expedient. The fee for registration of an expired certificate for a registered cosmetologist shall be five dollars and registration of an expired certificate of an apprentice shall be three dollars. (1933, c. 179, s. 21.)

§ 88-22. Persons exempt.—The following persons are exempt from the provisions of this chapter while engaged in the proper discharge of their professional duties:

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§ 88-23. Rules and regulations of board. — The state board of cosmetic art examiners shall have authority to make reasonable rules and regulations for the sanitary management of cosmetic art shops, beauty parlors, hairdressing establishments, cosmetic art schools, colleges, academies and training schools, hereinafter called shops and schools, and to have such rules and regulations enforced. The duly authorized agents of said board shall have authority to enter upon and inspect any shop or school at any time during business hours. A copy of the rules and regulations adopted by said board and approved by the state board of health shall be furnished from the office of the board or by the above mentioned authorized agents to the owner or manager of each shop or school in the State, and such copy shall be kept posted in a conspicuous place in each shop and school. (1933, c. 179, s. 23; 1933, c. 54, s. 5.)

Editor's Note.—The amendment of 1935 made this section applicable to academies and training schools.

§ 88-24. Posting of certificates.—Every holder of a certificate of registration shall display it in a conspicuous place adjacent to or near his, or her work chair. (1933, c. 179, s. 24.)

§ 88-25. Annual renewal of certificates.—Every registered cosmetologist and every registered apprentice, who continues in active practice or service shall annually, on or before June 30th, of each year, file with the secretary of the board, a renewal certificate as to physical fitness, renew his, or her certificate of registration which has not been renewed prior to, or during the month of July in any year, and which shall expire on the first day of August in that year. A registered cosmetologist, or a registered apprentice whose certificate of registration has expired may have his or her certificate restored immediately upon payment of the required restoration fee, and furnishing to the secretary of the board renewal certificate as to physical fitness. Any registered cosmetologist who retires from the practice of cosmetic art for not more than three years may renew his or her certificate of registration upon payment of the required restoration fee, and by furnishing to the secretary of the board renewal certificate as to physical fitness. (1933, c. 179, s. 25.)

§ 88-26. Causes for revocation of certificates. — The board of cosmetic art examiners may either refuse to issue or renew, or may suspend, or revoke any certificate of registration for any one, or combination of the following causes: (a) Persons authorized under the laws of the state to practice medicine and surgery. (b) Commissioned medical or surgical officers of the United States army, navy, or marine hospital services. (c) Registered nurses. (d) Undertakers. (e) Registered barbers. (f) Manicurists as herein defined. (1933, c. 179, s. 22.)

§ 88-27. Hearing on charges. — The board may neither refuse to issue, nor refuse to renew, nor suspend, nor revoke any certificate of registration, however, for any of these causes, unless the person accused has been given at least thirty days notice in writing of the charge against him or her and public hearing by the board of cosmetic art examiners. (a) Upon the hearing of any such proceeding, the board may administer oaths and may procure by its subpoena, the attendance of witnesses and the production of relevant books and papers. (b) Any cosmetologist in the state whose case has been passed upon by the board of cosmetic art examiners shall have the right to appeal to the superior court of the state, which court may in its discretion reverse, or modify any order made by the said board of cosmetic art examiners. (1933, c. 179, s. 27; 1939, c. 218, s. 1.)

Cross Reference.—As to uniform procedure for suspension or revocation of licenses, see §§ 150-1 to 150-8.

§ 88-28. Acts made misdemeanors. — Each of the following constitutes a misdemeanor punishable upon conviction by a fine of not less than $10.00 and not more than $50.00, or imprisonment for not less than ten days, or more than thirty days: (a) The violation of any of the provisions of § 88-1. (b) Permitting any person in one's employ, supervision, or control to practice as an apprentice unless that person has a certificate of registration as a registered apprentice. (c) Permitting any person in one's employ, supervision, or control, to practice as a cosmetologist unless that person has a certificate as a registered cosmetologist. (d) Obtaining, or attempting to obtain, a certificate of registration for money other than required fee, or any other thing of value, or by fraudulent misrepresentations. (e) Practicing or attempting to practice by fraudulent misrepresentations. (f) The willful failure to display a certificate of registration as required by § 88-24. (g) The willful and continued violation of the reasonable rules and regulations adopted by the state board of cosmetic art examiners, and approved by the state board of health, for the sanitary management of shops and schools. (1933, c. 179, s. 28.)

Variance.—Where defendant was tried upon a warrant charging that she permitted persons in her employ to practice as apprentices without certificate of registration as reg-
listered apprentices or registered cosmetologists, and the jury returned a special verdict to the effect that defendant permitted unlicensed students to work in her school, there is a fatal variance between the warrant and the special verdict and a failure of proof, and the adjudication that defendant was not guilty is affirmed. State v. McIver, 216 N. C. 734, 6 S. E. (2d) 493.

§ 88-29. Records to be kept by board.—The board of cosmetic art examiners shall keep a record of its proceedings relating to the issuance of certificates of registration. This record shall contain the name, place of business, and residence of each registered cosmetologist and registered apprentice, and the date and number of his certificate of registration. This record shall be open to public inspection during all days, excepting Sundays and legal holidays. (1923, c. 179, s. 29.)

Chapter 89. Engineering and Land Surveying.

Sec.
89-1. Qualification to practice; registration.
89-2. Private practice.
89-3. State board of registration for engineers and surveyors.
89-4. Requisites for appointment; pay.
89-5. Certificate of appointment; oath; certificate of registration; seal; by-laws.
89-6. Meetings; notice; quorum.
89-7. Fund of board; bond of secretary of board.
89-8. Record of proceedings and register of applicants; roster of engineers and surveyors; annual report.
89-14. Exemptions from operation of chapter.
89-16. Land surveying.
89-17. Fees of surveyors and chain-carriers.

§ 89-1. Qualification to practice; registration.
In order to safeguard life, health, and property, any person practicing or offering to practice engineering or land surveying in this state shall hereafter be required to submit evidence that he or she is qualified so to practice, and shall be registered as hereinafter provided; and from February 25, 1922, it shall be unlawful for any person to practice or to offer to practice engineering or land surveying in this state, except as herein provided, unless such person has been duly registered under the provisions of this chapter. (1921, c. 1, s. 1; C. S. 6055(b).)

§ 89-2. Private practice.—Nothing in this chapter shall be construed as requiring registration for the purpose of practicing engineering or land surveying by an individual, firm, or corporation on property owned or leased by said individual, firm, or corporation, unless the same involves the public safety or health. (1921, c. 1, s. 2; C. S. 6055(c).)

§ 89-3. State board of registration for engineers and surveyors.—There is hereby created a state board of registration for engineers and land surveyors, hereinafter called the "board," consisting of five members, who shall be appointed by the governor within sixty days after this chapter becomes effective. At least two members of such board shall be appointed from the engineering faculty of the North Carolina State college of agriculture and engineering of the University of North Carolina. Not more than three members of said board shall be from the same branch of the profession of engineering. The members of the first board shall be appointed to serve for the following terms: Two members for one year, two members for two years, and one member for four years; said terms ending on the thirty-first day of December of the succeeding year. On the expiration of each of said terms the term of office of each newly appointed or reappointed member of the board shall be for a period of four years and shall terminate on the thirty-first day of December. Each member shall hold over after the expiration of his term until his successor shall be duly appointed and qualified. The governor may remove any member of the board for misconduct, incompetency, or neglect of duty. Vacancies in the membership of the board, however created, shall be filled by appointment by the governor for the unexpired term. (1921, c. 1, s. 3; C. S. 6055(d).)

§ 89-4. Requisites for appointment; pay.—Each member of the board shall be a citizen of the United States and a resident of this state at the time of his appointment. He shall have been engaged in the practice or teaching of his profession for at least ten years. Each member of the board shall receive ten dollars ($10) per day for attending sessions of the board or of its committees, and for the time spent in necessary travel, and, in addition, shall be reimbursed for all necessary traveling, incidental, and clerical expenses incurred in carrying out the provisions of this chapter. (1921, c. 1, s. 4; C. S. 6055(e).)

§ 89-5. Certificate of appointment; oath; certificate of registration; seal; by-law.—Each member of the board shall receive a certificate of appointment from the governor, and before beginning his term of office he shall file with the secretary of state the constitutional oath of office. Each member of the board first created shall receive a certificate of registration under this chapter from the governor of the state. The board shall have power to compel the attendance of witnesses, may administer oaths and may take testimony and proofs concerning all matters within its jurisdiction. The board shall adopt and have an official

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§ 89-6. Meetings; notice; quorum.—The board shall hold a meeting within thirty days after its members are first appointed, and thereafter shall hold at least two regular meetings each year. Special meetings shall be held at such times as the by-laws of the board may provide. Notice of all meetings shall be given in such manner as the by-laws may provide. The board shall elect annually from its members a chairman, a vice-chairman, and a secretary. A quorum of the board shall consist of not less than three members. (1921, c. 1, s. 6; C. S. 6055(g)).

§ 89-7. Fund of board; bond of secretary of board.—The secretary of the board shall receive and account for all moneys derived from the operation of this chapter and shall pay them to the state treasurer, who shall keep such moneys in a separate fund, to be known as the "Fund of the Board of Registration for Engineers and Land Surveyors," which fund shall be continued from year to year, and shall be drawn upon only for the purpose of this chapter as herein provided. All expenses certified by the board as properly and necessarily incurred in the discharge of its duties, including authorized compensation, shall be paid out of said fund on the warrant of the auditor of the state, issued on requisition signed by the chairman and secretary of the board: Provided, however, that at no time shall the total of warrants issued exceed the total amount of funds accumulated under this chapter. The secretary of the board shall give a surety bond satisfactory to the state treasurer, conditioned upon the faithful performance of his duties. The premium on said bond shall be regarded as a proper and necessary expense of the board. (1921, c. 1, s. 7; C. S. 6055(h)).

§ 89-8. Record of proceedings and register of applicants; roster of engineers and surveyors; annual report.—The board shall keep a record of its proceedings and a register of all applicants for registration showing for each the date of application, name, age, education and other qualifications, place of business and place of residence, and whether the applicant was rejected or not for the purpose of this chapter as herein provided. The books and register of the board shall be prima facie evidence of all matters recorded therein. A roster showing the names and places of business and of residence of all registered engineers and land surveyors shall be prepared by the secretary of the board during the month of January of each year; such roster shall be printed by the board out of the fund of the said board as provided in § 89-7, and a copy mailed to and placed on file by the clerk of each incorporated city, town and county in the state. On or before the first day of March of each year the board shall submit to the governor a report of its transactions for the preceding year, and shall file with the secretary of state a true copy of such report, together with a complete statement of the receipts and expenditures of the board, tested by the affidavits of the chairman and the secretary, and a copy of the said roster of registered engineers and registered surveyors. (1921, c. 1, s. 8; C. S. 6055(i)).

§ 89-9. Certificates; issuance; fees; eligibility of applicants.—The board shall, on application therefor, on prescribed form, and the payment of a fee of twenty-five dollars ($25) by engineers, or the payment of a fee of ten dollars ($10) by land surveyors, issue a certificate of registration:

1. To any person who submits evidence satisfactory to the board that he or she is fully qualified to practice engineering, or land surveying, such evidence after January first, one thousand nine hundred and twenty-three, to include an examination, oral or written; or

2. To any person who holds a like unexpired certificate of registration issued to him or her by any state, territory, county, city, town or any city, town or county in the United States in which the requirements for the registration of engineers or land surveyors are of a standard satisfactory to the board: Provided, however, that the engineering registration board of said states or territories shall grant full and equal reciprocal registration rights and privileges to North Carolina registrants: Provided, however, that no person shall be eligible for registration who is under twenty-one years of age, who is not a citizen of the United States, who does not speak and write the English language, who is not of good character and reputation. Unless disqualifying evidence be before the board, the following facts established in the application shall be regarded as prima facie evidence to the board, that the applicant is fully qualified to practice engineering or land surveying, or both:

(a) Five (5) or more years of active engagement in engineering, or three or more years of active practice in land surveying, February 25, 1921: Provided, however, each year of teaching, or of study satisfactorily completed, in a college of standing satisfactory to the board shall be considered as equivalent to one year of such active practice: Provided further, the period spent in the army, navy, marine corps, or other government service of the United States in the late war be interrupted by such services shall also be counted as equivalent to an equal period of active practice: Provided, however, the application for registration is made within twelve (12) months after February 25, 1921.

(b) Graduation, after a course of not less than four (4) years, in engineering from a school or college approved by the board as of satisfactory standing.

(c) Full membership in the American Society of Civil Engineers, American Institute of Chemical Engineers, American Institute of Electrical Engineers, American Society of Mechanical Engineers, American Institute of Mining and Metallurgical Engineers, American Society of Mining, Metallurgical and Chemical Engineers, or such other national or state engineering or architectural societies as may be approved by the board, the requirements for full membership of which are not lower than the requirements for full mem-
bersonship in the professional societies or institutes named above.

Applicants for registration, in cases where the evidence originally presented in the application does not appear to the board conclusively or warranting the issuance of a certificate, may present further evidence which may include the results of a required examination, for the consideration of the board.

In case the board denies the issuance of a certificate to an applicant, the registration fee deposited shall be returned by the board to the applicant. (1921, c. 1, s. 9; C. S. 6055(j).)

Local Modification.—Macon: Pub. Lec. 1927, c. 657.

§ 89-10. Expiration and renewal of certificates.

—Certificates of registration shall expire on the last day of the month of December following their issuance or renewal, and shall become invalid on that date unless renewed. It shall be the duty of the secretary of the board to notify by mail every person registered hereunder of the date of the expiration of his certificate and the amount of the fee required for its renewal for one year; such notice shall be mailed at least one month in advance of the date of the expiration of said certificate. Renewal may be effected at any time during the month of January by the payment of a fee of five dollars ($5) to the secretary of the board. The failure on the part of any registrant to renew his certificate annually in the month of January, as required above, shall not deprive such person of the right of renewal thereafter, but the fee paid for the renewal of a certificate after the month of January shall be increased ten per cent for each month or fraction of a month that payment for renewal is delayed: Provided, however, that the maximum fee for a delayed renewal shall not exceed twice the normal fee. (1921, c. 1, s. 9; C. S. 6055(k).)

§ 89-11. Revocation of license; reissue of revoked license; reinstatement; lost certificate. — The board shall have the power to revoke the certificate of registration of any engineer or land surveyor registered hereunder who is found guilty of any fraud or deceit in obtaining a certificate of registration, or gross negligence, incompetency or misconduct in the practice of engineering or land surveying. Any person may prefer charges of such fraud, deceit, negligence, incompetency or misconduct against any engineer or land surveyor registered hereunder; such charges shall be in writing and sworn to by the complainant and submitted to the board. Such charges, unless dismissed without hearing by the board as unfounded or trivial, shall be heard and determined by the board within three (3) months after the date on which they are preferred. Hearings shall be in the county of the residence of the person whose license is involved; provided that after notice such person and the board may agree that the hearing may be held in some other county. A copy of the charges, together with a notice of the time and place of hearing, shall be legally served on the accused at least thirty (30) days before the date fixed for the hearing, and in the event that such service cannot be effected thirty (30) days before such hearing, then the date of hearing and determination shall be postponed as may be necessary to permit the carrying out of this condition. At said hearing the accused shall have the right to appear personally and by counsel, and to cross-examine witnesses against him or her and to produce evidence or witnesses in his or her defense. If after said hearing the board unanimously votes in favor of finding the accused guilty of any fraud or deceit in obtaining the certificate or of gross negligence, incompetency, or misconduct in the practice of engineering or land surveying, the board may revoke the certificate of registration of the accused. The board may reissue a certificate of registration to any person whose certificate has been revoked: Provided, three or more members of the board vote in favor of such reissuance for reasons the board may deem sufficient. The board shall immediately notify the secretary of state and the clerk of each incorporated city, town or county in the state of its findings in the case of the revocation of a certificate of registration or of its reissuance of a revoked certificate of registration. A new certificate of registration to replace any certificate lost, destroyed or mutilated may be issued, subject to the rules and regulations of the board. (1921, c. 1, s. 10; 1939, c. 218, s. 2; C. S. 6055(j).)

Cross Reference.—As to uniform procedure for suspension or revocation of licenses, see §§ 190-1 to 190-8.

§ 89-12. Evidence carried by certificate; seal of registrant. — The issuance of a certificate of registration by the board shall be evidence that the person named therein is entitled to all the rights and privileges of a registered engineer or registered land surveyor, or both, while the said certificate remains unrevoked or unexpired. Each registrant hereunder shall, upon registration, obtain a seal of the design authorized by the board, bearing the registrant's name and the legend "registered engineer," or "registered land surveyor." Plans, specifications, plats and reports issued by a registrant shall be stamped with said seal during the life of registrant's certificate, but it shall be unlawful for any one to use an expired or revoked certificate or any document or instrument bearing such said seal after the certificate of the registrant named thereon has expired or has been revoked unless said certificate has been renewed or reissued. (1921, c. 1, s. 11; C. S. 6055(m).)

§ 89-13. Acts declared misdemeanors; punishment.—Any person, who, after February 25, 1922, is not legally authorized to practice engineering or land surveying in this state, according to the provisions of this chapter, and shall practice or offer to practice engineering or land surveying in this state, except as provided in §§ 89-14 and 89-16, and any person presenting or attempting to file as his own the certificate of registration of another, or who shall give false or forged evidence of any kind to the board, or to any member thereof, in obtaining a certificate of registration, or who shall falsely impersonate any other practitioner, of like or different name, or who shall use an expired or revoked certificate of registration, shall be deemed guilty of a misdemeanor and shall for each such offense of which he is convicted be punished by a fine of not less than one hundred dollars ($100) or by imprisonment for three (3) months, or by both fine and im-
§ 89-14. Exemptions from operation of chapter. — The following shall be exempted from the provisions of this chapter:

(a) Any person or persons offering to practice in this state, as an engineer or land surveyor, not a resident of and having no established place of business in this state.

(b) Practice as an engineer or land surveyor in this state by any person not a resident of this state, and having no established place of business in this state, when this practice does not aggregate more than thirty (30) days in any calendar year; Provided, that said person is legally qualified for such professional service in his own state or country.

(c) Practice as an engineer or land surveyor in this state by any person not a resident of this state and having no established place of business in this state, or any person resident in this state but whose arrival in the state is recent; Provided, however, such person shall have filed an application for registration as an engineer or land surveyor and shall have paid the fee provided for in § 89-9. Such exemption shall continue for only such reasonable time as the board requires in which to consider and grant or deny the said application for registration.

(d) Engaging in engineering and land surveying work as an employee, or assistant, of a registered engineer or a registered land surveyor, or as an employee or assistant of a nonresident engineer or a nonresident land surveyor, provided for in paragraphs (b) and (c) of this section, provided that said work as an employee may not include responsible charge of design or supervision.

(e) Practice of engineering or land surveying by any person not a resident of this state and having no established place of business in this state, as a consulting associate or an architect, engineer or a land surveyor registered under the provisions of this chapter: Provided, the nonresident is qualified for such professional service in his own state or county.

(f) Practice of engineering and land surveying solely as an officer or as an employee of the United States. (1921, c. 1, s. 12; C. S. 6055(n).)

§ 89-15. Corporations and partnerships. — A corporation or partnership may engage in the practice of engineering or land surveying in this state: Provided, the person or persons connected with such corporation or partnership in charge of the designing or supervision which constitutes such practice is or are registered as herein required of engineers and land surveyors.

The same exemptions shall apply to corporations and partnerships as apply to individuals under this chapter. (1921, c. 1, s. 14; C. S. 6053(p).)

§ 89-16. Land surveying. — Land surveying as covered by this chapter refers only to surveys for the determination of areas, or for the establishment or reestablishment of land boundaries and the subdivision and platting of land, and making plats, maps, and drawing descriptions of the lands or lines so surveyed, platted or investigated. Nothing in this chapter shall be construed as prohibiting a duly qualified registered engineer from making land surveys; nor as prohibiting any person from doing land surveying provided he does not represent himself to be a registered land surveyor. (1921, c. 1, s. 15; C. S. 6055(q).)

Local Modification.—Cumberland: 1937, c. 110.

§ 89-17. Fees of surveyors and chain-carriers.—Surveyors appointed by courts to survey any lands the boundaries of which may come in question in any suit or proceeding pending therein, or called upon by the commissioners to assist in surveying and dividing the lands of intestates or others, held in common, shall receive the following fees, and no other, namely: For every survey on an entry containing three hundred acres or less, one dollar and sixty cents, and for every hundred more than that quantity, forty cents; for surveying lands in dispute, by order of court, traveling to and from the place, and performing the duty, two dollars per day, or such greater sum as the court may allow; for assisting in surveying and dividing the lands of intestates, or others, held in common, when called upon by the commissioners appointed to make partition, or in laying off dower, traveling to and from the place, and performing the duty, two dollars per day.

For assisting in surveying and allotting the homestead exemption of any person when summoned to do so by the sheriff or other lawful officer, for traveling to and from the place, and performing the duty, two dollars per day, or such greater sum as the court may allow; for assisting in surveying and dividing the lands of intestates, or others, held in common, when called upon by the commissioners appointed to make partition, or in laying off dower, traveling to and from the place, and performing the duty, two dollars per day.

For assisting in surveying and allotting the homestead exemption of any person when summoned to do so by the sheriff or other lawful officer, for traveling to and from the place, and performing the duty, two dollars per day, or such greater sum as the court may allow; for assisting in surveying and dividing the lands of intestates, or others, held in common, when called upon by the commissioners appointed to make partition, or in laying off dower, traveling to and from the place, and performing the duty, two dollars per day.

For assisting in surveying and allotting the homestead exemption of any person when summoned to do so by the sheriff or other lawful officer, for traveling to and from the place, and performing the duty, two dollars per day, or such greater sum as the court may allow; for assisting in surveying and dividing the lands of intestates, or others, held in common, when called upon by the commissioners appointed to make partition, or in laying off dower, traveling to and from the place, and performing the duty, two dollars per day.
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§ 90-1. North Carolina medical society incorporated. — The association of regularly graduated physicians, calling themselves the state medical society, is hereby declared to be a body politic and corporate, to be known and distinguished by the name of The Medical Society of the State of North Carolina. (Rev., s. 4491; Code, s. 3121; 1858-9, c. 258.)

§ 90-2. Board of examiners. — The medical society shall have power to appoint the board of medical examiners. (Rev., s. 4492; Code, s. 3126; 1858-9, c. 258, s. 9; C. S. 6607.)

§ 90-3. Medical society appoints board. — The medical society shall have power to appoint the board of medical examiners. (Rev., s. 4493; Code, s. 3126; 1858-9, c. 258, s. 9; C. S. 6607.)

§ 90-4. Board elects officers and fills vacancies. — The board of medical examiners is authorized to elect all such officers and to frame all such by-laws as may be necessary, and in the event of any vacancy by death, resignation, or otherwise, of any member of said board, the board, or a quorum thereof, is empowered to fill such vacancy. (Rev., s. 4494; Code, s. 3128; 1858-9, c. 258, s. 11; C. S. 6608.)

§ 90-5. Meetings of board. — The board of medical examiners may assemble once in every year in the city of Raleigh, and shall remain in session from day to day until all applicants who may present themselves for examination within the first
two days of this meeting have been examined and disposed of; other meetings in each year may be held at some suitable point in the state if deemed advisable. (Rev., s. 4495; 1915, c. 220, s. 1; 1935, c. 363; C. S. 6609.)

Editor’s Note.—The amendment of 1935 substituted the word “may” for the word “shall” near the beginning of this section.

§ 90-6. Regulations governing applicants for license, examinations, etc.—The board of medical examiners is empowered to prescribe such regulations as it may deem proper, governing applicants for license, admission to examinations, the conduct of applicants during examinations, and the conduct of examinations proper. (1921, c. 47, s. 8; Ex. Sess. 1921, c. 44, s. 2; C. S. 6610.)

§ 90-7. Bond of secretary.—The secretary of the board of medical examiners shall give bond with good surety, to the president of the board, for the safe-keeping and proper payment of all moneys that may come into his hands. (Rev., s. 4497; Code, s. 3134; 1858-9, c. 258, s. 17; C. S. 6611.)

§ 90-8. Officers may swear applicants and summon witnesses.—The president and secretary of the board of medical examiners of this state shall have power to administer oaths to all persons who may apply for examination before the board, or to any other persons deemed necessary in connection with performing the duties of the board as imposed by law. The board shall have power to summon any witnesses deemed necessary to testify under oath in connection with any cause to be heard before it; or to summon any licentiate against whom charges are preferred in writing, and the failure of the licentiate, against whom charges are preferred, to appear at the stated time and place to answer to the charges, after due notice or summons has been served in writing, shall be deemed a waiver of his right to said hearing, as provided in § 90-14. (1913, c. 20, s. 7; Ex. Sess. 1921, c. 44, s. 3; C. S. 6612.)

§ 90-9. Examination for license; scope; conditions and prerequisites.—It shall be the duty of the board of medical examiners to examine for license to practice medicine or surgery, or any of the branches thereof, every applicant who complies with the following provisions: He shall, before he is admitted to examination, satisfy the board that he has an academic education equal to the entrance requirements of the University of North Carolina, or furnish a certificate from the superintendent of public instruction of the county that he has passed an examination upon his literary attainments to meet the requirements of entrance in the regular course of the state university. He shall exhibit a diploma or furnish satisfactory proof of graduation from a medical college in good standing requiring an attendance of not less than four years, and supplying such facilities for clinical and scientific instruction as shall meet the approval of the board; but the requirement of four years attendance at a school shall not apply to those graduating prior to January the first, nineteen hundred.

The examination shall cover the following branches of medical science: anatomy, embryology, histology, physiology, pathology, bacteriology, surgery, pediatrics, medical hygiene, chemistry, pharmacy, materia medica, therapeutics, obstetrics, gynecology, and the practice of medicine.

If on such examination the applicant is found competent, the board shall grant him a license authorizing him to practice medicine or surgery or any of the branches thereof.

Five members of the board shall constitute a quorum, and four of those present shall be agreed as to the qualification of the applicant. (Rev., s. 4498; 1915, c. 20, ss. 2, 3, 6, 1921, c. 47, s. 1; C. S. 6613.)

§ 90-10. Two examinations, preliminary and final, allowed.—It shall be the duty of the state board of medical examiners to examine any applicant for license to practice medicine on the subjects of anatomy, histology, physiology, bacteriology, embryology, pathology, medical hygiene, and chemistry, upon his furnishing satisfactory evidence from a medical school in good standing, and supplying such facilities for anatomical and laboratory instruction as shall meet with the approval of the board, that he has completed the course of study in the school upon the subjects mentioned. The board shall set to the credit of such applicant upon his record books the grade made by him upon the examination, which shall stand to the credit of such applicant; and when he has subsequently completed the full course in medicine and surgery, he shall have accounted to the board for the moneys that may come into his hands. (Rev., s. 4498; 1915, c. 20, ss. 2, 3, 6, 1921, c. 47, s. 1; C. S. 6613.)

Constitutional Discrimination.—"That the statute is not in violation of the State Constitution is thoroughly discussed and held in State v. Vandoran, 109 N. C. 864, 14 S. E. 32. It is not to be questioned that the law making power of the State has the right to require an examination and certificate as to the competency of persons desiring to practice law or medicine." State v. Call, 121 N. C. 643, 645, 28 S. E. 517; State v. Siler, 169 N. C. 314, 34 S. E. 1015.

§ 90-11. Qualification of applicant for license.—Every person making application for a license to practice medicine or surgery in the state shall be not less than twenty-one years of age, and of good moral character, before any license can be granted by the board of medical examiners: Provided, that the age requirement shall not apply to students taking the examinations of the first two years in medicine. (1921, c. 47, s. 3; Ex. Sess. 1921, c. 44, s. 4; C. S. 6614.)

§ 90-12. Limited license.—The board may, whenever in its opinion the conditions of the locality where the applicant resides are such as to render it advisable, make such modifications of the requirements of the preceding sections, both as to application for examination and examination for license, as in its judgment the interests of the people living in that locality may demand, and
may issue to such applicant a special license, to be entitled a “Limited License”, authorizing the holder thereof to practice medicine and surgery within the limits only of the districts specifically described therein. The holder of the limited license practicing medicine or surgery beyond the boundaries of the district as laid down in said license shall be guilty of a misdemeanor, and upon conviction shall be fined not less than twenty-five dollars nor more than fifty dollars for each and every offense; and the board is empowered to revoke such limited license, in its discretion, after due notice. The clerk of the superior court, in registering the holder of a limited license, shall copy upon the certificate of registration and upon his record the description of the district given in the license. (1909, c. 218, s. 1; C. S. 6616.)

§ 90-13. When license without examination allowed.—The board of medical examiners shall in their discretion issue a license to any applicant to practice medicine and surgery in this state without examination if said applicant exhibits a diploma or satisfactory proof of graduation from a medical college in good standing, requiring an attendance of not less than four years and a license issued to him to practice medicine and surgery by the board of medical examiners of another state. (1907, c. 890; 1913, c. 20, s. 3; C. S. 6517.)

§ 90-14. Board may rescind license.—The board shall have the power to revoke and rescind any license granted by it, when, after due notice and hearing, it shall find that any physician licensed by it has been guilty of grossly immoral conduct, or of producing or attempting to produce a criminal abortion, or, by false and fraudulent representations, has obtained or attempted to obtain, practice in his profession, or is habitually addicted to the use of morphine, cocaine or other narcotic drugs, or has by false or fraudulent representations of his professional skill obtained, or attempted to obtain, money or anything of value, or has advertised himself or held himself out under a name other than his own, or has advertised or publicly professed to treat human ailments under a system or school of treatment or practice other than that for which he holds a license, or is guilty of any fraud or deceit by which he was admitted to practice, or has been guilty of any unprofessional or dishonorable conduct unworthy of, and affecting, the practice of his profession, or has been convicted in any court, state or federal, of any felony or other criminal offense involving moral turpitude. Upon the hearing before said board of any charge involving a conviction of such felony or other criminal offense, a transcript of the record thereof certified by the clerk of the court in which such conviction is had, shall be sufficient evidence to justify the revocation or rescinding of such license. The findings and action of said board shall, in all such cases and hearings, be final and conclusive. And, for any of the above reasons, the said board of medical examiners may refuse to issue a license to an applicant. The said board of medical examiners may, in its discretion, restore a license so revoked and rescinded, upon due notice being given and hearing had, and satisfactory evidence produced of reformation of the licentiate. (1921, c. 47, s. 4; Ex. Sess. 1921, c. 44, s. 6; 1933, c. 32; C. S. 6618.)

Editor’s Note.—Public Laws of 1933, c. 32, substituted the above section for the former reading. A comparison of the two sections is necessary to determine the changes.

Unprofessional Conduct.—While the board does not have the power to revoke a license on the sole ground that the holder thereof has been convicted of the violation of a criminal statute in force in the State or in the United States, the board has the power to revoke a license upon a finding that the holder thereof has been convicted of an unprofessional or dishonorable conduct, or has been convicted of an unprofessional or dishonorable conduct in that he had violated the provisions of the act. Board of Medical Examiners v. Gardner, 201 N. C. 123, 159 S. E. 8.

Appeal.—The appeal from the State Board of Medical Examiners allowed to a physician whose license has been revoked for immoral conduct in the practice of his profession, follows the procedure allowed in analogous cases, and the intent of the Legislature is interpreted to give a trial de novo in the Superior Court wherein the jury are to decide upon the evidence adduced before them the facts involved in the state. State v. Carroll, 194 N. C. 37, 138 S. E. 339.

§ 90-15. License fee; salaries, fees, and expenses of board.—Each applicant for examinations shall pay to the treasurer of the board of medical examiners of the state of North Carolina a fee of fifteen dollars ($15) before being admitted to the examination: Provided, however, that in the case of applicants taking the examinations in two halves, as provided in § 90-10, the fee shall be seven and one-half dollars ($7.50) for each of the two half examinations. Whenever any license is granted without examination, as authorized in § 90-13, the applicant shall pay to the treasurer of the board a fee of fifty dollars ($50). Whenever a limited license is granted, as provided in § 90-12, the person shall pay to the treasurer of the board a fee of fifteen dollars ($15). A fee of five dollars ($5) shall be paid for each duplicate license. All fees shall be paid in advance to the treasurer of the board of medical examiners of the state of North Carolina, to be by him held as a fund for the use of said board. The compensation and expenses of the members and officers of said board, and all expenses proper and necessary in the opinion of said board, to the discharge of its duties under and to enforce the laws regulating the practice of medicine or surgery shall be paid out of such fund, and upon the warrant of the president and secretary of said board. All salaries and fees of the officers and members of the said board shall be fixed by the board, but shall not exceed ten dollars ($10) per day per member, and railroad fare and hotel expenses; and no expense shall be created to exceed the income from fees herein provided. Any unexpended sum or sums of money remaining in the treasury of the said board at the expiration of the terms of office of the members thereof, shall be paid over to their successors after their election and qualification as such. (Rev., s. 4501; Code, s. 3130; 1858-9, c. 255m; Laws 1913, c. 20, ss. 4, 5; 1921, c. 47, s. 5; Ex. Sess. 1921, c. 44, s. 7; C. S. 6619.)

§ 90-16. Board to keep record; publication of names of licentiates; transcript as evidence.—The board of examiners shall keep a regular record of its proceedings in a book kept for that purpose, together with the names of the members of the board present, the names of the applicants for license, and other information as to its actions. The board of examiners shall cause to be entered in a separate book the name of each applicant to

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§ 90-17. Blanks furnished clerk.—It shall be the duty of the medical society of the state of North Carolina to prescribe proper form of certificates required by this article and all such blanks and forms as the clerk may need to enable him to perform his duties under this article. (Rev., s. 4500; Code, s. 3129; 1858-9, c. 258, s. 12; 1921, c. 47, s. 6; C. S. 6620.)

§ 90-18. Practicing without license; practicing defined; penalties.—No person shall practice medicine or surgery, or any of the branches thereof, nor in any case prescribe for the cure of diseases unless he shall have been first licensed and registered so to do in the manner provided in this article, and if any person shall practice medicine or surgery without being duly licensed and registered, as provided in this article, he shall not be allowed to maintain any action to collect any fee for such services. The person so practicing without license shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than fifty dollars ($50) nor more than one hundred ($100), or imprisoned at the discretion of the court for each and every offense.

Any person shall be regarded as practicing medicine or surgery within the meaning of this article who shall diagnose or attempt to diagnose, treat or attempt to treat, operate or attempt to operate on, or prescribe for or administer to, or profess to treat any human ailment, physical or mental, or any physical injury to or deformity of another person: Provided, that the following cases shall not come within the definition above recited:

1. The administration of domestic or family remedies in cases of emergency.
2. The practice of dentistry by any legally licensed dentist engaged in the practice of dentistry and dental surgery.
3. The practice of pharmacy by any legally licensed pharmacist engaged in the practice of pharmacy.
4. The practice of medicine and surgery by any surgeon or physician of the United States army, navy, or public health service in the discharge of his official duties.
5. The treatment of the sick or suffering by mental or spiritual means without the use of any drugs or other material means.
6. The practice of optometry by any legally licensed optometrist engaged in the practice of optometry.
7. The practice of midwifery by any woman who pursues the vocation of midwife.
8. The practice of chiroprapy by any legally licensed chiropryst when engaged in the practice of chiroprapy, and without the use of any drug.
9. The practice of osteopathy by any legally licensed osteopath when engaged in the practice of osteopathy as defined by law, and especially § 90-129.
10. The practice of chiropractic by any legally licensed chiropractor when engaged in the practice of chiropractic, along with any information pertinent to the practice of medicine within the meaning of this article. "Chiropractic" shall be defined as, that method of medical practice in which demonstration and examination of the normal and abnormal structures, parts or functions of the human body are made by use of x-rays. Any person shall be regarded as engaged in the practice of Radiology who makes or offers to make, for consideration, a demonstration or examination of a human being or a part or parts of a human body by means of fluoroscopic exhibition or by the shadow imagery registered with photographic materials and the use of x-rays; or holds himself out to diagnose or able to make or makes any interpretation or explanation by word of mouth, writing or otherwise of the meaning of such fluoroscopic or registered shadow imagery of any part of the human body by the use of x-rays; or who treats any disease or condition of the human body by the application of x-rays or radium. Nothing in this subsection shall prevent the practice of Radiology by any person licensed under the provisions of Articles 2, 7, 8, and 12 of this chapter. (Rev., ss. 3645, 4502; Code, s. 3123; 1858-9, c. 258, s. 2; 1885, c. 117, s. 2; 1885, c. 261; 1889, c. 181, ss. 1; 1921, c. 47, s. 7; Ex. Sess. 1921, c. 44, s. 8; 1941, c. 163; C. S. 6622.)

Editor's Note.—This section was amended in 1921. Before these changes it provided against practice without license, and that an unlicensed practitioner could not maintain an action to collect fees, $50 was the minimum fine for practicing without license. The section was not applicable to mid-wives, physicians with diplomas granted before March 7, 1883, and reputable physicians from out of the state and regularly practicing in this state. The 1941 amendment added subsection 13.

Constitutionality.—This statute is not invalid, as it is the exercise of police power to protect the public, and is not the creation of a monopoly. State v. Call, 121 N. C. 643, 28 S. E. 517.

Nonmedical Physicians.—The statute is applicable only to one holding himself out as a medical physician. If one curing by other means he is not subject to this statute. State v. Biggs, 133 N. C. 729, 46 S. E. 401.

A patent medicine vendor cannot hold himself out as a
§ 90-19. Practicing without registration; penalties.—Any person desiring to engage in the practice of medicine or surgery shall personally appear before the clerk of the superior court of the county in which he resides or practices, for registration as a physician or surgeon. The person so applying shall produce and exhibit before the clerk of the superior court a license obtained from the board of medical examiners of the state. The clerk shall thereupon register the date of registration, with the name and residence of such applicant, in a book to be kept for this purpose in his office. Any person obtaining such certificate shall be entitled to practice medicine or surgery, or both, in the county where the same was obtained, and in any other county in this state; but if he shall remove to another county he shall exhibit said certificate to the clerk of such other county and be registered, which registration shall be made by said clerk without fee or charge.

Any person who practices or attempts to practice medicine or surgery in this state without first having registered and obtained the certificate required in this section, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than twenty-five dollars nor more than one hundred dollars, or be imprisoned at the meanor, and upon conviction thereof shall be fined not less than two hundred dollars and shall be removed from office. (Rev., ss. 3646, 32, 1885, c. 181, ss. 4, 5; 1891, c. 499; Ex. Sess. 1921, c. 44, s. 9; C. S. 6623.)

Editor's Note.—By the amendment Ex. Sess. 1921 the part of this section allowing registration upon presentment of a diploma issued by a regular medical college prior to March 7, 1885 or making oath that he was practicing medicine or surgery in this state prior to the last mentioned date, was omitted.

What Constitutes Practicing.—To constitute the offense of practicing medicine without registration, etc., it is not necessary to allege or prove the person practiced upon; it is sufficient if the defendant held himself out to the public as a physician. State v. Van Doran, 109 N. C. 864, 14 S. E. 32.

§ 90-20. Clerk punishable for illegally registering physician.—If any clerk of the superior court shall register, or issue a certificate to, any person practicing medicine or surgery in any other manner than that prescribed by law, he shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than two hundred dollars and shall be removed from office. (Rev., s. 3647; 1889, c. 181, s. 6; C. S. 6624.)

§ 90-21. Certain offenses prosecuted in superior court; duties of attorney-general.—In case of the violation of the criminal provisions of §§ 90-19 to 90-20, the attorney-general of the state of North Carolina, upon complaint of the board of medical examiners of the state of North Carolina, shall investigate the charges preferred, and if in his judgment the law has been violated, he shall direct the solicitor of the district in which the offense was committed to institute a criminal action against the offending persons. A solicitor's fee of five dollars shall be allowed and collected in accordance with the provisions of § 6-12. The board of medical examiners may also employ, at their own expense, special counsel to assist the attorney-general or the solicitor.

§ 90-22. Board of dental examiners continued; membership; term of office; vacancies; present members hold over.—The North Carolina state board of dental examiners heretofore created by chapter one hundred and thirty-nine, Public Laws, one thousand eight hundred and seventy-nine and by chapter one hundred and seventy-eight, Public Laws one thousand nine hundred and fifteen, is hereby continued as the agency of the State for the regulation of the practice of dentistry in this State, said board to consist of six (6) members of the North Carolina dental society, to be elected by the said society at its annual meeting; said members so elected to be commissioned by the governor for a period of three years or until their successors are elected, commissioned and qualified. Any vacancy in the said board shall be filled by a member of the North Carolina dental society to be elected by said board by and with the consent and approval of the executive committee of the North Carolina dental society, and commissioned by the governor to hold office for the unexpired term to which they have been elected. Nothing in this article and no provision of this section shall in any way change the terms of office of the members of the North Carolina state board of dental examiners as now constituted, and said members of said board shall hold their office for the term to which they have been elected. (1935, c. 66, s. 1.)

§ 90-23. Officers; common seal.—The North Carolina state board of dental examiners shall, at each annual meeting thereof, elect one of its members president and one secretary-treasurer. The common seal which has already been adopted by said board, pursuant to law, shall be continued as the seal of said board. (1935, c. 66, s. 2.)

§ 90-24. Quorum; adjourned meetings.—Four (4) members of said board shall constitute a quorum for the transaction of business and at any meeting of the board, if four (4) members are not present at the time and the place appointed for the meeting, those members of the board present may adjourn day to day until a quorum is present, and the action of the board taken at any adjourned meeting thus held shall have the same force and effect as if had upon the day and at the hour of the meeting called and adjourned from day to day. (1935, c. 66, s. 2.)

§ 90-25. Records and transcripts.—The said board shall keep a record of its transactions at [ 827 ]
§ 90-26. Annual and special meetings. — The North Carolina state board of dental examiners shall meet annually on the fourth Monday in June of each year at such place as may be determined by the board, and at such other times and places as may be determined by action of the board or by any four (4) members thereof. Notice of the place of the annual meeting and of the time and place of any special or called meeting shall be given by advertising a copy of said notice in at least three daily newspapers published in this State at least ten days prior to said meeting. At the annual meeting or at any special or called meeting, the said board shall have the power to conduct examination of applicants and to transact such other business as may come before it, provided that in case of a special meeting, the purpose for which said meeting is called shall be stated in the notice. (1935, c. 66, s. 2.)

§ 90-27. Judicial powers; additional data for records. — The president of the North Carolina state board of dental examiners, and/or the secretary-treasurer of said board, shall have the power to administer oaths, issue subpoenas requiring the attendance of persons and the production of papers and records before said board in any hearing, investigation or proceeding conducted by it. The sheriff or other proper official of any county of the State shall serve the process issued by said president or secretary-treasurer of said board pursuant to its requirements and in the same manner as process issued by any court of record. The said board shall pay for the service of like process in other cases. The board shall have the power to administer oaths, issue subpoenas requiring him to attend and testify before said board or to produce books, records or documents shall be guilty of a misdemeanor and upon conviction thereof shall be fined or imprisoned in the discretion of the court.

The board shall have the power, upon the production of any papers, records or data, to authorize certified copies thereof to be substituted in the permanent record of the matter in which such books, records or data shall have been introduced in evidence. (1935, c. 66, s. 4.)

§ 90-28. By-laws and regulations. — The North Carolina state board of dental examiners shall have the power to make necessary by-laws and regulations, not inconsistent with the provisions of this article, regarding any matter referred to in this article and for the purpose of facilitating the transaction of business by the said board. (1935, c. 66, s. 5.)

§ 90-29. Necessity for license; dentistry defined; certain practices exempted. — No person shall engage in the practice of dentistry in this State or attempt to do so without first having applied for and obtained a license for such purpose from the said North Carolina state board of dental examiners, or without first having obtained from said board a certificate of renewal of license for the calendar year in which such person proposes to practice dentistry.

A person shall be deemed to practice dentistry in this State within the meaning of this article and this section of this article, who represents himself as being able to remove stains and accretions from teeth, diagnose, treat, operate or prescribe for any disease, pain, injury, deficiency, deformity or physical condition of the human teeth, alveolar process, gums or maxillary bones and associated tissues or parts and/or who offers or undertakes by any means or methods to remove stains or accretions from teeth, diagnose, treat, operate or prescribe for any disease, pain, injury, deficiency, deformity or physical condition of the same, or to take impressions of the teeth or jaws and/or who owns, maintains or operates an office for the practice of dentistry, and/or who engages in any of the practices included in the curricular of recognized and approved dental schools or colleges.

The fact that a person uses any dental degree or designation or any card, device, directory, poster, sign or other media whereby he represents himself to be a dentist practicing in the State, shall constitute prima facie evidence that such person is engaged in the practice of dentistry.

The following practices, acts, and operations, however, shall be exempt from the provisions of this article:

(a) Any act in the practice of his profession by a duly licensed physician or surgeon.
(b) The rendering of dental relief in emergency cases in the practice of his profession by a physician or surgeon licensed as such and registered under the laws of this State, unless he undertakes to reproduce or reproduces lost parts of the human teeth in the mouth, or to restore or replace in the human mouth, lost or missing teeth.
(c) The practice of dentistry in the discharge of their official duties by dentists in the United States army, the United States navy, the United States public health service, the United States veterans bureau, or other federal agency.
(d) The teaching of dentistry in dental schools or colleges as may be conducted in the State of North Carolina and approved by the said North Carolina state board of dental examiners, and the practice of dentistry by students in dental schools or colleges so approved when such students are acting under the direction and supervision of registered and licensed dentists acting as instructors.
(e) The practice of dentistry by licensed dentists of another state, territory or country at meet-
ings of the North Carolina dental society, or component parts thereof, meetings of dental colleges or other like dental organizations while appearing as clinicians, or when appearing in emergency cases upon the specific call of dentist duly licensed under the provisions of this article.

§ 90-30. Examination and licensing applicants; qualifications; causes for refusal to grant license; void licenses. — The North Carolina state board of dental examiners shall grant licenses to practice dentistry to such applicants who are graduates of a reputable dental institution, who, in the opinion of a majority of the board, shall undergo a satisfactory examination of proficiency in the knowledge and practice of dentistry, subject, however, to the further provisions of this section and of the provisions of this article.

The applicant shall be of good moral character, at least twenty-one years of age at the time the application for examination is filed. The application shall be made to the said board in writing and shall be accompanied by evidence satisfactory to said board that the applicant is a person of good moral character, has an academic education, the standard of which shall be determined by the said board; that he is a graduate of and has a diploma from a reputable dental college or the dental department of a reputable university or college recognized, accredited and approved as such by the said board.

The North Carolina state board of dental examiners is authorized to conduct both written and oral and clinical examinations of such character as may sufficiently test the qualifications of the applicant, and may refuse to examine any person who, in its discretion, is found deficient in said examination, or to any person guilty of cheating, deception or fraud during such examination, or whose examination discloses to the satisfaction of the board, a deficiency in academic education.

The North Carolina state board of dental examiners may refuse to grant a license to any person guilty of a crime involving moral turpitude, or gross immorality, or to any person addicted to the use of alcoholic liquors or narcotic drugs to such an extent as, in the opinion of the board, renders the applicant unfit to practice dentistry.

Any license obtained through fraud or by any false representation shall be void ab initio and of no effect. (1935, c. 66, s. 6.)

Editor's Note.—The following cases were decided under C. S. section 6631, now repealed. However, these cases seem equally applicable to the present law as the provisions of former section 6631 are substantially set forth in the instant section.

Mandamus to Procure License.—The courts cannot by a mandamus compel the board of dental examiners to certify to the further provisions of this section and that he practiced dentistry in the State before the specified time, or has filed the required statement. State v. Hicks, 143 N. C. 689, 57 S. E. 441.

§ 90-31. Annual renewal of licenses. — The laws of North Carolina now in force, having provided for the annual renewal of any license issued by the North Carolina state board of dental examiners, it is hereby declared to be the policy of this State, that all licenses heretofore issued by the North Carolina state board of dental examiners or hereafter issued by said board are subject to annual renewal and the exercise of any privilege granted by any license heretofore issued or hereafter issued by the North Carolina state board of dental examiners is subject to the issuance on or before the first day of January of each year of a certificate of renewal of license.

On or before the first day of January of each year, each dentist engaged in the practice of dentistry in North Carolina shall make application to the North Carolina state board of dental examiners and receive from said board, subject to the further provisions of this section and of this article, a certificate of renewal of said license.

The application shall show the serial number of the applicant's license, his full name, address and the county in which he has practiced during the preceding year, the date of the original issuance of license to said applicant and such other information as the said board from time to time may prescribe, at least six months prior to January first of any year. (1935, c. 66, s. 8.)

§ 90-32. Contents of original license. — The original license granted by the North Carolina state board of dental examiners shall bear a serial number, the full name of the applicant, the date of issuance and shall be signed by the president and the majority of the members of the said board and attested by the seal of said board and the secretary thereof. The certificate of renewal of license shall bear a serial number which need not be the serial number of the original license issued, the full name of the applicant and the date of issuance. (1935, c. 66, s. 8.)

§ 90-33. Displaying license and current certificate of renewal. — The license and the current certificate of renewal of license to practice dentistry issued, as herein provided, shall at all times be displayed in a conspicuous place in the office of the holder thereof and whenever requested the license and the current certificate of renewal shall be exhibited to or produced before the North Carolina state board of dental examiners or to its authorized agents. (1935, c. 66, s. 8.)

§ 90-34. Refusal to grant renewal license. — For cause satisfactory to it or to a majority
thereof, the North Carolina state board of dental examiners may refuse to issue a certificate of renewal of license upon any application made to it therefor, and the applicant whose certificate of renewal of license is refused, for cause by said board, shall not be authorized to practice dentistry in North Carolina until said board shall, in its discretion, renew the license of the applicant. (1935, c. 66, s. 8.)

§ 90-35. Duplicate licenses. — When a person is a holder of a license to practice dentistry in North Carolina, or holds a certificate of renewal of license, he may make application to the North Carolina state board of dental examiners for the issuance of a copy or a duplicate thereof accompanied by a fee of two dollars. Upon the filing of the application and the payment of the fee, the said board shall issue a copy or duplicate. (1935, c. 66, s. 8.)

§ 90-36. Licensing practitioners of other states. — The North Carolina state board of dental examiners may, in its discretion, issue a license to practice dentistry in this State without an examination other than clinical to a legal and ethical practitioner of dentistry who moves into North Carolina from another state or territory of the United States, whose standard of requirements is equal to that of the State of North Carolina and in which such applicant has conducted a legal and ethical practice of dentistry for at least five (5) years, next preceding his or her removal and who has not, during his period of practice, been charged with violation of the ethics of his profession, nor with the violation of the laws of the state which issued license to him, or of the criminal laws of the United States, nor whose license to practice dentistry has been revoked or suspended by a duly constituted authority.

Application for license to be issued under the provisions of this section shall be accompanied by a certificate from the dental board or like board of the State from which said applicant removed, certifying that the applicant is the legal holder of a license to practice dentistry in that State, and for a period of five (5) years immediately preceding the application has engaged in the practice of dentistry; is of good moral character and that during the period of his practice no charges have been filed with said board against the applicant for the violation of the laws of the State or of the United States, or for the violation of the ethics of the profession of dentistry.

Application for a license under this section shall be made to the North Carolina state board of dental examiners within the six (6) months of the date of the issuance of the certificate hereinafter required, and said certificate shall be accompanied by the diploma or other evidence of the graduation from a reputable, recognized and approved dental college, school or dental department of a college or university.

Any license issued upon the application of any dentist from any other state or territory shall be subject to all of the provisions of this article with reference to the license issued by the North Carolina state board of dental examiners upon examination of applicants and the rights and privileges to practice the profession of dentistry under any license so issued shall be subject to the same duties, obligations, restrictions and the conditions as imposed by this article on dentists originally examined by the North Carolina state board of dental examiners. (1935, c. 66, s. 9.)

§ 90-37. Certificate issued to dentist moving out of state. — Any dentist duly licensed by the North Carolina state board of dental examiners, desiring to move from North Carolina to another state, territory or foreign country, if a holder of a certificate of renewal of license from said board, upon application to said board and the payment to it of the fee in this article provided, shall be issued a certificate by said board certifying the date and address the certificate of license originally issued to him, the date and number of his renewal of license, and whether any charges have been filed with the board against him. The board may provide forms for such certificate, requiring such additional information as it may determine proper. (1935, c. 66, s. 10.)

§ 90-38. Licensing former dentists who have moved back into state or resumed practice. — Any person who shall have been licensed by the North Carolina state board of dental examiners to practice dentistry in this State who shall have retired from practice or who shall have moved from the state and shall have returned to the state, may, upon a satisfactory showing to said board of his proficiency in the profession of dentistry and his good moral character during the period of his retirement, be granted by said board a license to resume the practice of dentistry upon making application to the said board in such form as it may require and upon the payment of the fee of ten dollars. The license to resume practice, after issuance thereof, shall be subject to all the provisions of this article. (1935, c. 66, s. 11.)

This section is constitutional and valid as an exercise of the police power of the state for the good and welfare of the people. Allen v. Carr, 210 N. C. 513, 187 S. E. 809.

Mandamus will not lie to control the decision of the board in the exercise of its discretionary power under this section, the extent of mandamus in such cases being limited to compel the exercise of the discretionary power, but not to control the decision reached in its exercise. Allen v. Carr, 210 N. C. 513, 187 S. E. 809.

§ 90-39. Fees collectible by board. — In order to provide the means of carrying out and enforcing the provisions of this article and the duties devolving upon the North Carolina state board of dental examiners, it shall charge and collect for: (a) each applicant for examination, a fee of twenty dollars; (b) each certificate of renewal of license, a fee of two dollars; (c) each certificate of practice to a resident dentist desiring to change to another state or territory, a fee of five dollars; (d) each license issued to a legal
§ 90-40. Unauthorized practice; penalty. — If any person shall practice or attempt to practice dentistry in this State without first having passed the examination and obtained a license from the North Carolina board of dental examiners; or, if a period of more than one year has elapsed since the issuance of his license, and he shall practice without first having obtained a certificate of renewal of license; or shall practice or attempt to practice dentistry while his license is revoked, or suspended, or when a certificate of renewal of license has been refused; or shall violate any of the provisions of this article for which no specific penalty has been prescribed; or shall practice dentistry under any name other than his own name, said person shall be guilty of a misdemeanor, and, upon conviction, shall be fined in the sum of fifty ($50.00) dollars for the first offense.

Whenever any person shall have been convicted once in this State of the violation of chapter one hundred and thirty-nine, Public Laws of one thousand eight hundred and seventy-nine, and/or chapter one hundred and seventy-eight, Public Laws of one thousand nine hundred and fifteen and/or amendments to said acts and/or of this article, and shall practice, or attempt to practice, dentistry in violation of any of the provisions of this article, he shall be guilty of a misdemeanor and, upon conviction, shall be fined in the sum of fifty ($50.00) dollars for the first offense.

§ 90-41. Revocation or suspension of license. — Whenever it shall appear to the North Carolina state board of dental examiners that any dentist who has received license to practice dentistry in this State, or who has received from the said board a certificate of renewal of license, has been guilty of fraud, deceit or misrepresentation in obtaining his license; or of gross immorality, or is an habitual user of intoxicants or drugs, rendering him unfit for the practice of dentistry, or has been guilty of malpractice, or is grossly ignorant or incompetent or has been guilty of willful neglect in the practice of dentistry, or has been employing unlicensed persons to perform work which, under this article, can be legally done or performed only by persons holding a license to practice dentistry in this State, or of practicing deceit or other fraud upon the public or individual patients in obtaining or attempting to obtain practice, or has been guilty of fraudulent and/or misleading statements of his art, skill or knowledge, or of his method of treatment or practice, or any offense involving moral turpitude, or has by himself or another, solicited or advertised in any manner for professional business, or has been guilty of any other unprofessional conduct in the practice of dentistry, or in the procurement of license has filed, as his own, a diploma or license of another, or a forged diploma or a forged or false affidavit of identification or qualification, the board may revoke the license of such person, or may suspend the license of such person for such period of time as, in the judgment of said board, will be commensurate with the offense committed: Provided, however, it shall not be considered advertising within the meaning of this section for a dentist, duly authorized to practice in this State, to place a card containing his name, telephone number and office address and office hours in a registry or other publication or to place upon the window or door of his office his name followed by the word, "dentist."

The North Carolina state board of dental examiners is authorized and empowered to appoint an investigator to ascertain the facts with reference to any information coming to the attention of the said board respecting the violation of any of the provisions of this article, or of any act heretofore in effect in this State.

Such investigator so appointed by the North Carolina state board of dental examiners is thereupon authorized and directed to make an investigation as to any information coming to his attention with reference to the violation of the provisions of this article or any act in force at the time of said violation, and formulate a statement of charges which the said board, upon presentation of the said investigator, shall cause to be served upon the dentist so accused. Said notice shall contain the statement of a time and place at which the charges against the accused shall be heard before the board or a quorum thereof, which time shall not be less than ten (10) days from the date of service of said statement and notice.

At the time and place named in said notice, the said board shall proceed to hear the charges against the accused upon competent evidence, oral or by deposition, and at said hearing said accused shall have the right to be present in person and/or represented by counsel. After hearing all the evidence, including such evidence as the accused may present, the board shall determine its action and announce the same.

From any action of the board depriving the accused of his license, or certificate of renewal of license, the accused shall have the right of appeal to the superior court of the county wherein the hearing was held, upon filing notice of appeal within ten days of the decision of the board. The record of the hearing before the North Carolina state board of dental examiners shall constitute the record upon appeal in the superior court and the same shall be heard in the superior court as in the case of consent references. (1935, c. 66, s. 14.)
§ 90-42. Restoration of revoked license. —Whenever any dentist has been deprived of his license, the North Carolina state board of dental examiners, in its discretion, may restore said license upon due notice being given and hearing had, and satisfactory evidence produced of proper reformation of the licentiate, before restoration. (1935, c. 66, s. 14.)

§ 90-43. Compensation and expenses of board. — Each member of the North Carolina state board of dental examiners shall receive as compensation for his services in the performance of his duties under this article a sum not exceeding ten dollars for each day actually engaged in the performance of the duties of his office, said per diem to be fixed by said board, and all legitimate and necessary expenses incurred in attending meetings of the said board.

The secretary-treasurer shall, as compensation for his services, both as secretary-treasurer of the board and a member thereof, be allowed a reasonable annual salary to be fixed by the board and shall, in addition thereto, receive all legitimate and necessary expenses incurred by him in attending meetings of the board and in the discharge of the duties of his office.

All per diem allowances and all expenses paid as herein provided shall be paid upon voucher drawn by the secretary-treasurer of the board who shall likewise draw voucher payable to himself for the salary fixed for him by the board.

The board is authorized and empowered to expend from funds collected hereunder such additional sum or sums as it may determine necessary in the administration and enforcement of this article. (1935, c. 66, s. 15.)

§ 90-44. Annual report of board. — Said board, shall, on or before the fifteenth day of February in each year, make an annual report as of the thirty-first day of December of the year preceding, of its proceedings, showing therein the examinations given, the fees received, the expenses incurred, the hearings conducted and the result thereof, which said report shall be filed with the governor of the State of North Carolina. (1935, c. 66, s. 15.)

§ 90-45. Exemption from jury duty. — All dentists duly licensed by the North Carolina state board of dental examiners and/or the holders of certificate of renewal of license from said board shall be exempt from service as jurors in any of the courts of this State. (1935, c. 66, s. 16.)

§ 90-46. Filling prescriptions. — Legally licensed druggists of this State may fill prescriptions of dentists duly licensed by the North Carolina state board of dental examiners. (1935, c. 66, s. 17.)

§ 90-47. Restrictions on lectures and teaching. — Lectures on the science of dentistry shall not be made in North Carolina in connection with the demonstration, promotion or distribution of any product or products used or claimed to be useful in the promotion of the health of the oral cavity, except after specific authority has been granted by the North Carolina state board of dental examiners, nor shall the science of dentistry be taught in North Carolina except by duly licensed dentists acting as teachers in a duly organized school or college of dentistry or a dental department of a college or university. (1935, c. 66, s. 18.)

§ 90-48. Rules and regulations of board; violation a misdemeanor. — The North Carolina state board of dental examiners shall be and is hereby vested, as an agency of the State, with full power and authority to enact rules and regulations governing the practice of dentistry within the State, provided such rules, and regulations are not inconsistent with the provisions of this article. Such rules and regulations shall become effective thirty days after passage, and the same may be proven, as evidence, by the president and/or the secretary-treasurer of the board, and/or by certified copy under the hand and official seal of the secretary-treasurer. A certified copy of any rule or regulation shall be receivable in all courts as prima facie evidence thereof if otherwise competent, and any person, firm, or corporation violating any such rule, regulation, or by-law shall be guilty of a misdemeanor, subject to a fine of not more than fifty ($50.00) dollars or imprisonment for not more than thirty days. (1935, c. 66, s. 19.)

Art. 3. The Licensing of Mouth Hygienists, to Teach and Practice Mouth Hygiene in Public Institutions.

§ 90-49. Qualifications and examinations of applicants. — Any person of good moral character who holds a grade "A" teacher's certificate issued by the Department of Education of the State of North Carolina, may be licensed to practice mouth hygiene in conjunction with the teaching of health subjects in the public institutions and public schools of the State as is hereinafter provided in this article.

Such person shall be a graduate in Mouth Hygiene from an approved school for such technical training, said approval to be by the North Carolina State Board of Dental Examiners. Upon the completion of such course or courses and upon the payment of a fee of ten dollars ($10.00), which shall not be returned, the applicant for such license shall apply to the North Carolina State Board of Dental Examiners, at their annual meeting which shall be held on the fourth Monday of June, or at any other such time as they deem necessary, for an examination on such subjects as said Board shall deem essential for the practice of mouth hygiene in this State; and if the examination is satisfactory to said Board of Dental Examiners, the applicant shall be registered and licensed by said Board as a mouth hygienist to practice as such only in the public institutions and public schools of the State. (1929, c. 304, s. 1.)

§ 90-50. By whom employed; duties. — Only public institutions and public school authorities of the State may employ such licensed mouth hygienist, whose clinical work shall be under the direct supervision of the dentist who shall be at the head of the Bureau of Mouth Hygiene of the State Board of Health. The duties of a mouth hygienist shall be to examine mouths of inmates of said institutions and of pupils of said public schools without expense, to make such
§ 90-51. Revocation or suspension of license. —The State Board of Dental Examiners shall have the power to revoke or suspend the license of any mouth hygienist, who shall violate the provisions of this article, and the proceedings to revoke or suspend said license shall be the same as are provided in the case of suspension or revoking the license of a dentist as set out in §§ 90-22 to 90-48 of this Code. (1929, c. 304, s. 2.)

§ 90-52. Penalty for violation of article. — Any person falsely claiming to have a mouth hygienist's license, or who shall practice or attempt to practice mouth hygiene without first having been duly licensed therefor, as provided in this article, shall be guilty of a misdemeanor, and upon conviction thereof, shall be fined twenty-five dollars for each and every offense; any person, who, having been so licensed to practice mouth hygiene in said public institutions and public schools, fails to display the said license, or who practices or attempts to practice mouth hygiene elsewhere than in said public institutions and public schools, as hereinbefore provided, in this article, shall, upon conviction thereof, be fined twenty-five dollars for each and every offense; any person, who, failing to display the said license, or who shall practice or attempt to practice mouth hygiene in said public institutions and public schools, shall also forfeit her license to practice mouth hygiene in the said institutions and schools. (1929, c. 304, s. 4.)

Art. 4. Pharmacy.

Part 1. Practice of Pharmacy.

§ 90-53. North Carolina pharmaceutical association. — The North Carolina pharmaceutical association, and the persons composing the same, shall continue to be a body politic and corporate under the name and style of the North Carolina Pharmaceutical Association, and by said name have the right to sue and be sued, to plead and be impleaded, to purchase and hold real estate and grant the same, to have and to use a common seal, and to do such other things and perform such other acts as appertain to bodies corporate and politic not inconsistent with the constitution and laws of the state. (Rev., s. 4471; Code, s. 3135; 1881, c. 355, s. 1; C. S. 6650.)

§ 90-54. Object of pharmaceutical association. — The object of the association is to unite the pharmacists and druggists of this state for mutual aid, encouragement, and improvement; to encourage scientific research, develop pharmaceutical talent, to elevate the standard of professional thought, and ultimately restrict the practice of pharmacy to properly qualified druggists and apothecaries. (Rev., s. 4472; Code, s. 5156; 1881, c. 355, s. 2; C. S. 6651.)

§ 90-55. Board of pharmacy; election; terms; vacancies. — The board of pharmacy shall consist of five persons licensed as pharmacists within this state, who shall be elected and commissioned by the governor, as hereinafter provided. The members of the present board of pharmacy shall continue in office until the expiration of their respective terms, and the rules, regulations, and by-laws of said board, so far as they are not inconsistent with the provisions of this article, shall continue in effect. The North Carolina pharmaceutical association shall annually elect a resident pharmacist from its number to fill the vacancy annually occurring in said board, and the pharmacist so elected shall be commissioned by the governor and shall hold office for the term of five years and until his successor has been duly elected and qualified. In case of death, resignation, or removal from the state of any member of said board of pharmacy, the said board shall elect, from among the pharmacists who is a member of said North Carolina pharmaceutical association, who shall be commissioned by the governor as a member of the said board of pharmacy for the remainder of the term. It shall be the duty of a member of the board of pharmacy, within ten days after receipt of notification of his appointment and commission, to appear before the clerk of the superior court of the county in which he resides and take and subscribe an oath to properly and faithfully discharge the duties of his office according to law. (Rev., s. 4473; 1905, c. 108, ss. 5-7; C. S. 6652.)

§ 90-56. Election of officers; bonds; annual meetings. — The board of pharmacy shall elect two officers, a president and a secretary-treasurer, who shall hold their offices until their successors shall have been elected and qualified. The president shall be elected from the membership of the board. The secretary-treasurer may or may not be a member of the board, as the board shall determine. The secretary-treasurer shall give bond in such sum as may be prescribed by the board, conditioned for the faithful discharge of the duties of his office according to law, and said bond shall be made payable to the North Carolina board of pharmacy and approved by said board. The said board shall hold an annual meeting at such time and place as it may provide by rule for the examination of candidates and for the discharge of such other business as may legally come before it, and said board may hold such additional meetings as may be necessary for the examination of candidates and for the discharge of any other business. (Rev., s. 4474; 1905, c. 108, s. 6; 1923, c. 82; C. S. 6653.)

§ 90-57. Powers of board; reports; quorum; records. — The board of pharmacy shall have a common seal, and shall have the power and authority to define and designate nonpoisonous domestic remedies, to adopt such rules, regulations, and by-laws, not inconsistent with this article, as may be necessary for the regulation of its proceedings and for the discharge of the duties imposed under this article, and shall have power and authority to employ an attorney to conduct prosecutions and to assist in the conduct of prosecutions under this article, and for any other purposes which said board may deem
necessary. The said board of pharmacy shall keep a record of its proceedings and a register of all persons to whom certificates of license as pharmacists and permits have been issued, and of all renewals thereof; and the books and register of the said board, or a copy of any part thereof, certified by the said board, attested by the seal of the said board, shall be taken and accepted as competent evidence in all the courts of the state.

The said board of pharmacy shall make annually to the governor and to the North Carolina Pharmaceutical Association written reports of its proceedings and of its receipts and disbursements under this article, and of all persons licensed to practice as pharmacists in this state.

A majority of the board shall constitute a quorum for the transaction of all business. (Rev., s. 4475; 1905, c. 108, s. 9; 1907, c. 113, s. 1; C. S. 6654.)

§ 90-58. Compensation of secretary and board.

The secretary of the board of pharmacy shall receive such salary as may be prescribed by the board, and shall be paid his necessary expenses while engaged in the performance of his official duties. The other members of the said board shall receive the sum of ten dollars for each day actually employed in the discharge of their official duty and their necessary expenses while engaged therein: Provided, that the compensation and expenses of the secretary and members of the said board of pharmacy and all disbursements for expenses incurred by the said board in carrying into effect and executing the provisions of this article shall be paid out of the fees received by the said board. (Rev., s. 4476; 1905, c. 108, s. 10; 1921, c. 57, s. 2; C. S. 6655.)

§ 90-59. Secretary to investigate and prosecute.

Upon information that any provision of this article has been or is being violated by any member of the said board of pharmacy or any one appointed by the said board of pharmacy shall promptly make investigations of such matters, and, upon probable cause appearing, shall file complaint and prosecute the offender. All fines and penalties prescribed in this article shall be recoverable by suit in the name of the people of the state. In all prosecutions for the violation of any of the provisions of this article, a certificate under oath by the secretary of the board of pharmacy shall be competent and admissible as evidence in any court of the state that the person so charged with the violation of this article is not a registered pharmacist or assistant pharmacist, as required by law. (Rev., s. 4477; 1905, c. 108, s. 11; 1923, c. 74, s. 1; C. S. 6656.)

Editor's Note.—Prior to the amendment to this section by Public Laws 1923 investigation and prosecution was restricted to the secretary of the board and there was no provision for the board and for the board to investigate and prosecute violations of the aforementioned article, in addition to the Secretary of the Board and by making a certificate under oath by the secretary of the Board competent and admissible as evidence in any court of the state, a person charged with violation of such law is not duly licensed. See N. C. C. R.R. Rev., 1905, c. 108, s. 13; 1915, c. 165; 1921, c. 52; 1933, c. 206, ss. 1, 2; 1933, c. 181; 1937, c. 94; C. S. 6658.)

§ 90-60. Fees collectible by board.—The board of pharmacy shall be entitled to charge and collect the following fees: For the examination of an applicant for license as a pharmacist ten dollars; for renewing the license as a pharmacist or as an assistant pharmacist, five dollars; for issuing a permit to a physician to conduct a drug store in a village of not more than five hundred inhabitants, ten dollars; for the renewal of a permit to a physician to conduct a drug store in a village of not more than five hundred inhabitants, five dollars. All fees shall be paid before any applicant may be admitted to examination or his name placed upon the register of pharmacists or before any license or permit, or any renewal thereof, may be issued by the board. (Rev., s. 4478; 1905, c. 108, s. 12; 1921, c. 57, s. 3; C. S. 6657.)

§ 90-61. Application and examination for license, prerequisites.—Every person licensed or registered as a pharmacist on February 4, 1905, under the laws of this state shall be entitled to continue in the practice of his profession until the expiration of the term for which his certificate of registration or license was issued. Every person who shall desire to be licensed as a pharmacist shall file with the secretary of the board of pharmacy an application, duly verified under oath, setting forth the name and age of the applicant, the place or places at which and the time he has spent in the study of the science and art of pharmacy, the experience in the compounding of physicians' prescriptions which the applicant has had under the direction of a legally licensed pharmacist, and the length of the aforementioned article, an applicant shall appear at a time and place designated by the board of pharmacy and submit to an examination as to his qualifications for registration as a licensed pharmacist. The application referred to above shall be prepared and furnished by the board of pharmacy.

In order to become licensed as a pharmacist, within the meaning of this article, an applicant shall be not less than twenty-one years of age, shall present to the board of pharmacy satisfactory evidence that he has had four years' experience in pharmacy under the instruction of a licensed pharmacist, and that he is a graduate of a reputable school or college of pharmacy, and shall also pass a satisfactory examination of the board of pharmacy: Provided, however, that the actual time of attendance at a reputable school or college of pharmacy, not to exceed three years, may be deducted from the time of experience required. Provided, further, that any person legally registered or licensed as a pharmacist by another state board of pharmacy, and who has had fifteen years continuous college training and has been filling prescriptions in a drug store or stores for twenty years or longer may take the examination as provided in the above proviso. (Rev., ss. 4479, 4480; 1905, c. 108, s. 13; 1915, c. 165; 1921, c. 52; 1933, c. 206, ss. 1, 2; 1933, c. 181; 1937, c. 94; C. S. 6658.)

Editor's Note.—Public Laws of 1933, c. 206, inserted the last proviso of this section relative to pharmacists in another state taking the examination in North Carolina. The 1937 amendment abolished the time restriction formerly appearing in the proviso.

In the first proviso of the second paragraph of this sec-
tion the maximum deductible time was increased from two to three years. (Public Laws of 1935, c. 181.)

The provisions of this section, as amended in 1933, relative to a pharmacist licensed by another state, do not entitle a person meeting the qualifications of this act and being of the required age to stand the examination upon his application therefor filed after 1 July, 1933, although he has previously made other applications therefor and has been permitted to stand the examination on his application held prior to 1 July, 1933, and has failed to pass such examinations, the request filed after 1 July, 1933, for a "re-examination" being in legal effect an application for an examination de novo, nor is this result affected by the fact that the board has permitted applicants who failed to pass the examination to stand a subsequent examination without filing a new application, and the issuance of a writ of mandamus directing the board to permit such applicant to stand the examination upon his application filed after 1 July, 1933, by Vereen McNair v. North Carolina Board of Pharmacy, 208 N. C. 572, 198 S. E. 816. (Rev., s. 4482; 1905, c. 108, ss. 17, 25; C. S. 6661.)

§ 90-66. Expiration and renewal of license; failure to renew misdemeanor.—Every licensed pharmacist or assistant pharmacist who desires to continue in the practice of his profession, and every physician holding a permit to sell drugs in a village of not more than six hundred inhabitants, shall within thirty days next preceding the expiration of his license or permit, file with the secretary and treasurer of the board of pharmacy an application for the renewal thereof, which application shall be accompanied by the fee hereinbefore prescribed. If the board of pharmacy shall find that an applicant has been legally licensed in this state, and is entitled to a renewal thereof, or to a renewal of a permit, it shall issue to him a certificate attesting that fact. And if any pharmacist or assistant pharmacist shall fail, for a period of six days after the expiration of his license, to make application to the board for its renewal, his name shall be erased from the register of licensed pharmacists and assistant pharmacists and such person, in order to again become registered as a licensed pharmacist or assistant pharmacist shall be required to pay the same fee as in the case of original registration. And if any holder of a permit to sell drugs in a village of not more than six hundred inhabitants shall fail, for a period of sixty days after the expiration of his permit, to make application for the renewal thereof, his name shall be erased from the register of persons holding such permits, and he may be restored thereto only upon the payment of the fee required for the granting of original permit. The registration of every license and every permit issued by the board shall expire on the thirty-first day of December next ensuing the granting thereof. Provided, that the board of pharmacy, in its discretion, shall have the power to issue a license or permit, or renewal thereof, to any person whose license or permit has been revoked by operation of law or by the board of pharmacy, or whose renewal thereof has been refused by the board of pharmacy, after the expiration of one year from the date of such revocation of license or permit, or refusal of a renewal thereof, upon satisfactory proof that such person is entitled to such license or permit, or to a renewal thereof. Every holder of a license or permit as a pharmacist or assistant pharmacist, who after the expiration thereof continues to carry on the business for which the license or permit was granted, without renewing the same as required by this section, shall be guilty of a misdemeanor, and fined not less than five nor more than twenty-five dollars. (Rev., ss. 3653, 4484; 1905, c. 108, ss. 19, 19, 27; 1911, c. 48; 1921, c. 68, s. 2; C. S. 6662.)

§ 90-67. License to be displayed; penalty.—Every certificate or license to practice as a pharmacist or assistant pharmacist and every permit to a practicing physician to conduct a pharmacy due notice and hearing, revoke a license for like cause, or any license which has been procured by fraud. Any license or permit, or renewal thereof, obtained through fraud or by any fraudulent or false representations shall be void and of no effect in law. (Rev., s. 4483; 1905, c. 108, ss. 17, 25; C. S. 6661.)
§ 90-68. Unlicensed person not to use title of pharmacist; penalty.—It shall be unlawful for any person not legally licensed as a pharmacist or assistant pharmacist to take, use or exhibit the title of pharmacist of assistant pharmacist or licensed or registered pharmacist, or the title druggist or apothecary, or any other title, name, or description of like import.

Every person who violates this section shall be guilty of a misdemeanor and be fined not less than twenty-five nor more than one hundred dollars. (Rev., ss. 3653, 4458; 1905, c. 108, ss. 18, 26; 1921, c. 68, s. 3; C. S. 6663.)

§ 90-69. Purity of drugs protected; seller responsible; adulteration misdemeanor.—Every person who shall engage in the sale of drugs, chemicals, and medicines shall be held responsible for the quality of all drugs, chemicals, and medicines he may sell or dispense, with the exception of those sold in the original packages of the manufacturers, and also those known as "patent or proprietary medicines."

If any person engaged in the sale of drugs, chemicals, and medicines shall intentionally adulterate, or cause to be adulterated, or exposed to sale knowing the same to be adulterated, any drugs, chemicals, or medical preparations, he shall be guilty of a misdemeanor and liable to a fine not exceeding one hundred dollars, and if he is a licensed pharmacist or assistant pharmacist his name shall be stricken from the register of licensed pharmacists and assistant pharmacists. (Rev., ss. 3648, 4488; Code, s. 3145; 1881, c. 385, s. 11; 1897, c. 182, s. 7; 1905, c. 108, s. 3; 1921, c. 68, s. 5; C. S. 6665.)

§ 90-70. Prescriptions preserved; copies furnished.—Every proprietor or manager of a drug store or pharmacy shall keep in his place of business a suitable book or file, in which shall be preserved for a period of not less than five years the original of every prescription compounded or dispensed at such drug store or pharmacy. Upon the request of the prescribing physician, or of the person for whom such prescription was compounded or dispensed, the proprietor or manager of such drug store or pharmacy shall furnish a true and correct copy of such prescription, and said book or file of original prescriptions shall at all times be open to the inspection and examination of duly authorized officers of the law or other persons authorized and directed by the board of pharmacy to make such inspection and examination. (Rev., s. 4490; 1905, c. 108, s. 21; C. S. 6666.)

§ 90-71. Selling drugs without license prohibited; drug trade regulated.—It shall be unlawful for any person not licensed as a pharmacist or assistant pharmacist within the meaning of this article to conduct or manage any pharmacy, drug or chemical store, apothecary shop or other place of business for the retailing, compounding, or dispensing of any drugs, chemicals, or poison, or for the compounding of physicians' prescriptions, or to keep exposed for sale at retail any drugs, chemicals, or poison, except as herein after provided, or for any person not licensed as a pharmacist within the meaning of this article to compound, dispense, or sell at retail any drug, chemical, poison, or pharmaceutical preparation upon the prescription of a physician or otherwise, or to compound physicians' prescriptions except as an aid to and under the immediate supervision of a person licensed as a pharmacist or assistant pharmacist under this article. Provided, that during the temporary absence of the licensed pharmacist in charge of any pharmacy, drug or chemical store, a licensed assistant pharmacist may conduct or have charge of said store. And it shall be unlawful for any owner or manager of a pharmacy or drug store other place of business to cause or permit any other than a person licensed as a pharmacist or assistant pharmacist to compound, dispense, or sell at retail any drug, medicine, poison or pharmaceutical preparation except as an aid to and under the immediate supervision of a person licensed as a pharmacist or assistant pharmacist.

Nothing in this section shall be construed to interfere with any legally registered practitioner of medicine in the compounding of his own prescriptions, or with the exclusively wholesale business of any dealer who shall be licensed as a pharmacist or who shall keep in his employ at least one person who is licensed as a pharmacist, nor with the selling at retail of nonpoisonous domestic remedies, nor with the sale of patent or proprietary preparations which do not contain poisonous ingredients, nor, except in cities and towns wherein there is located an established drug store, and except in the counties of Avery, Bertie, Cleveland, Cabarrus, Cumberland, Duplin, Forsyth, Gaston, Guilford, Halifax, Harnett, Iredell, Henderson, Mecklenburg, Montgomery, Nash, Pender, Moore, New Hanover, Orange, Richmond, Rockingham, Robeson, Rowan, Scotland, and Wilson, shall this section be construed to interfere with the sale of paregoric, Godfrey's Cordial, Aspirin, arbor, borax, bicarbonate of soda, calomel tablets, castor oil, compound carthartic pills, copperas, cough remedies which contain no poison or narcotic drugs, cream of tartar, distilled extract with witch hazel, epsom salts, hemlock oil, gum asafetida, gum camphor, glycerin, peroxide of hydrogen, petroleum jelly, saltpetre, spirit of turpentine, spirit of camphor, sweet oil, and sulphate of quinine, nor with the sale of poisonous substances which are sold exclusively for use in the arts or for use as insecticides when such substances are sold in unbroken packages bearing a label having plainly printed upon it the name of the contents, the word "Poison," the vignette of
the skull and crossbones, and the name of at least two readily obtainable antidotes.

In any village of not more than six hundred inhabitants the board of pharmacy may, after due investigation, grant any legally registered practicing physician a permit to conduct a drug store or pharmacy in such village, which permit shall not be valid in any other village than the one for which it was granted, and shall cease and terminate when the population of the village for which such permit was granted shall become greater than six hundred. (Rev., s. 4487; 1905, c. 108, s. 4; 1921, c. 68, s. 6; Ex. Sess. 1924, c. 116; C. S. 6667.)

Local Modification.—Johnston: 1929, c. 249; Onslow, McDowell: 1925, c. 27.

Editor’s Note.—In 3 N. C. Law Rev. in considering this section it is said: it “prohibits the sale of drugs without a license and regulates the drug trade. It excepts from the requirements of a license physicians who compound their own prescriptions, also the sale of non-poisonous domestic remedies and patent medicines containing no poisonous ingredients.

"Ch. 116 Act 1924 adds to these exceptions a list of some thirty drugs and remedies, such as paregoric, aspirin, bicarbonate of soda, calomel, castor oil, camphor, etc. These may be sold by duly licensed pharmacists without a license, provided there is no established drug store in the county. The act does not apply in twenty-six counties, which further restricts it."

"Similar to the list of drugs named are harmless in ordinary use, it may be safe enough to allow the small country store-keeper to sell them, but the statute makes an opening which might lead to worse things. There may be a question whether paregoric, a strong narcotic, should ever be sold except upon a doctor’s prescription. Similarly with other drugs in the list. It seems that the legislature would have done better to leave the details of drug-selling to the State Board of Pharmacy or to some other expert group who understand the nature and effect of drugs and the danger involved in allowing them to be sold by anybody."

§ 90-72. Compounding prescriptions without license.—If any person, not being licensed as a pharmacist or assistant pharmacist, shall compound, dispense, or sell at retail any drug, medicine, poison, or pharmaceutical preparation, either upon a physician’s prescription or otherwise, and if any person being the owner or manager of a drug store, pharmacy, or other place of business for the compounding, dispensing, or sale at retail of any drugs, medicines, or poisons, or for the compounding of physicians’ prescriptions contrary to the provisions of this article, he shall be deemed guilty of a misdemeanor, and fined not less than twenty-five nor more than one hundred dollars. (Rev., s. 3649; 1905, c. 108, s. 23; C. S. 6669.)

§ 90-73. Conducting pharmacy without license.—If any person, not being licensed as a pharmacist, shall conduct or manage any drug store, pharmacy, or other place or business for the compounding, dispensing, or sale at retail of any drugs, medicines, or poisons, or for the compounding of physicians’ prescriptions contrary to the provisions of this article, he shall be deemed guilty of a misdemeanor, and be fined not less than twenty-five nor more than one hundred dollars, and each week such drug store or pharmacy or other place of business is so unlawfully conducted shall be held to constitute a separate and distinct offense. (Rev., s. 3650; 1905, c. 108, s. 23; C. S. 6669.)

§ 90-74. Pharmacist obtaining license fraudulently.—If any person shall make any fraudulent or false representations for the purpose of procuring a license or permit, or renewal thereof, either for himself or for another, he shall be guilty of a misdemeanor, and fined not less than twenty-five nor more than one hundred dollars; and if any person shall wilfully make a false affidavit or any other false or fraudulent representation for the purpose of procuring a license or permit, or renewal thereof, either for himself or for another, he shall be deemed guilty of perjury, and upon conviction thereof shall be subject to like punishment as is now prescribed for the crime of perjury. (Rev., s. 3654; 1905, c. 108, s. 25; C. S. 6670.)

§ 90-75. Registration of drug stores and pharmacies.—The Board of Pharmacy shall require and provide for the annual registration of every drug store and pharmacy doing business in this State; the proprietor of every drug store or pharmacy opening for business after January 1, 1928, shall apply to the Board of Pharmacy for registration and it shall be unlawful for any drug store or pharmacy to do business until so registered; the fee for such registration, whether original or annual, shall be one dollar ($1), and upon the payment thereof the Board of Pharmacy shall issue permit to applicant entitled to receive same. All permits issued under this section shall expire on December thirty-first of each year.

The terms "drug store" and "pharmacy" as used herein shall mean any store or other place in which drugs, medicines, chemicals, poisons, or prescriptions are compounded, dispensed, or sold at retail, or which uses the title "drug store," "pharmacy" or "apothecary" or any combination of such titles, or any title or description of like import: Provided, that nothing in this section shall apply to the sale of domestic remedies, patent and proprietary preparations, and insecticides as set out and provided for in paragraph two of § 90-71. (1927, c. 28, s. 1.)

§ 90-76. Substitution of drugs, etc., prohibited.—Any person or corporation engaged in the business of selling drugs, medicines, chemicals, or preparations for medical use or of compounding or dispensing physicians’ prescriptions, who shall, in person or by his or his agents or employees, or as agent or employee of some other person, knowingly sell or deliver to any person a drug, medicine, chemical preparation for medicinal use, recognized or authorized by the latest edition of the United States Pharmacopeia and National Formulary, or prepared according to the private formula of some individual or firm, other or different from the drug, medicine, chemical or preparation for medicinal use, recognized or authorized by the latest edition of the United States Pharmacopeia and National Formulary, or prepared according to the private formula of some individual or firm, ordered or called for by such person, or called for in a physician’s prescription,
shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine or imprisonment, or both, at the discretion of the court: Provided, that this section shall apply to registered drug stores and their employees only. (1937, c. 59.)

Part 2. Dealing in Specific Drugs Regulated.

§ 90-77. Poisons; sales regulated; label; penalties.—It shall be unlawful for any persons to sell or deliver to any person any of the following described substances or any poisonous compound, combination, or preparation thereof, to wit: The compounds and salts of arsenic, antimony, lead, mercury, silver and zinc, oxalic and hydrocyanic acids and their salts, the concentrated mineral acids, carbolic acid, the essential oils of almonds, pennyroyal, tansy and savine, croton oil, creosote, chloroform, chloral hydrate, cantharides, or any aconite, belladonna, bitter opium, ergot, cannabis stramonius, or any of the hydrocyanic acids and their salts, the compound, combination, or preparation thereof, to contain more than two fluid ounces or the weight of two avoirdupois ounces does not contain more than an adult medicinal dose of such poisonous substance.

If any person shall sell or deliver to any person any poisonous substance specified in this section without labeling the same and recording the delivery thereof in the manner prescribed, he shall be guilty of a misdemeanor, and fined not less than twenty-five nor more than one hundred dollars. (Rev., ss. 3655, 4489; 1905, c. 108, ss. 20, 28; C. S. 6671.)

§ 90-78. Certain patent cures and devices; sale and advertising forbidden.—It shall be unlawful for any person, firm, association, or corporation in the state, or any agent thereof, to sell or offer for sale any proprietary or patent medicine or remedy purporting to cure cancer, consumption, diabetes, paralysis, Bright's disease, or any other disease for which no cure has been found, or any mechanical device whose claims for the cure or treatment of disease are false or fraudulent; and it shall be unlawful for any person, firm, association, or corporation in the state, or agent thereof, to publish in any manner, or by any means, or cause to be published, circulated, or in any way placed before the public any advertisement in a newspaper or other publication or in the form of books, pamphlets, handbills, circulars, either printed or written, or by any drawing, map, print, tag, or by any other means whatsoever, any advertisement of any kind or description offering for sale or commending to the public any proprietary or patent medicine or remedy purporting to cure cancer, consumption, diabetes, paralysis, Bright's disease, or any other disease for which no cure has been found, or any mechanical device for the treatment of disease, when the North Carolina board of health shall declare that such device is without value in the treatment of disease.

Any person, firm, association, or corporation violating any of the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding one hundred dollars for each offense. Each sale, offer for sale, or publication of any advertisement for sale of any of the medicines, remedies, or devices mentioned in this section shall constitute a separate offense. (1917, c. 27, ss. 1, 2, 3; C. S. 6684.)

Editor's Note.—In 4 N. C. Law Rev. it is said: "There is a statute in this State which makes it unlawful for any person to publish any advertisement of any patent medicine or remedy purporting to cure cancer, consumption, diabetes, paralysis, Bright's disease, or any other disease for which no cure has been found or any mechanical device for the treatment of disease when the North Carolina Board of Health shall declare that such device is without value in the treatment of disease. This curious statute puts too heavy a burden on the advertising manager, for who is to say whether there is a cure for a disease or whether a device is of value in the treatment of disease."

§ 90-79. Certain patent cures and devices; enforcement of law.—To provide for the efficient enforcement of § 90-78, the same shall be under the supervision and management of the North Carolina board of pharmacy, and it shall be
§ 90-80. Duty of all registered pharmacists to report immediately any violations thereof to the secretary of the board of pharmacy, and any willful failure to make such report shall have the effect of revoking his license to practice pharmacy in this state. (1917, c. 27, ss. 4, 5; C. S. 6685.)

§ 90-80. Department of agriculture to analyze patent medicines.—The chemists and other experts of the department of agriculture shall, under such rules and regulations as may be prescribed by the board of pharmacy, and upon request of the secretary of said board, make an analytical examination of all samples of drugs, preparations, and compounds sold or offered for sale in violation of §§ 90-73 and 90-79. (1917, c. 27, s. 6; C. S. 6686.)

§ 90-81. Hypnotic drugs defined and enumerated.—In §§ 90-81 to 90-85, unless the context otherwise requires, the words “hypnotic drug” include:

(1) Sulphormethane (sulphonal).
(2) Sulphonethylmethane (trional).
(3) Diethyl sulphonedrethylmethane (tetronal).
(4) Chloral hydrate or any mixture or solution thereof containing twenty grains or more thereof to the fluid ounce. (1931, c. 162, s. 1.)

§ 90-82. Sale prohibited except by physicians and pharmacists.—No person other than a licensed pharmacist, a duly licensed physician, doctor of dental surgery, or doctor of veterinary surgery shall sell or offer to sell any hypnotic drug to consumers or have such drug in his possession with intent to sell or give away to consumers. (1931, c. 162, s. 2.)

§ 90-83. Limitation on quantity that may be sold; exception; record of sales. — No hypnotic drug as defined in §§ 90-81 to 90-85 may be sold in quantities exceeding twelve therapeutic doses, except to persons known to be suffering with epilepsy: Provided, however, that nothing in §§ 90-81 to 90-85 shall apply to prescriptions of duly licensed physicians, doctors of dental surgery, or doctors of veterinary surgery.

Any person dispensing any hypnotic drug coming under the provisions of §§ 90-81 to 90-85, other than upon prescription, shall record in a book kept for the purpose the name of the article sold, the quantity delivered, the date of delivery, the name and address of the purchaser and the name of the dispenser, which record shall at all times be open to the inspection of the proper officer of the law. (1931, c. 169, s. 3.)

§ 90-84. Dispensing of drugs by physicians in lawful practice.—Nothing in §§ 90-81 to 90-85 shall be construed to limit the sale of hypnotic drugs to, nor to the dispensing of hypnotic drugs in the course of their professional practice by, duly licensed physicians, doctors of dental surgery or doctors of veterinary surgery lawfully practicing their profession in this State, or to registered retail or wholesale pharmacists, or to hospitals and other institutions for the treatment of defective, afflicted, sick and injured persons. (1931, c. 162, s. 4.)

§ 90-85. Violation of sections 90-81 to 90-85 a misdemeanor.—Any person who shall violate any provision of §§ 90-81 to 90-85 shall be deemed guilty of a misdemeanor and upon conviction thereof for the first offence shall be fined not more than twenty-five dollars, and upon conviction of the second offence shall be fined not more than one hundred dollars. (1931, c. 162, s. 5.)


§ 90-86. Title of article.—This article may be cited as the Uniform Narcotic Drug Act. (1935, c. 477, s. 26.)

§ 90-87. Definitions. — The following words and phrases as used in this article shall have the following meanings unless the context otherwise requires:

(a) “Person” includes any corporation, association, copartnership or one or more individuals.
(b) “Physician” means any person authorized by law to practice medicine in this State and any other person authorized by law to treat sick and injured human beings in this State and to use narcotic drugs in connection with such treatment.
(c) “Pharmacist” means any person authorized by law to practice pharmacy in this State.
(d) “Veterinarian” means any person authorized by law to practice veterinary in this State.
(e) “Manufacture” means a person who by compounding, mixing, cultivating, growing or other process produces or prepares narcotic drugs, but does not include a pharmacist who compounds narcotic drugs to be sold or dispensed on prescription.
(f) “Wholesaler” means a person who supplies narcotic drugs that he himself has not produced or prepared, on official written order, but not on prescription.
(g) “Pharmacist” means a registered pharmacist of this State.
(h) “Pharmacy owner” means the owner of a store or other place of business where narcotic drugs are compounded or dispensed by a registered pharmacist; but nothing in this article contained shall be construed as conferring on a person who is not registered or licensed as a pharmacist any authority, right or privilege that is not granted to him by the pharmacy laws of this State.
(i) “Hospital” means an institution for the care and treatment of the sick and injured, approved by the state board of pharmacy as proper to be entrusted with the custody of narcotic drugs and the professional use of narcotic drugs under the direction of a physician, dentist or veterinarian.
(j) “Laboratory” means a laboratory to be entrusted with the custody of narcotic drugs and the use of narcotic drugs for scientific, experimental and medical purposes and for purposes of instruction approved by the state board of pharmacy.
(k) “Sale” includes barter, exchange or offer therefor, and each such transaction made by any person, whether as principal, proprietor, agent, servant or employee.
(l) “Coca leaves” includes cocaine and any compound, manufacture, salt, derivative, mixture
or preparation of coca leaves, except derivatives of coca leaves which do not contain cocaine, ecgonine, or substances from which cocaine or ecgonine may be synthesized or made.

(m) "Opium" includes morphine, codeine and heroin and any compound, manufacture, salt, derivative, mixture, or preparation of opium.

(n) "Cannabis" includes the following substances under whatever means they may be designated:

1. The dried flowering or fruiting tops of the pistillate plant cannabis sativa L. from which the resin has not been extracted;
2. The resin extracted from such tops; and
3. Every compound, manufacture, salt, derivative, mixture, or preparation of such resin or of such tops from which the resin has not been extracted; and
4. Peyote or mara huana.

(o) "Narcotic drugs" means coca leaves, opium, cannabis, and every substance not chemically distinguishable from them.

(p) "Federal narcotic law" means the laws of the United States relating to opium, coca leaves and other narcotic drugs.

(q) "Official written order" means an order written on a form provided for that purpose by the United States commissioner of narcotics, under any laws of the United States making provision therefor, if such order forms are authorized and required by federal law.

(r) "Dispense" includes distribute, leave with, give away, dispose of or deliver.

(s) "Registry number" means the number assigned to each person registered under the federal narcotic laws. (1935, c. 477, s. 1.)

Editor's Note.—For an analysis of this article, see 13 N. C. Law Rev. 403.

Applied in State v. Williams, 210 N. C. 159, 185 S. E. 661.

§ 90-88. Manufacture, sale, etc., of narcotic drugs regulated.—It shall be unlawful for any person to manufacture, possess, have under his control, sell, prescribe, administer, dispense, or compound any narcotic drug, except as authorized in this article. (1935, c. 477, s. 2.)

Indictment Quashed for Uncertainty.—Where the defendant was indicted under this section, the indictment following the words of the section and charging defendant in one count with the commission of the several acts forbidden, the several offenses being charged by the use of the disjunctive "or," it was held that it was impossible to ascertain from the indictment which of the several separate offenses defendant was charged with committing, the indictment failing to charge the commission of each of them, since the disjunctive "or" is used, and defendant's motion to quash the indictment for uncertainty should have been allowed. State v. Williams, 210 N. C. 159, 185 S. E. 661.

§ 90-89. Conditions of sale of drugs.—A duly licensed manufacturer or wholesaler may sell and dispense narcotic drugs to any of the following persons but only on official written orders:

(a) To a manufacturer, wholesaler, pharmacist or pharmacy owner.

(b) To a physician, dentist or veterinarian.

(c) To a person in charge of a hospital, but only for use by or in that hospital.

(d) To a person in charge of a laboratory, but only for use in that laboratory for scientific and medicinal purposes.

A duly licensed manufacturer or wholesaler may sell narcotic drugs to any of the following persons:

(a) On a special written order accompanied by a certificate of exemption, as required by the federal narcotic laws, to a person in the employ of the United States government or of any state, territory, district, county, municipality, or insular government, purchasing, receiving, possessing or dispensing narcotic drugs by reason of his official duties.

(b) To a master of a ship or a person in charge of any air craft upon which no physician is regularly employed for the actual medical needs of persons on board such ship or air craft when not in port, provided such narcotic drug shall be sold to the master of such ship or person in charge of such air craft only in pursuance of a special order form approved by a commanding medical officer or acting assistant surgeon of the United States public health service.

(c) To a person in a foreign country if the provisions of the federal narcotic laws are complied with. (1935, c. 477, s. 3.)

§ 90-90. Execution of written orders; use in purchase; preserving copies for inspection. — All official written orders for any narcotic drug shall be signed in duplicate by the person giving said order or by his duly authorized agent. The original shall be presented to the person who sells or dispenses the narcotic drug or drugs named therein. In the event of the acceptance of such order by said person, each party to the transaction shall preserve his copy of such order for a period of two years, in such a way as to be readily accessible for inspection by any public officer or employee engaged in the enforcement of this article. It shall be deemed a compliance with this section if the parties to the transaction have complied with the federal narcotic laws respecting the requirements governing the use of order forms. (1935, c. 477, s. 4.)

§ 90-91. Lawful possession of drugs.—Possession of or control of narcotic drugs obtained as authorized in this article shall be lawful if obtained in the regular course of business, occupation, profession, employment or duty of the possessor. (1935, c. 477, s. 5.)

§ 90-92. Dispensing of drugs regulated. — A person in charge of a hospital or of a laboratory, or in the employ of this State or of any other state, or of any political subdivision thereof, and the master or other proper officer of a ship or air craft, who obtains narcotic drugs under the provisions of this article or otherwise shall not administer, nor dispense, nor otherwise use such drugs within this State except within the scope of his employment or official duty and then only for scientific or medicinal purposes and subject to the provisions of this article. (1935, c. 477, s. 6.)

§ 90-93. Sale of drugs on doctor's prescription.—A pharmacist in good faith may sell and dispense narcotic drugs to any person upon the written prescription of a physician, dentist or veterinarian, provided it is properly executed, dated and signed by the person prescribing on the day when issued and bearing the full name and address of the patient for whom, or of the

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owner of the animal for which, the drug is dispensed, and the full name, address and registry number under the federal narcotic laws of the person so prescribing if he is required by those laws to be so registered. If the prescription be for an animal, it shall state the species of animal for which the drug is prescribed. A person filling the prescription shall write the date of filling and his own signature on the face of the prescription. The prescription shall be retained on file by the proprietor of the pharmacy in which it is filled for a period of two years so as to be readily accessible for the inspection of any officers engaged in the enforcement of this article. The prescription shall not be refilled.

The legal owner of any stock of narcotic drugs in a pharmacy, upon discontinuance of dealing in said drugs, may sell said stock to a manufacturer, wholesaler, pharmacist or pharmacy owner but only upon an official written order. A pharmacist, only upon an official written order, may sell to a physician, dentist or veterinarian in quantities not exceeding one ounce at any one time, aqueous or oleaginous solutions of which the content of narcotic drugs does not exceed a proportion greater than twenty per centum (20%) of the complete solution, to be used for medicinal purposes. (1935, c. 477, s. 7.)

Editor's Note.—The case treated below was decided under C. $. section 6677, now repealed. This case is made available to the practitioner as an aid in construing the present law, but it must be read in the light of the former law.

Liability to Husband for Injury to Wife.—One who, despite the protests and warnings of a husband, persistently sells drugs to the latter's wife, is liable in damages to the husband for the injuries so sustained. Holleman v. Harward, 119 N. C. 150, 25 S. E. 927.

§ 90-94. Prescribing, administering or dispensing by physicians or dentists.—A physician or a dentist, in good faith and in the course of his professional practice, only, may prescribe on a written prescription, administer, or dispense narcotic drugs, or any preparation containing a narcotic drug that may be prescribed, administered, compounded, dispensed, or sold, to any person or for the use of any person or animal, when it is prescribed by a physician, dentist, or veterinarian for an animal, it shall state the species of animal for which the drug is prescribed and the full name, address and registry number under the federal narcotic laws of the person prescribing, provided he is required by those laws to be so registered. (1935, c. 477, s. 8.)

§ 90-96. Returning unused portions of drugs.—Any person who has obtained from a physician, dentist or veterinarian any narcotic drug for administration to a patient during the absence of such physician, dentist or veterinarian shall return to such physician, dentist or veterinarian any unused portion of such drug when it is no longer required by the patient. (1935, c. 477, s. 8.)

§ 90-97. Article not applicable in certain cases.—Except as otherwise herein specifically provided, this article shall not apply to the following cases:

1. Prescribing, administering, compounding, dispensing or selling at retail of any medicinal preparation that contains in one fluid ounce, or if a solid or semi-solid preparation, in one avoirdupois ounce (a) not more than two grains of opium, (b) not more than one-quarter grain of morphine or of any of its salts, (c) not more than one grain of codeine, or of any of its salts, (d) not more than one-eighth of a grain of heroin or of any of its salts, (e) not more than one-half of a grain of extract of cannabis nor more than one-half of a gram of any more potent derivative or preparation of cannabis.

2. Prescribing, administering, compounding, dispensing or selling at retail of liniments, ointments, and other preparations that are susceptible of external use only and that contain narcotic drugs in such combinations as prevent their being readily extracted from such liniments, ointments, or preparations, except that this article shall apply to all liniments, ointments, and other preparations that contain coca leaves in any quantity or combinations.

3. The exemptions authorized by this section shall be subject to the following conditions:

(a) The medicinal preparation, or the liniment, ointment, or other preparation susceptible of external use only, prescribed, administered, dispensed, or sold, shall contain, in addition to the narcotic drug in it, some drug or drugs conferring upon it medicinal qualities other than those possessed by the narcotic drug alone.

(b) Such preparation shall be prescribed, administered, compounded, dispensed and sold in good faith as a medicine, and not for the purpose of evading the provisions of this article.

4. Nothing in this section shall be construed to limit the kind and quantity of any narcotic drug that may be prescribed, administered, compounded, dispensed, or sold, to any person or for the use of any person or animal, when it is prescribed, administered, compounded, dispensed, or sold, in compliance with the general provisions of this article. (1935, c. 477, s. 9.)

§ 90-98. Records of drugs dispensed; records of manufacturers and wholesalers; records of pharmacists; written orders unnecessary for certain drugs; invoices rendered with sales.—Every physician, dentist, veterinarian, or other person who is authorized to administer or professionally use narcotic drugs shall keep a record of such drugs received by him, and a record of all such drugs administered, dispensed, or professionally used by him otherwise than by prescription. It shall, however, be deemed a sufficient compliance with this section if any such
person using small quantities or solutions or other preparations of such drugs for local application shall keep a record of the quantity, character, and potency of such solutions or other preparations purchased or made up by him, and of the dates when purchased or made up, without keeping a record of the amount of such solution or other preparation applied by him to individual patients.

Manufacturers and wholesalers shall keep records of all narcotic drugs compounded, mixed, cultivated, grown, or by any other process produced or prepared, and of all narcotic drugs received and disposed of by them, in accordance with the provisions of this section.

Pharmacists and pharmacy owners shall keep records of all narcotic drugs received and disposed of by them, in accordance with the provisions of this article.

The keeping of a record required by or under the terms of this article shall constitute the only record required to be kept by every person who purchases for resale or who sells narcotic drug preparations exempted.

Written orders shall not be required for the sale of cannabis indica or cannabis sativa, or peyote and mara huanna, and the provisions of the article in respect to written orders and records shall not apply to cannabis indica, cannabis sativa, peyote and mara huanna, but manufacturers and wholesalers of cannabis indica, cannabis sativa, peyote and mara huanna shall be required to render with every sale of cannabis indica or cannabis sativa, peyote and mara huanna, an invoice, whether such sale be for cash or on credit; and such invoice shall contain the date of such sale, the name and address of the purchaser, and the amount of cannabis indica or cannabis sativa or peyote and mara huanna so sold.

Every purchaser of cannabis indica, cannabis sativa or peyote and mara huanna from a wholesaler or manufacturer shall be required to keep the invoice rendered with such purchase for a period of two years. (1935, c. 477, s. 10.)

§ 90-99. Labeling packages containing drugs.—Whenever a manufacturer sells or dispenses a narcotic drug and whenever a wholesaler sells and dispenses a narcotic drug in a package prepared by him, he shall securely affix to each package in which that drug is contained a label showing in legible English the name and address of the vendor and the quantity, kind and form of narcotic drug contained therein. No person, except a pharmacist for the purpose of filling a prescription under this article, shall alter, deface or remove any label so affixed. (1935, c. 477, s. 11.)

§ 90-100. Labeling containers of drugs dispensed on prescriptions. — Whenever a pharmacist sells or dispenses any narcotic drug on prescription issued by a physician, dentist, or veterinarian he shall affix to the container in which such drug is sold or dispensed, a label showing his own name, address, and registry number, or the name, address and registry number of the pharmacist or pharmacy owner for whom he is lawfully acting; the name and address of the patient, or, if the patient is an animal, the name and address of the owner of the animal and the species of the animal; the name, address and registry number of the physician, dentist or veterinarian, by whom the prescription was written; and such directions as may be stated on the prescription. No person shall alter, deface or remove any label so affixed as long as any of the original contents remain. (1935, c. 477, s. 11.)

§ 90-101. Lawful possession in original containers. — A person to whom or for whose use any narcotic drug has been prescribed, sold or dispensed by a physician, dentist, pharmacist, or other person authorized under the provisions of this article, the owner of any animal for which any such drug has been prescribed, sold, or dispensed by a veterinarian, may lawfully possess it only in the container in which it was delivered to him by the person selling or dispensing the same. (1935, c. 477, s. 12.)

§ 90-102. Common carriers and warehousemen excepted; other persons exempt.—The provisions of this article restricting the possessing and having control of narcotic drugs shall not apply to common carriers or to warehousemen while engaged in lawfully transporting or storing such drugs, or to any employees of the same acting within the scope of his employment; or to public officers or employees in the performance of their official duties requiring possession or control of narcotic drugs; or to temporary incipient possession by agents or employees of persons lawfully entitled to possession, or by persons whose possession is for the purpose of aiding public officials in performing their official duties. (1935, c. 477, s. 13.)

§ 90-103. Places unlawfully possessing drugs declared nuisances.—Any store, shop, warehouse, dwelling house, building, vehicle, boat, aircraft, or any place whatever, which is resorted to by narcotic drug addicts for the purpose of using narcotic drugs or which is used for the illegal keeping or selling of the same shall be deemed a common nuisance. No person shall keep or maintain such common nuisance. (1935, c. 477, s. 14.)

§ 90-104. Forfeiture and disposition of drugs unlawfully possessed. — All narcotic drugs the lawful possession of which is not established, or the title to which cannot be ascertained, which have come into the custody of a peace officer, shall be forfeited, and disposed of as follows:

(a) The court or magistrate having jurisdiction shall immediately notify the state board of pharmacy and unless otherwise requested within fifteen days by the state board of pharmacy in accordance with sub-section (b) of this section shall order such narcotic drugs forfeited and destroyed. A record of the place where said drugs were seized, of the kinds and quantities of drugs so destroyed, and of the time, place and manner of destruction, shall be kept, and a return under oath, reporting said destruction, shall be made to the court or magistrate and to the United States commissioner of narcotics, by the officer who destroys them.

(b) Upon written application by the state board of pharmacy the court or magistrate by whom the forfeiture of narcotic drugs has been decreed may order the delivery of them except heroin and
its salts and derivatives to said state board of pharmacy for distribution or destruction, as hereinafter provided.

3) The application by any hospital within this State, not operated for private gain, to the state board of pharmacy may in its discretion deliver any narcotic drugs that have come into its custody by authority of this section to the applicant for medicinal use. The state board of pharmacy may from time to time deliver excess stocks of such drugs to the United States commissioner of narcotics, or shall destroy the same.

3a) The state board of pharmacy shall keep a full and complete record of all drugs received and of all drugs disposed of, showing the exact kinds, quantities and forms of such drugs; the persons from whom received and to whom delivered; by whose authority received, delivered and destroyed; and the dates of the receipt, disposal, or destruction, which record shall be open to inspection by all federal and state officers charged with the enforcement of federal and state narcotic laws. (1935, c. 477, s. 15.)

Editor’s Note.—The case treated below was decided under C. S. section 6679, now repealed, which made the possession of certain drugs unlawful. This case is made available to the practitioner as an aid in construing the present law, but must be read in the light of the former law.

Constructive Possession.—In State v. Lee, 164 N. C. 533, 80 S. E. 403, the Court held that under this statute the guilty possession was not necessarily actual possession, but that the statutory presumption could arise from the constructive possession; that the statute includes actual and constructive possession." State v. Ross, 168 N. C. 130, 131, 83 S. E. 307.

§ 90-105. Prescriptions, stocks, etc., open to inspection by officials.—Prescriptions, orders and records, required by this article, and stocks of narcotic drugs shall be open for inspection only to federal, state, county and municipal officers, whose duty it is to enforce the laws of this State or of the United States relating to narcotic drugs. No officer having knowledge by virtue of his office of any such prescription, order or record shall divulge such knowledge, except in connection with a prosecution or proceeding in court or before a licensing board or officer to which prosecution or proceeding the person to whom such prescriptions, orders or records relate is a party. (1913, c. 477, s. 16.)

§ 90-106. Fraudulent attempts to obtain drugs prohibited.—No person shall obtain or attempt to obtain a narcotic drug, or procure or attempt to procure the administration of a narcotic drug (a) by fraud, deceit, misrepresentation, or subterfuge; or (b) by the forgery or alteration of a prescription or of any written order; or (c) by the concealment of a material fact; or (d) by the use of a false name or by giving of a false address.

(a) Information communicated to a physician in an effort unlawfully to procure a narcotic drug, or unlawfully to procure the administration of any such drug, shall not be deemed a privileged communication.

(b) No person shall wilfully make a false statement in any prescription, order, report, or record, required by this article.

(c) No person shall, for the purpose of obtaining a narcotic drug, falsely assume the title of, or represent himself to be, a manufacturer, wholesaler, pharmacist, pharmacy owner, physician, dentist, veterinarian, or other authorized person.

(d) No person shall make or utter any false or forged prescription or written order.

(e) No person shall affix any false or forged label to a package or receptacle containing narcotic drugs. (1935, c. 477, s. 17.)

§ 90-107. Application of certain restrictions.—The provisions of § 90-106 shall apply to all transactions relating to narcotic drugs under the provisions of § 90-97 in the same way as they apply to transactions under all other sections. (1935, c. 477, s. 18.)

§ 90-108. Possession of hypodermic syringes and needles regulated.—No person except a manufacturer or a wholesaler or a retail dealer in surgical instruments, pharmacist, physician, dentist, veterinarian, nurse or intern shall at any time have or possess a hypodermic syringe or needle or any instrument or implement adapted for the use of habit forming drugs by subcutaneous injections and which is possessed for the purpose of administering habit forming drugs, unless such possession be authorized by the certificate of a physician issued within the period of one year prior hereto. (1935, c. 477, s. 19.)

§ 90-109. Burden on defendant to prove exemption.—In any complaint, information, or indictment, and in any action or proceeding brought for the enforcement of any provision of this article, it shall not be necessary to negative any exception, excuse, proviso, or exemption, contained in this article, and the burden of proof of any such exception, excuse, proviso, or exemption shall be upon the defendant. (1935, c. 477, s. 20.)

§ 90-110. State board of pharmacy and peace officers to enforce article.—It is hereby made the duty of the state board of pharmacy, its officers, agents, inspectors and representatives, and of all peace officers within the State, and of all state’s attorneys, to enforce all provisions of this article, except those specifically delegated, and to cooperate with all agencies charged with the enforcement of the laws of the United States, of this State and of all other states, relating to narcotic drugs. (1935, c. 477, s. 21.)

§ 90-111. Penalties for violation.—Any person violating any provision of this article shall, upon conviction, be punished for the first offense by a fine not exceeding one thousand ($1,000.00) dollars or imprisonment for not exceeding three years, or both; and for any subsequent offense by a fine not exceeding three thousand dollars ($3,000.00) or by imprisonment for not exceeding five years, or both. (1935, c. 477, s. 22.)

Editor’s Note.—The cases discussed below were decided under C. S. section 6683, now repealed. These cases are made available to the practitioner as an aid in construing the present law, but they must be read in the light of the former law.

This section confers no power on the Board to revoke the license of a physician who has been convicted of its violation. Board of Medical Examiners v. Gardner, 201 N. C. 121, 127, 150 S. E. 8.

Power of Board to Renew Revoked License.—When the license of a pharmacist convicted of the unlawful sale of narcotics, etc., is revoked, the board has no authority to renew the license upon the tender of the prescribed fee of $2. Thomas v. Board, 152 N. C. 373, 67 S. E. 925.

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§ 90-112. Double jeopardy. — No person shall be prosecuted for a violation of any provision of this article if such person has been acquitted or convicted under the federal narcotic laws of the same act or commission, which, it is alleged, constitutes a violation of this article. (1935, c. 477, s. 23.)

§ 90-113. Construction of article. — This article shall be so interpreted and construed as to effectuate its general purpose and to make uniform the laws of those states which enact it. (1935, c. 477, s. 25.)

Art. 6. Optometry.

§ 90-114. Optometry defined. — The practice of optometry is hereby defined to be the employment of any means, other than the use of drugs, medicines, or surgery, for the measurement of the powers of vision and the adaptation of lenses for the aid thereof; and in such practices as above defined, the optometrist may prescribe, give directions or advice as to the fitness or adaptation of a pair of spectacles, eyeglasses or lenses for another person to wear for the correction or relief of any condition for which a pair of spectacles, eyeglasses or lenses are used, or to use or permit or allow the use of instruments, test-cards, test types, test lenses, spectacles or eyeglasses or anything containing lenses, or any device for the purpose of aiding any person to select any spectacles, eyeglasses or lenses to be used or worn by such last mentioned person or by any other person. (1909, c. 444, s. 1; 1993, c. 42, s. 1; C. S. 6657.)

Editor's Note.—By the amendment Public Laws 1923 the part of this section following the semi-colon was added.

The purpose of the amendment "is to raise the standards of the practice of optometry in North Carolina. Its chief effect upon this section is the requirement of two years attendance at a recognized optical college, eliminating the option of two years under a registered optometrist, the raising of the examination fee from $10 to $20, and the raising of the compensation of the Board of Examiners from $5 to $10 for each day spent in the duties of the office." 1 N. C. Law Rev. 300.

§ 90-115. Practice without registration unlawful. — After the passage of this article it shall be unlawful for any person to practice optometry in the state unless he has first obtained a certificate of registration and filed the same, or a certified copy thereof, with the clerk of the superior court of his residence, as hereinafter provided. Within the meaning of this article, a person shall be deemed as practicing optometry who does, or attempts to, sell, furnish, replace, or duplicate, a lens, frame, or mounting, or furnishes any kind of material or apparatus for ophthalmic use, without a written prescription from a person authorized under the laws of the State of North Carolina to practice optometry, or from a person authorized under the laws of North Carolina to practice medicine: Provided, however, that the provisions of this section shall not prohibit persons or corporations from selling completely assembled spectacles, without advice or aid as to the selection thereof, as merchandise from permanently located or established places of business, nor shall it prohibit persons or corporations from making mechanical repairs to frames for spectacles; nor shall it prohibit any person, firm, or corporation engaged in grinding lenses and filling prescriptions from replacing or duplicating lenses on original prescriptions issued by a duly licensed optometrist, and oculist. (1909, c. 444, s. 2; 1935, c. 63; C. S. 6688.)

Editor's Note.—The amendment of 1935 added all of this section except the first sentence.

§ 90-116. Board of examiners in optometry. — There is hereby created a board, whose duty it shall be to carry out the purposes and enforce the provisions of this article, and which shall be styled the "North Carolina State Board of Examiners in Optometry." This board shall be elected by the North Carolina State Optometric Society and commissioned by the governor and shall consist of five regular optometrists who are members of the North Carolina state optometric society and who have been engaged in the practice of optometry in the state for five years. The terms of the members shall be as follows: One for one year, one for two years, one for three years, one for four years, one for five years. The terms of members thereafter appointed shall be for five years. The members of the board, before entering upon their duties, shall respectively take all oaths taken and prescribed for other state officers, in the manner provided by law, which shall be filed in the office of the secretary of state, and the board shall have a common seal. The North Carolina State Optometric Society shall have the power to fill all vacancies on said board for unexpired terms, and members so elected shall be commissioned by the governor. (1909, c. 444, s. 3; 1915, c. 21, s. 1; 1933, c. 63; C. S. 6689.)

Editor's Note.—The amendment of 1935 added the last two sentences of the section.

§ 90-117. Organization; meetings and powers thereof; records, witnesses and evidence. — The board of examiners shall choose, at the first regular meeting and annually thereafter, one of its members as president and one as secretary and treasurer. The board shall make such rules and regulations, not inconsistent with law, as may be necessary to the proper performance of its duties, and each member may administer oaths as and take testimony concerning any matter within the jurisdiction of the board. A majority of the board shall constitute a quorum. The board shall meet at least once a year, the times and places of meeting to be designated by the president and secretary. The secretary of the board shall keep a full record of its proceedings, which shall at all reasonable times be open to public inspection. The president, secretary-treasurer, or any member of the board shall have power in connection with any matter within the jurisdiction of the board to summon and examine witnesses under oath and to compel their attendance and the production of books, papers, or other documents or writings deemed by it necessary or material to the inquiry. Each summons or subpoena shall be issued under the hand of the secretary-treasurer or the president of the board and shall have the force and effect of a summons or subpoena issued by a court of record, and any witness who shall refuse or neglect to appear in obedience thereto or to testify or produce books, papers, or other documents or writings required shall be liable to punishment
§ 90-118. Examination for practice; prerequisites; registration. — Every person, before beginning to practice optometry in this state after the passage of this article, shall pass an examination before the board of examiners. The examination shall be confined to such knowledge as is essential to practice of optometry. Every applicant for examination at the time of examination must comply with the following conditions:

1. He must be twenty-one years of age.
2. He shall file with the secretary of the board a certificate of good moral character. If desired, he may be examined by two reputable citizens of this state; but an applicant from another state may have such certificate signed by any state officer of the state from which he comes.
3. He shall satisfy the board that he has been in actual attendance in approved school of optometry, and that he holds a certificate of graduation from said school, which school shall be approved by the North Carolina Board of Examiners in Optometry.
4. He must pay to the board for the use of the board the sum of twenty dollars, and if he shall successfully pass the examination he shall pay to the secretary for the use of the board a further sum of five dollars on the issuance to him of the certificate:

Provided, the applicant may stand any subsequent examination by paying an additional fee of five dollars.

Every person successfully passing the examination shall be registered in the board registry, which shall be kept by the secretary, as licensed to practice optometry, and he shall also receive a certificate of registration from said school, which school shall be approved by the North Carolina Board of Examiners in Optometry.

§ 90-119. Persons in practice before passage of statute. — Every person who has been engaged in the practice of optometry in the state for two years prior to the date of the passage of this article shall hereafter file an affidavit as proof thereof with the board. The secretary shall keep a record of such persons who shall be exempt from the provisions of the preceding section. Upon the payment of three dollars he shall issue to each of them certificates of registration without the necessity of an examination. Failure on the part of a person so entitled within six months of the enactment of this article to make written application to the board for the certificate of registration accompanied by a written statement, signed by him and duly verified before an officer authorized to administer oaths within this state, fully setting forth the grounds upon which he claims such certificate, shall be deemed a waiver of his right to a certificate under the provisions of this section. A person who has thus waived his right may obtain a certificate thereafter by successfully passing examination and paying a fee as provided herein.

§ 90-120. Filing of certificate by licensee; fees; failure to file, certified copies.—Each recipient of the certificate of registration shall present the same for record to the clerk of the superior court of the county in which he resides, and shall pay a fee of fifty cents for recording the same. The clerk shall record it in a book to be provided by him for that purpose. Any person so licensed, before engaging in the practice of optometry in any other county, shall file the certificate for record with the clerk of the superior court of the county in which he desires to practice, and pay the clerk for recording it a fee of fifty cents. Any failure, neglect, or refusal on the part of a person holding a certificate to file it for record, for thirty days after the issuance thereof, shall forfeit the certificate and it shall become null and void. Upon the request of any person entitled to a certificate of registration the board shall issue a certified copy thereof, and upon the fact of the loss of the original being made to appear, the certified copy shall be recorded in lieu of the original, and the board shall be entitled to a fee of one dollar for recording such certified copy.

§ 90-121. Certificate to be displayed at office. — Every person to whom a certificate of examination or registration is granted shall display the same in a conspicuous part of his office wherein the practice of optometry is conducted.

§ 90-122. Compensation of boards; surplus funds. — Out of the funds coming into possession of said board each member thereof may receive as compensation the sum of ten dollars for each day he is actually engaged in the duties of his office and mileage of five cents per mile for all distances necessarily traveled in going to and coming from the meetings of the board.
and carrying out the provisions of this article, and he shall give the state such bond as the board shall require from time to time, direct for the faithful performance of his duties, and the board shall make an annual report of its proceedings to the governor on the first Monday in January of each year, which report shall contain an account of all moneys received and disbursed by them pursuant to this article. The secretary-treasurer shall receive from the funds of the board such salary as may be determined by the board. (1909, c. 444, s. 11; 1923, c. 42, s. 4; 1935, c. 63; C. S. 6695.)

Editor's Note.—The amendment of 1935 added the last sentence of this section.

§ 90-123. Annual fees; failure to pay; revocation of license; collection by suit.—For the use of the board such salary as may be determined by the board. (1909, c. 444, s. 11; 1923, c. 42, s. 4; 1935, c. 63; C. S. 6695.)

Editor's Note.—The amendment of 1935 added the last sentence of this section.

§ 90-124. Revocation and regrant of certificate.—The board shall have the power to make such rules and regulations, not inconsistent with the laws of the State of North Carolina, as may be necessary and proper for the regulation of the practice of the profession of optometry, and for the performance of its duties. The board shall have the power to revoke any certificate of registration granted by it under this article for conviction of crime, habitual drunkenness, gross incompetence, contagious or infectious disease; and the board shall likewise have the power to revoke any such certificate of registration upon the finding by the board that the holder of such certificate has been guilty of unethical conduct or practice.

Unethical practice as herein stipulated as a condition for revocation of license shall include the following:

1. Advertising the "free examination of the eyes," "free consultation," "consultation without obligation," "free advice," or any words or phrases of similar import which convey, or are calculated to convey, the impression to the public that the eyes are examined free, or of a character tending to deceive or mislead the public, or in the nature of "bait advertising";

2. Use of advertising, directly or indirectly, whether printed, radio, display, or of any other nature which seeks or solicits practice on any installment payment plan;

3. House-to-house canvassing or peddling, directly or through any agent or employee, for the purpose of selling, fitting, or supplying frames, mounting, lenses, or other ophthalmic products.

Before any certificate shall be so revoked for any of the grounds or reasons herein set forth, the holder thereof shall be served with a written notice by any officer authorized to serve civil summons. The said notice shall inform the holder of the charge or charges against him and shall specify the day, which shall be at least 30 days from the date of the issuance of the notice, the place, and the time of the hearing before the board. The holder of the certificate shall have an opportunity to produce testimony in his behalf, and to confront the witnesses against him. Any person whose certificate has been revoked for any of the grounds or reasons herein set forth, or on account of non-payment of dues, may, after the expiration of ninety days, and within two years, apply to the board to have same regranted, and the holder thereof shall be served with a written notice and at the discretion of the board, license to practice optometry may be restored to such person. (1909, c. 444, s. 13; 1935, c. 63; C. S. 6697.)

Editor's Note.—Public Laws of 1935, c. 63, struck out the former section and inserted the above in lieu thereof. A comparison of the two sections is necessary to determine the changes.

§ 90-125. Practicing under other than own name or as a salaried or commissioned employee.—It shall be unlawful for any person licensed to practice optometry under the provisions of this article to advertise, practice, or attempt to practice under a name other than his own, except as an associate of or assistant to an optometrist licensed under the laws of the state of North Carolina; and it shall be likewise unlawful for any corporation, lay body, organization, group, or lay individual to engage, or undertake to engage, in the practice of optometry through means of engaging the services, upon a salary or commission basis, of one licensed to practice optometry or medicine in any of its branches in this state. Likewise, it shall be unlawful for any optometrist licensed under the provisions of this article to undertake to engage in the practice of optometry as a salaried or commissioned employee of any corporation, lay
body, organization, group, or lay individual. (1935, c. 63; 1937, c. 362, s. 2.)

Editor's Note.—The 1937 amendment inserted the words "or medicine in any of its branches" near the end of the first sentence.

Where Suit to Enjoin Enforcement of Section Not Allowed by Federal Court.—Defendants had been enjoined by a state court for an alleged violation of this section. In a suit brought in the district court to enjoin the enforcement of this section, as violating the commerce clause and due process and equal protection clauses of the constitution, it was held that this was a suit to enjoin the decree of a state court and was prohibited by a federal statute. Ritholz v. North Carolina State Board of Examiners, 18 F. Supp. 499.

§ 90-126. Violation of article forbidden.—Any person who shall violate any of the provisions of this article, and any person who shall hold himself out to the public as a practitioner of optometry without a certificate of registration provided for herein, shall be deemed guilty of a misdemeanor, and upon conviction may be punished by a fine of not more than one hundred dollars or imprisonment for not more than four months, or both, in the discretion of the court. (1909, c. 444, s. 14; C. S. 6698.)

§ 90-126.1. Board may enjoin illegal practices.—In view of the fact that the illegal practice of optometry imminently endangers the public health and welfare, and is a public nuisance, the North Carolina state board of optometry may, if it shall find that any person is violating any of the provisions of this article, apply to the superior court for a temporary or permanent restraining order or injunction to restrain such person from continuing such illegal practices. If upon such application, it shall appear to the court that such person has violated, or is violating, the provisions of this article, the court shall issue an order restraining any further violations thereof. All such actions by the board for injunctive relief shall be governed by the provisions of article thirty-seven of the chapter under the provisions of § 90-126. (1943, c. 444.)

§ 90-127. Application of article.—Nothing in this article shall be construed to apply to physicians and surgeons authorized to practice under the laws of North Carolina, except the provisions contained in § 90-125, or prohibit persons to sell spectacles, eyeglasses, or lenses as merchandise from permanently located and established places of business. (1909, c. 444, s. 15; 1937, c. 362, s. 3; C. S. 6699.)

Editor's Note.—The 1937 amendment inserted the reference to § 90-125.

§ 90-128. Repeal of laws; exception.—Nothing in the provisions amending §§ 90-114, 90-118, 90-122, and 90-133, shall repeal any of the provisions of § 90-127. (1923, c. 42, s. 7; C. S. 6699(b).)

Art. 7. Osteopathy.

§ 90-129. Osteopathy defined.—For the purpose of this article osteopathy is defined to be the science of healing without the use of drugs, as taught by the various colleges of osteopathy recognized by the North Carolina Osteopathic Society, Incorporated. (1907, c. 764, s. 8; 1913, c. 92, s. 3; C. S. 6706.)

§ 90-130. Board of examiners; membership; officers; meetings.—There shall be a state board of osteopathic examination and registration, consisting of five members appointed by the governor, in the following manner, to wit: within thirty days after this article goes into effect the governor shall appoint five persons who are reputable practitioners of osteopathy, selected from a number of not less than ten who are recommended by the North Carolina osteopathic society, and this number may be increased to fifteen, upon the request of the governor; the recommendation of the president and secretary being sufficient proof of the appointees' standing in the profession; and said appointees shall constitute the first board of osteopathic examination and registration. Their term of office shall be so designated by the governor that the term of one member shall expire each year. Thereafter in each year the governor shall in like manner appoint one person to fill the vacancy in the board thus created, from a number of not less than five, who are recommended by the state osteopathic society; the term of said appointee to be for five years. A vacancy occurring from any other cause shall be filled by the governor for the unexpired term in the same manner as last above stated. The board shall, within thirty days after its appointment, meet in the city of Raleigh, and organize by electing a president, secretary and treasurer, each to serve for one year. Thereafter the election of said officers shall occur annually. The treasurer and secretary shall each give bond, approved by the board, for the faithful performance of their respective duties. In such sum as shall be found from time to time determine. The board shall have a common seal, and shall formulate rules to govern its actions; and the president and secretary shall be empowered to administer oaths. The board shall meet in the city of Raleigh at the call of the president, in the month following the election of its officers, and in July of each succeeding year, and at such other times and places as a majority of the board may designate. Three members of the board shall constitute a quorum, but no certificate to practice osteopathy shall be granted on an affirmative vote of less than three. The board shall keep a record of its proceedings, and a register of all applicants for certificates, giving the name and location of the institution granting the applicant the degree of doctor of or diploma in osteopathy, the date of his or her diploma, and also whether the applicant was rejected or a certificate granted. The record and registers shall be prima facie evidence of all matters recorded therein. (1907, c. 764, s. 1; 1913, c. 92, s. 1; 1937, c. 301, s. 1; C. S. 6701.)

Editor's Note.—The 1937 amendment struck out the words "or other nondrug-giving school of medical practice" formerly appearing after the word "osteopathy" in the next to the last sentence.

§ 90-131. Examination and certification of applicant; prerequisites.—Any person, before engaging in the practice of osteopathy in this state, shall, upon the payment of a fee of twenty-five dollars, make application for a certificate to practice osteopathy to the board of osteopathic examination and registration on a form prescribed by the board, giving, first, his name, age (which shall not be less than twenty-one years), and residence; second, evidence that such appli-
§ 90-132. When examination dispensed with; temporary permit.—The board may, in its discretion, dispense with an examination in the case, first, of an osteopathic physician duly authorized to practice osteopathy in any other state or territory, or the District of Columbia, who presents a certificate of license issued after an examination by the legally constituted board of such state, territory, or District of Columbia, accorded only to applicants of equal grade with those required in this state; or, second, an osteopathic physician who has been in the actual practice of osteopathy for five years, who is a graduate of a reputable school of osteopathy, who may desire to change his residence to this state, and who makes application on a form to be prescribed by the board, accompanied by a fee of twenty-five dollars.

The secretary of the board may grant a temporary permit until a regular meeting of the board, or to such time as the board can conveniently meet, to one whom he considers eligible to practice in the state, and who may desire to commence the practice immediately. Such permit shall only be valid until legal action of the board can be taken. In all the above provisions the fee shall be the same as charged to applicants for examination. (1907, c. 764, s. 2; C. S. 6703.)

§ 90-133. Fees held by board; salaries; payment of expenses.—All fees shall be paid in advance to the treasurer of the board, to be by him held as a fund for the use of the state board of osteopathic examination and registration. The compensation and expenses of the members and officers of said board, and all expenses proper and necessary, in the opinion of said board, to discharge its duties under and to enforce the law, shall be paid out of such fund, upon the warrant of the president and secretary of said board, and no expense shall be created to exceed the income of fees or fines as herein provided. The expenses shall be fixed by the board, but shall not exceed ten dollars per day per member, and railroad and hotel expenses. (1907, c. 764, s. 3; C. S. 6705.)

§ 90-134. Subject to state and municipal regulations.—Osteopathic physicians shall observe and be subject to all state and municipal regulations relating to the control of contagious diseases, the reporting and certifying of births and deaths, and all matters pertaining to public health, the same as physicians of other schools of medicine, and such reports shall be accepted by the officers or department to whom the same are made. (1907, c. 764, s. 4; C. S. 6706.)

§ 90-135. Record of certificates; fees. — Every person holding a certificate from the state board of examination and registration shall have it recorded in the office of the county clerk of the county in which he or she expects to practice. Until such certificate is filed for record, the holder shall exercise none of the rights or privileges therein conferred. Said clerk of the county shall keep in a book for that purpose a complete list of all certificates recorded by him, with the date of the recording of each certificate. Each holder of a certificate shall pay to said clerk a fee of one dollar for making such record. (1907, c. 764, s. 5; C. S. 6707.)
§ 90-136. Revocation or suspension of license. — The North Carolina state board of osteopathic examination and registration may refuse to issue a license to any one otherwise qualified, and may suspend or revoke any license issued by it to any osteopathic physician, who is not of good moral character, and/or for any one or any combination of the following causes:  
1. Conviction of a felony, as shown by a certified copy of the record of the court of conviction;  
2. The obtaining of or an attempt to obtain a license, or practice in the profession, or money, or any other thing of value, by fraudulent misrepresentations;  
3. Gross malpractice;  
4. Advertising by means of knowingly false or deceptive statements;  
5. Advertising, practicing, or attempting to practice under a name other than one's own;  
6. Habitual drunkenness or habitual addiction to the use of morphine, cocaine, or other habit-forming drugs.  
Each of the following acts constitutes a misdemeanor, punishable upon conviction by a fine not less than twenty-five ($25.00) dollars nor more than two hundred ($200.00) dollars; or imprisonment for not less than thirty days nor more than one year, or both in the discretion of the court:  
1. The practice of osteopathy or an attempt to practice osteopathy, or professing to do so without a license;  
2. The obtaining of or an attempt to obtain a license, or practice in the profession, or money, or any other thing of value by fraudulent misrepresentation;  
3. The making of any wilfully false oath or affirmation whenever an oath or affirmation is required by this article;  
4. Advertising, practicing or attempting to practice osteopathy under a name other than one's own.  
The state board may neither suspend nor revoke any license, however, for any of the causes hereinabove set forth unless the person accused has been given at least twenty days notice in writing of the charge against him and a public hearing had by said board, or a quorum thereof.  
At the time and place named in said notice the said board, or a quorum thereof, shall proceed to hear the charges against the accused upon competent evidence, oral or by deposition, and at said hearing said accused shall have the right to be present in person and/or represented by counsel.  
After hearing all the evidence, including such evidence as the accused may present, the board shall determine its action and announce the same.  
From any action of the board depriving the accused of his license, or certificate of renewal of license, the accused may present, the board shall hear the charges against the accused upon personal and/or represented by counsel.  
At said hearing, including such evidence as the accused may present, the board shall determine its action and announce the same.  
Whenever any osteopath has been deprived of his license, the North Carolina state board of osteopathic examination and registration, in its discretion, may restore said license upon due notice being given and hearing had, and satisfactory evidence produced of proper reformation of the licentiate before restoration. (1937, c. 301, s. 3.)

§ 90-137. Restoration of revoked license. — The North Carolina state board of osteopathic examination and registration may refuse to issue a license to any one otherwise qualified, and may suspend or revoke any license issued by it to any osteopathic physician, who is not of good moral character, and/or for any one or any combination of the following causes:  
1. Conviction of a felony, as shown by a certified copy of the record of the court of conviction;  
2. The obtaining of or an attempt to obtain a license, or practice in the profession, or money, or any other thing of value, by fraudulent misrepresentations;  
3. Gross malpractice;  
4. Advertising by means of knowingly false or deceptive statements;  
5. Advertising, practicing, or attempting to practice under a name other than one's own;  
6. Habitual drunkenness or habitual addiction to the use of morphine, cocaine, or other habit-forming drugs.  
Each of the following acts constitutes a misdemeanor, punishable upon conviction by a fine not less than twenty-five ($25.00) dollars nor more than two hundred ($200.00) dollars; or imprisonment for not less than thirty days nor more than one year, or both in the discretion of the court:  
1. The practice of osteopathy or an attempt to practice osteopathy, or professing to do so without a license;  
2. The obtaining of or an attempt to obtain a license, or practice in the profession, or money, or any other thing of value by fraudulent misrepresentation;  
3. The making of any wilfully false oath or affirmation whenever an oath or affirmation is required by this article;  
4. Advertising, practicing or attempting to practice osteopathy under a name other than one's own.  
The state board may neither suspend nor revoke any license, however, for any of the causes hereinabove set forth unless the person accused has been given at least twenty days notice in writing of the charge against him and a public hearing had by said board, or a quorum thereof.  
At the time and place named in said notice the said board, or a quorum thereof, shall proceed to hear the charges against the accused upon competent evidence, oral or by deposition, and at said hearing said accused shall have the right to be present in person and/or represented by counsel.  
After hearing all the evidence, including such evidence as the accused may present, the board shall determine its action and announce the same.  
From any action of the board depriving the accused of his license, or certificate of renewal of license, the accused shall have the right of appeal to the superior court of the county wherein the hearing was held, upon filing notice of appeal within ten days of the decision of the board.  
The record of the hearing before the North Carolina state board of osteopathic examination and registration shall constitute the record upon appeal in the superior court. (1937, c. 301, s. 3.)

§ 90-138. Objects of North Carolina osteopathic society.—The object of the North Carolina osteopathic society shall be to unite the osteopaths of this state for mutual aid, encouragement, and improvements; to encourage scientific research in the laws of health and treatment of diseases of the human family; to elevate the standard of professional thought and conduct in the practice of osteopathy and to restrict the practice of osteopathy to persons educated and trained in the science and possessing a diploma from a reputable college of osteopathy. (1907, c. 764, s. 7; C. S. 6709.)

Art. 8. Chiropractic.

§ 90-139. Creation and membership of board of examiners. — There is hereby created and established a board to be known by the name and style of the state board of chiropractic examiners. The board shall be composed of three practicing chiropractors of integrity and ability, who shall be residents of the state, and no more than two members of said board shall be graduates from the same school or college of chiropractic. (1917, c. 73, s. 1; C. S. 6710.)

Editor's Note.—The case of State v. Gibson, 169 N. C. 381, 85 S. E. 7, was decided before this and following sections were passed. The above cited case applied the rule laid down in § 90-131 to all nondrug-giving practitioners.

§ 90-140. Appointment; term; successors; recommendations. — The governor shall appoint the members of the state board of chiropractic examiners, whose terms of office shall be as follows: One member shall be appointed for a term of one year from the close of the next regular annual meeting of the North Carolina chiropractic association; one member shall be appointed for a term of two years from such time, and one member shall be appointed for a term of three years from such time. Annually thereafter, at the time of the annual meeting or immediately thereafter the governor shall appoint one member of the state board of chiropractic examiners, whose term of office shall be three years, and such members of the board of examiners shall be appointed from a number of not less than five who shall be recommended by the North Carolina chiropractic association. (1917, c. 73, s. 2; 1933, c. 442, s. 1; C. S. 6711.)

Editor's Note.—Public Laws of 1933, c. 442, changed "North Carolina board of chiropractors" to "North Carolina chiropractic association."

§ 90-141. Organization and vacancies. — The board of chiropractic examiners shall elect such officers as they may deem necessary, and in case of a vacancy, caused by death or in any other manner, a majority of the board shall have the right to fill the vacancy by the election of some other member of the North Carolina chiropractic association. (1917, c. 73, s. 4; 1933, c. 442, s. 1; C. S. 6713.)

Editor's Note.—Public Laws of 1933, c. 442, changed "North Carolina board of chiropractors" to "North Carolina chiropractic association."
§ 90-142. Rules and regulations. — The state board of chiropractic examiners may adopt suitable rules and regulations for the performance of their duties. (1919, c. 148, s. 4; C. S. 6714.)

§ 90-143. Definitions of chiropractic; examinations; educational requirements. — Chiropractic is herein defined to be the science of adjusting the cause of disease by realigning the twenty-four movable vertebrae of the spine, releasing pressure on nerves radiating from the spine to all parts of the body, and allowing the nerves to carry their full quota of health current (nerve energy) from the brain to all parts of the body. It shall be the duty of the board of examiners to examine all applicants who shall furnish satisfactory proof of good character and of graduation from a regular chiropractic school of good standing, and such examination shall embrace such branches of study as are usually included in the regular course of study for chiropractors in chiropractic schools or colleges of good standing, including especially an examination of each applicant in the science of chiropractic as herein defined. Every applicant for license shall furnish to the said board of examiners sufficient and satisfactory evidence that, prior to the beginning of his course in chiropractic, he had obtained a high school education, or what is equivalent therefor, entitling him to admission in a reputable college or university; and he shall also exhibit to the said board of chiropractic examiners, or satisfy them that he holds, a diploma from a reputable chiropractic college, and not a correspondence school, and that said diploma was granted to him on a personal attendance course from three to four years. It is provided that the said state board of chiropractic examiners and the North Carolina chiropractic association shall hold their annual meetings at the same time and place. But the said board of examiners may, in their discretion, meet not more than three days in advance of the annual meeting of the North Carolina chiropractic association. (1917, c. 73, s. 6; 1933, c. 442, s. 1; C. S. 6716.)

Editor's Note.—Public Laws of 1933, c. 442, changed “North Carolina board of chiropractors” to “North Carolina chiropractic association.”

§ 90-144. Annual meetings. — The board of chiropractic examiners and the North Carolina chiropractic association shall hold their annual meetings at the same time and place. But the said board of examiners may, in their discretion, meet not more than three days in advance of the annual meeting of the North Carolina chiropractic association. (1917, c. 73, s. 6; 1933, c. 442, s. 1; C. S. 6716.)

§ 90-145. Grant of license; temporary license. — The board of chiropractic examiners at such regular annual meeting of the board shall grant to each applicant who is found to be competent, upon examination, a license authorizing him or her to practice chiropractic in North Carolina. Any two members of said board may grant a temporary license to any applicant who shall comply with the requirements of this article as to proof of good character and of graduation from a chiropractic school or college as prescribed in this article; but such temporary license shall not continue in force longer than until the next annual meeting of the said board of examiners, and in no case shall a temporary license be granted to an applicant who has already been refused a license by the board of examiners at an annual meeting. (1917, c. 73, s. 7; C. S. 6717.)

§ 90-146. Graduates from other states. — A graduate of a regular chiropractic school who comes into this state from another state may be granted a license by the board of examiners as required in his article. (1917, c. 73, s. 8; C. S. 6718.)

§ 90-147. Practice without license a misdemeanor. — Any person practicing chiropractic in this state without having first obtained a license as provided in this article shall be guilty of a misdemeanor and fined or imprisoned, or both, in the discretion of the court. (1917, c. 73, s. 9; C. S. 6719.)

§ 90-148. Records of board. — The secretary of the board of chiropractic examiners shall keep a record of the proceedings of the board, giving the name of each applicant for license, and the name of each applicant licensed and the date of such license. (1917, c. 73, s. 10; C. S. 6720.)

§ 90-149. Application fee.—Each applicant shall pay the secretary of said board a fee of twenty-five dollars. (1917, c. 73, s. 11; C. S. 6721.)

§ 90-150. Exempt from jury service. — All duly licensed chiropractors of this state shall be exempt from service as jurors in any of the courts of this state. (1933, c. 442, s. 2.)

§ 90-151. Extent and limitation of license.—Any
person obtaining a license from the board of chiropractic examiners shall have the right to practice the science known as chiropractic, in accordance with the method, thought, and practice of chiropractors, as taught in recognized chiropractic schools and colleges, but shall not prescribe for or administer to any person any medicine or drugs, nor practice osteopathy or surgery. (1917, c. 73, s. 12; 1933, c. 442, s. 3; C. S. 6722.)

Editor's Note.—Public Laws of 1913, c. 442, inserted, near the middle of this section, the words "as taught in recognized chiropractic schools and colleges."

§ 90-152. Registration of license.—Any person desiring to engage in the practice of chiropractic, having first obtained a license as herein provided, shall appear before the clerk of the superior court of the county in which he resides, or proposes to practice, for registration as a chiropractor. He shall produce and exhibit to the said clerk a license obtained from the board of chiropractic examiners, and upon such exhibition the clerk shall register the name and residence of the applicant, giving the date of such registration, in a book to be kept for the purpose of registering chiropractors, and shall issue to him a certification of such registration under the seal of the superior court of such county, for which the clerk shall be entitled to collect from said applicant a fee of fifty cents. The person obtaining such certificate shall be entitled to practice chiropractic anywhere in this state; but if he shall remove his residence to another county, he shall exhibit said certificate to the clerk of the superior court of such other county and be registered. Any one receiving a temporary license as provided in this article shall not be entitled to register, but may practice anywhere in this state during the time such temporary license shall be in force. (1917, c. 73, s. 13; C. S. 6723.)

§ 90-153. Licensed chiropractors may practice in public hospitals.—A licensed chiropractor in this state may have access to and practice chiropractic in any hospital or sanitarium in this state that receives aid or support from the public. (1919, c. 148, s. 3; C. S. 6724.)

§ 90-154. Grounds for refusal or revocation of license.—The board of chiropractic examiners may refuse to grant or may revoke a license to practice chiropractic in this state, upon the following grounds: Immoral conduct, bad character, the conviction of a crime involving moral turpitude, habitual intemperance in the use of ardent spirits, narcotics, or stimulants to such an extent as to incapacitate him or her for the performance of such professional duties. (1917, c. 73, s. 14; C. S. 6725.)

§ 90-155. Annual fee for renewal of license.—All persons practicing chiropractic in this state shall, on or before the first Tuesday after the first Monday in January in each year after licenses issued to them as herein provided, pay to the secretary of the board of chiropractic examiners a renewal license fee of ten ($10.00) dollars, the payment of which, and a receipt from the secretary of the board, shall work a renewal of the license fee for twelve months. Any license or certificate granted by the board under this article shall automatically be cancelled if the holder thereof fails to secure a renewal within three months from the time herein provided; but any license thus cancelled may, upon evidence of good moral character and proper proficiency, be restored upon the payment of fifteen ($15.00) dollars. (1917, c. 73, s. 15; 1933, c. 442, s. 4; 1937, c. 293, s. 2; C. S. 6726.)

Editor's Note.—Prior to the 1927 amendment the fee specified in the first paragraph was two dollars and the fee in the second paragraph was ten dollars.

§ 90-156. Pay of board and authorized expenditures.—The members of the board of chiropractic examiners shall receive their actual expenses, including railroad fare and hotel bills, when meeting for the purpose of holding examinations, and performing any other duties placed upon them by this article, such expenses to be paid by the treasurer of the board out of the money received by him as license fees, or from renewal fees. The board shall also expend out of such fund so much as may be necessary for preparing licenses, securing seal, and all other necessary expenses in connection with the duties of the board. (1917, c. 73, s. 16; C. S. 6727.)

§ 90-157. Chiropractors subject to state and municipal regulations.—Chiropractors shall observe and be subject to all state and municipal regulations relating to the control of contagious and infectious diseases. (1917, c. 73, s. 17; C. S. 6728.)

Art. 9. Trained Nurses.

§ 90-158. Board of examiners.—A board of nurse examiners composed of five members, to consist of three registered nurses to be elected by the North Carolina State Nurses' Association, and one representative each from the North Carolina State Medical Society and the North Carolina State Hospital Association, is hereby created to be known by the title "The North Carolina Board of Nurse Examiners."

The members of the first board elected under this article shall serve as follows: The representative of the North Carolina State Medical Society and the representative of the North Carolina State Hospital Association shall serve for a term expiring June 1, 1926, or until their successors are qualified; and the three registered nurses elected by the North Carolina State Nurses' Association shall serve for a term expiring June 1, 1926, or until their successors are qualified. Thereafter, each member of said board shall serve a term of three years, or until his or her successor is appointed. The board shall fill any vacancy for an unexpired term.

The Board of nurse examiners is hereby empowered to prescribe such regulations as it may deem proper, governing applicants for licenses, admission to examinations, the conduct of applicants during examinations, and the conduct of the examinations proper with the approval of the standardization board hereinafter created. (1917, c. 17, s. 1; 1925, c. 87, s. 2; 1931, c. 56; C. S. 6729.)

Editor's Note.—Prior to Public Laws of 1925 it was provided by this section that there be two physicians on the board elected by the state medical society. A provision for the appointment of an inspector of the training schools by the nurse association was omitted, and there is a new
provision giving the board power to make rules and regula-
tions, by the amendment.
The Act of 1931 merely changed "The Board of Nurse
Examiners of North Carolina" to its present title.

§ 90-159. Committee on standardization.—A
joint committee on standardization, consisting of
three members appointed from the North Carolina
state nurses' association, and four members from
the North Carolina state hospital association,
whose members shall serve for a term of three
years, or until their successors are elected, is here-
by created. The joint committee on standardiza-
tion shall advise with the board of nurse examiners
herein created in the adoption of regulations gov-
erning the education of nurses, and shall jointly
with the North Carolina board of nurse examiners
have power to establish standards and provide
minimum requirements for the conduct of schools
of nursing of which applicants for examination
for nurse's license under this chapter must be
graduates before taking such examination. (1925,
c. 87, s. 3; 1931, c. 56; 1933, c. 203.)

Editor's Note.—The Act of 1911 struck out the second
sentence of this section and inserted the one above in
lieu thereof.

Public Laws of 1933, c. 203, changed the number of mem-
bers from the North Carolina State Hospital Association
from three to four, and inserted the provision making the
eexercise of power joint with the North Carolina board of
nurse examiners.

§ 90-160. Educational director of schools of
nursing.—An educational director of schools of
nursing shall be annually appointed by the North
Carolina State Nurses' Association, who shall
report annually to the board of nurse examiners,
and to the North Carolina State Hospital Asso-
ciation. Such director shall be a registered nurse,
her duties and compensation to be fixed by the
board of nurse examiners and the standardization
board. (1925, c. 87, s. 4.)

§ 90-161. Organization of board; seal; officers;
compensation.—Three members of the board shall
constitute a quorum, two of whom shall be nurses.
The board shall adopt and have custody of a
seal and shall frame by-laws and regulations for
its own government and for the execution of the
provisions of this article. The officers of said
board shall be a president and a secretary-treas-
urer, both to be elected from its nurse members.
The treasurer shall give bond in such sum as may
be fixed by the by-laws, and the premium there-
for to be paid from the treasury of said board.
The treasurer shall give bond in such sum as may
be fixed in the by-laws, and the premium there-
for to be paid from the treasury of said board.
The members of the board shall receive such
compensation in addition to actual traveling and
hotel expenses as shall be fixed by the board.
The secretary-treasurer may receive an
additional salary to be fixed by the board, said
expenses and salaries to be paid from fees received
by the board under the provisions of this article,
and in no case to be charged upon the treasury of
the State.

All moneys received in excess of said allowance,
and other expenses provided for, shall be held by
the secretary-treasurer for the expenses of the
board and for extending nursing education in the
State. (1917, c. 17, s. 2; 1925, c. 87, s. 5; C. S.
6730.)

Editor's Note.—Prior to Public Laws 1925, four dollars
per diem and actual traveling and hotel expenses was the
compensation of each member of the board.

§ 90-162. Meetings for examination; prerequi-
sites for applicants.—The board of nurse exami-
ners of North Carolina shall meet less than once annually, and at any time
more than ten or more applicants shall notify the secretary-
treasurer that they desire an examination. Thirty
days prior to such meetings notice stating time
and place of examination shall be published in one
nursing journal and three daily State papers.

At such meetings it shall be the duty of the
board of nurse examiners to examine graduate
nurses applying for license to practice their profes-
sion in North Carolina. An applicant must prove
to the satisfaction of the board that he or she is
twenty-one years of age, is of good moral charac-
ter, and has graduated from high school or has
equivalent credits.

Applicants shall have graduated from a school
of nursing connected with a general hospital giv-
ing a three years' course of practical and theo-
retical instruction, which said hospital meets the
minimum requirements and provides standards for
the conduct of schools of nursing which may have
been set up and established by the joint commit-
tee on standardization provided for in § 90-159.
Such schools of nursing may give credit for col-
lege work on the three years' course to the extent
and as may be approved by the board of nurse
examiners, such credits not to total more than
one year for any one person. (1917, c. 17, s. 3;
1925, c. 87, s. 6; 1931, c. 56; C. S. 6731.)

Editor's Note.—Public Laws 1925 added a provi-
sion that schools shall meet the requirements of the American Nurse's Association formerly appearing in the third para-
graph of this section. The Act of 1931 struck out this
paragraph and inserted another in lieu thereof. This Act
struck out from the second paragraph the words "twenty-
at least one year of high school education or its equivalent,"
and inserted in lieu thereof the words: "graduated from
high school or has equivalent credits."

§ 90-163. Scope of examination; fees; licensing.
—Examinations shall be held in anatomy and
physiology, materia medica, dietetics, hygiene and
elementary bacteriology, obstetrical, medical and
surgical nursing, nursing of children, contagious
diseases and ethics of nursing, and such other
subjects as may be prescribed by the examining board.
The subject of contagious diseases may be given
in theory only. If on examination the applicant
shall not be found competent, the board shall grant
a license authorizing him or her to register as
herein provided and to use the title "registered nurse," signified by the letters "R. N."

Before an applicant shall be permitted to take
such an examination he or she shall pay to the sec-
tary of the examining board an examination fee
of ten dollars. In the event of the failure of the ap-
licant to pass examination, one-half of the above
named fee shall be returned to the applicant.
(1917. c. 17, s. 4; 1925, c. 87, s. 7; C. S. 6733.)

Editor's Note.—This section was re-enacted without change
by Public Laws 1925.

§ 90-164. Licenses and certificates without ex-
amination; fee.—The board of nurse examiners
shall have authority to issue licenses without ex-
amination to nurses registered in other states:
Provided, that said states shall maintain an equi-

valent standard of registration requirements. The
examination fee shall accompany each such appli-
cation for license.

The board shall also have power in the exercise
of its discretion to issue a license without examination to any applicant who has been duly registered as a registered nurse under the laws of another state: Provided, said applicant possesses qualifications at least equal to those required by the State of North Carolina. The fee for license without examination shall be twenty-five dollars ($25.00). (1917, c. 17, s. 5; 1925, c. 87, s. 8; C. S. 6733.)

Editor's Note.—The second paragraph of this section is new with Public Laws 1925.

§ 90-165. Only licensed nurses to practice.—On and after February 28, 1925, all "trained," "graduate," "licensed," or "registered" nurses must obtain licenses from the board of nurse examiners before practicing their profession in this State, and before using the abbreviation "R. N." must obtain certificates of registration from the clerk of the Superior Court of any county as herein-after provided; but nothing in this section shall be construed to apply to any nurse who is qualified and practicing her profession on February 28, 1925. (1917, c. 17, s. 6; 1917, c. 288; 1925, c. 87, s. 9; C. S. 6734.)

Editor's Note.—Public Laws 1925 omitted a former proviso preventing the section having retroactive effect, otherwise it is substantially the same.

§ 90-166. Certain persons not affected by this article.—This article shall not be construed to affect or apply to the nursing of the sick by friends or members of the family. (1917, c. 17, s. 7; 1925, c. 87, s. 10; 1931, c. 56; C. S. 6735.)

Editor's Note.—This section was re-enacted without change by Public Laws 1925.

The Act of 1931 struck out the whole of this section and inserted in lieu thereof the above.

§ 90-167. Temporary nursing in state.—The board of nurse examiners may make reasonable rules of comity allowing registered nurses from other states to do temporary nursing in this State. (1925, c. 87, s. 10.)

§ 90-168. Registration of nurses.—The clerk of the Superior Court of any county, upon presentation to him of a license from the State Board of Nurse Examiners issued at a date not more than twelve months previous, shall enter the date of registration and the name and residence of the holder thereof in a book to be kept in his office for this purpose, and marked "record of registered nurses," and shall issue to the applicant a certificate of such registration, under the seal of the Superior Court of the county upon a form to be prescribed by the board of nurse examiners. For such registration he shall charge a fee of fifty cents. (1917, c. 17, s. 5; 1925, c. 87, s. 8; C. S. 6733.)

Editor's Note.—This section was re-enacted without change by Public Laws 1925.

§ 90-169. Revocation of license.—The board shall have power to revoke the license of any registered nurse upon conviction of gross incompetence, dishonesty, intemperance, or any act derogatory to the morals or standing of the profession of nursing. No license shall be revoked except upon charges preferred. The accused shall be furnished a written copy of such charges, and given not less than twenty days notice of the time and place when said board shall accord a full and fair hearing on the same. Upon the revocation of a license and certificate the name of the holder there-
§ 90-176. Practice of midwifery regulated by state board of health.—The state board of health is hereby authorized, empowered and directed to adopt, promulgate and enforce rules and regulations governing the practice of midwifery in this State. (1935, c. 225, s. 1.)

§ 90-177. Permit from state board of health.—No person shall practice midwifery in this State, except upon a permit granted and issued by the state board of health, under rules and regulations which it shall adopt with respect thereto, and upon forms which it shall prescribe. Provided that all persons who have practiced midwifery in this State for a period of five (5) years or more shall as a matter of right be entitled to the issuance of a permit to practice such occupation, if such person or persons shall make application therefor on or before April 24, 1936. (1935, c. 225, s. 2.)

§ 90-178. Practicing without permit a misdemeanor; authority of local health officers unaffected; counties may exempt themselves from state board of health—The state board of health is hereby authorized, empowered and directed to promulgate rules and regulations governing the practice of midwifery in this State. (1911, c. 34, s. 4; C. S. 6753.)

§ 90-179. State veterinary medical association—The association of veterinary surgeons and physicians calling themselves the North Carolina state veterinary medical association is declared to be a body politic and corporate under the name and style of The North Carolina State Veterinary Medical Association. The governor shall annually appoint and qualify a president and a secretary, who shall also perform the duties of a treasurer. None of the expenses of the board or of the members shall be paid by the state. (Rev., s. 5433; 1903, c. 503, ss. 3, 4, 6, 7; C. S. 6756.)

§ 90-180. Board of veterinary medical examiners; appointment; membership; organization.—In order to properly regulate the practice of veterinary medicine and surgery there shall be a board to consist of five members of the North Carolina veterinary medical association. The governor shall annually appoint one member of such board, who shall hold his office for five years, and until his successor is appointed and qualified. Every person so appointed shall, within thirty days after notice of appointment, appear before the clerk of the superior court of the county in which he resides and take oath to faithfully discharge the duties of his office. (Rev., s. 5432; 1903, c. 503, s. 2; C. S. 6753.)

§ 90-181. Meeting of board; powers.—The board of examiners shall meet at least once a year at such times and places as the association may decide upon, and remain in session sufficiently long to examine all who may make application at the appointed time for a license. Three members of the board shall constitute a quorum. The board of examiners shall elect a president and a secretary, who shall also perform the duties of a treasurer. They shall keep a regular record of their proceedings in a book to be kept for that purpose, which shall always be open for inspection, and shall keep a record of all applicants for a certificate and of all who are granted a certificate, and shall publish the names of the successful applicants at least once each year in two newspapers published in the state. The board shall have authority to adopt such by-laws and regulations as may be necessary. (Rev., s. 5433; 1903, c. 503, s. 9; C. S. 6757.)

§ 90-182. Compensation of board.—The members of such board shall receive such compensation for their services, not to exceed four dollars per day, and their traveling expenses, as the association may decide upon, to be paid by the secretary of the board out of any money coming into his hands as secretary. None of the expenses of the board or of the members shall be paid by the state. (Rev., s. 5434; 1903, c. 503, s. 9; C. S. 6757.)

§ 90-183. Examination and licensing of veterinarians.—The board of examiners shall, at their annual meeting, examine all applicants who desire license to practice veterinary medicine or surgery. If upon such examination the applicant be found to possess sufficient skill to practice veterinary medicine or surgery, and good moral character, a license or certificate shall be granted him. In no case shall such temporary certificate be granted to any person who has been an unsuccessful applicant for a certificate before the board. (Rev., s. 5435; 1903, c. 503, ss. 3, 5, 8; C. S. 6758.)

§ 90-184. Rescission of license.—The board shall have power to rescind any certificate that may have been granted by it or annul any registration made under this article in accordance with the provisions of §§ 150-1 to 150-8 upon satisfactory proof that the person thus licensed has been guilty of grossly immoral conduct or malpractice as determined by the board. And it shall be the duty of said board to furnish any information pertaining to the practice of veterinary medicine or
§ 90-185. Practitioners before one thousand nine hundred and thirty-five.—All persons who had, on the first day of January, one thousand nine hundred and thirty-five, been practicing veterinary medicine or surgery and who have for a period of twenty years paid all fees as are required by law shall be allowed to practice veterinary medicine or surgery in this State: Provided, that they make affidavit to the effect that they have practiced veterinary medicine or surgery as a profession for a period of twenty years prior to the first day of January, one thousand nine hundred and thirty-five, and that they have for a period of twenty years prior to the first day of January, one thousand nine hundred and thirty-five, paid all fees as may have been required by law. (Rev., s. 5437; 1903, c. 503, s. 11; 1905, c. 320; 1913, c. 129; 1919, c. 94; 1921, c. 171; Ex. Sess. 1921, c. 68; 1924, c. 26; 1935, c. 387; C. S. 6760.)

Editor's Note.—Public Laws of 1935, c. 387, struck out the former section and inserted the above in lieu thereof. A comparison of the two sections is necessary to determine the changes.

§ 90-186. When may practice without license.—Nothing in this article shall be construed to prohibit any member of the medical profession from prescribing for domestic animals in cases of emergency and collecting a fee therefor, nor to prohibit gratuitous services by any person in an emergency, nor to prevent any person from practicing veterinary medicine or surgery on any animal belonging to himself, or to prevent any one from castrating or spaying any of the domestic animals. And this article shall not apply to the first board of veterinary surgeons in the United States army. (Rev., s. 5438; 1903, c. 505, s. 12; C. S. 6761.)

§ 90-187. Violation of article misdemeanor.—Any person practicing veterinary surgery or medicine in this state, without first having complied with the provisions of this article, shall be guilty of a misdemeanor, and upon conviction shall be fined not less than fifty dollars or imprisoned not less than thirty days, in the discretion of the court. (1913, c. 129, s. 2; C. S. 6763.)


§ 90-188. Chiropody defined.—Chiropody (podiatry) as defined by this article is the surgical, medical and mechanical treatment of all ailments of the human foot, except the correction of deformities requiring the use of the knife, amputation of the foot or toes, or the use of an anesthetic other than local. (1919, c. 78, s. 2; C. S. 6765.)

§ 90-189. Unlawful to practice unless registered.—On and after the first of July, one thousand nine hundred and nineteen, it shall be unlawful for any person to practice or attempt to practice chiropody (podiatry) in this state or to hold himself out as a chiropodist (podiatrist) or to designate himself or describe his occupation by the use of any words or letters calculated to lead others to believe that he is a chiropodist (podiatrist) unless he is duly registered as provided in this article. (1919, c. 78, s. 1; C. S. 6764.)

§ 90-190. Board of chiropody examiners; how appointed; terms of office.—There shall be established a board of chiropody (podiatry) examiners for the state of North Carolina. This board shall consist of three members who shall be appointed by the North Carolina pedic association. All of such members shall be chiropodists who have practiced chiropody in North Carolina for a period of not less than one year. The members of the board shall be appointed by said association for a term of three years: Provided, the members of the first board shall be appointed to hold office for one, two and three years respectively, and one member shall be appointed annually thereafter by said association. The board shall have authority to elect its own presiding and other officers. (1919, c. 78, s. 3; C. S. 6765.)

§ 90-191. Applicants to be examined; examination fee; requirements.—Any person not heretofore authorized to practice chiropody (podiatry) in this state shall file with the board of chiropody examiners an application for examination accompanied by a fee of twenty-five dollars, together with proof that the applicant is more than twenty-one years of age, is of good moral character, and has obtained a preliminary education equivalent to four years instruction in a high school. Such applicant before presenting himself for examination, must be a graduate of a legally incorporated school of chiropody (podiatry) acceptable to the board. (1919, c. 78, s. 9; C. S. 6766.)

§ 90-192. Examinations; subjects; certificates.—The board of chiropody examiners shall hold at least one examination annually for the purpose of examining applicants under this article. The examinations shall be held at such time and place as the board may see fit, and notice of the same shall be published in one or more newspapers in the state. The board may make such rules and regulations as it may deem necessary to conduct its examinations and meetings. It shall provide such books, blanks and forms as may be necessary to conduct such examinations, and shall preserve and keep a complete record of all its transactions. Examinations for registration under this article shall be in the English language and shall be written, oral, or clinical, or a combination of written, oral, or clinical, as the board may see fit, and notice of the same and issue certificates to the successful candidates, signed by each member of the board; and the board of chiropody examiners shall report annually to the North Carolina pedic association. (1919, c. 78, s. 4; C. S. 6767.)

§ 90-193. Reexamination of unsuccessful applicants.—An applicant failing to pass his examina-
§ 90-194. Practitioners before enactment of this article; certificates.—Every person who is engaged in the practice of chiropody (podiatry) in this state one year next prior to the enactment of this article shall file with the board of chiropody examiners on or before the first day of July, one thousand nine hundred and nineteen, a written application for a certificate to practice chiropody (podiatry), together with proof satisfactory to the board that the applicant is more than twenty-one years of age and has been practicing chiropody in this state one year next prior to the enactment of this article; certificates—Every person who is engaged in the practice of chiropody (podiatry), together with proof satisfactory to the board that the applicant is more than twenty-one years of age and has been practicing chiropody in this state for a period of more than one year next prior to the passage of this article, and upon the payment of a fee of ten dollars the said board of chiropody examiners shall issue to such applicant a certificate to practice chiropody (podiatry) in this state. (1919, c. 78, s. 5; C. S. 6769.)

§ 90-195. Certificates to registered chiropodists of other states.—Applicants registered or certified by examiners of other states whose requirements are equal to those of this state may, upon the payment of a fee of twenty-five dollars, be granted a certificate without examination: Provided, that the provisions of this section shall be extended only to those states which extend to this state the same privilege. (1919, c. 78, s. 8; C. S. 6770.)

§ 90-196. Certificates filed with clerk of court; clerk to keep record.—Every person receiving a certificate from the board shall file the same with the clerk of the court of the city or county in which he resides. It shall be the duty of the clerk to register the name and address and date of the certificate in a book kept for such purpose as a part of the records of his office, and the number of the book and the page therein containing said recorded copy shall appear on the face of the certificate over the name of the clerk recording the same. The person thus registering shall pay to the clerk a fee of fifty cents. (1919, c. 78, s. 7; C. S. 6771.)

§ 90-197. Revocation of certificate; grounds for; suspension of certificate.—The board of chiropody examiners may revoke by a majority vote of its members, and in accordance with the provisions of §§ 150-1 to 150-8, any certificate it has issued, and cause the name of the holder to be stricken from the book of the registration by the clerk of the court in the city or county in which the name of the person whose certificate is revoked is registered, for any of the following causes:
1. The wilful betrayal of a professional secret.
2. Any person who in any affidavit required of the applicant for certificate, registration, or examination under this article shall make a false statement.
3. Any person convicted of a crime involving moral turpitude.
4. Any person habitually indulging in the use of narcotics, ardent spirits, stimulants or any other substance which impairs intellect and judgment to such an extent as in the opinion of the board to incapacitate such person for the performance of his professional duties.

Any person against whom charges have been made shall be notified of the fact and a copy of the charges shall be sent him by the board, and he shall be given a fair and impartial trial by the board, whose decisions shall be made by a majority vote of its members.

The board may suspend any certificate granted under this article for a period not exceeding six months on account of any misconduct on the part of the person registered which would not, in the judgment of the board, justify the revocation of his certificate. (1919, c. 78, ss. 12, 13; C. S. 6772.)

Cross Reference.—As to uniform procedure for suspension or revocation of licenses, see §§ 150-1 to 150-8.

§ 90-198. Fees for certificates and examinations: compensation of board.—To provide a fund in order to carry out the provisions of this article the board shall charge ten dollars for each certificate issued and fifteen dollars for each examination. From such funds all expenses and salaries, not exceeding four dollars per diem for each day actually spent in the performance of the duties of the office and actual railroad expenses in addition, shall be paid by the board: Provided, that at no time shall the expenses exceed the cash balance on hand. (1919, c. 78, s. 14; C. S. 6773.)

§ 90-199. Annual fee of $10 required; cancellation or renewal of license.—On or before the first day of July of each year every chiropodist engaged in the practice of chiropody in this State shall transmit to the Secretary-Treasurer of the said North Carolina State Board of Chiropody Examiners his signature and post office address, the date and year of his or her certificate, together with a fee to be set by the Board of Chiropody Examiners not to exceed ten ($10.00) dollars, and receive therefor a renewal certificate. Any license or certificate granted by said Board under or by virtue of this or the following section, shall automatically be cancelled and annulled if the holder thereof fails to secure the renewal herein provided for within a period of thirty days after the thirty-first day of July of each year, and such delinquent chiropodist shall pay a penalty of five dollars for reinstatement: Provided that any legally registered chiropodist in this state who has retired from practice or who has been absent from the state may, upon furnishing affidavit to that effect, reinstate himself by paying all fees due for the years in which he was absent or retired, the said amount in no case to exceed fees for five years. (1931, c. 191.)

§ 90-200. Issuance of license upon payment of fees.—Upon payment of the fees prescribed in the above section, by or before July first, nineteen hundred and thirty-one, by any person who has heretofore practiced chiropody in the State of North Carolina, for a period of five successive years regularly, it shall be the duty of the State Board of Chiropody Examiners to issue to said person a license which shall grant to such person all the rights and privileges of chiropodists now engaged in practicing chiropody. (1931, c. 191.)

§ 90-201. Unlawful practice of chiropody a misdemeanor.—Any person who shall practice or attempt to practice chiropody (podiatry) in this state
without having complied with the provisions of this article shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than fifty nor more than two hundred dollars, or shall be imprisoned for not less than thirty nor more than ninety days. Nothing in this article shall be construed to interfere with physicians in the discharge of their professional duties. (1919, c. 78, s. 10; C. S. 6774.)

§ 90-202. Sheriffs and police to report violators of this article.—It shall be the duty of the police department of the cities and the sheriff of each county in the state to see that all practitioners of chiroprisy (podiatry) in the state are legally registered according to the provisions of this article, and to report to the state's attorney of the city or county all cases of violation of this article; whereupon the state's attorney shall promptly prosecute those violating the provisions of this article. (1919, c. 78, s. 11; C. S. 6775.)


§ 90-203. State board; election; qualifications; term; vacancies.—The State board of embalmers shall consist of five members, elected by the state board of health, all of whom shall be licensed and practical embalmers, having experience in the care and disposition of dead human bodies. One member of such board shall be elected in June, one thousand nine hundred and five, and annually thereafter during the month of June one member of such board shall be elected. The term of office shall begin on the first day of July next after the election, and continue for five years. The state board of health shall fill all vacancies in such board. (Rev., s. 4384; 1901, c. 338, ss. 1, 2, 3; 1931, c. 174; C. S. 6777.)

Editor's Note.—The Act of 1931 struck out the words "three of whom shall be members of the State Board of Health, the other two shall be" formerly appearing in lines four and five of this section and inserted in lieu thereof "all of whom shall be licensed and."§ 90-204. Members; removal; oath.—The state board of health shall have power to remove from office any member of said board for neglect of duty, incompetency, or improper conduct. The state board of health shall furnish each person appointed to serve on the state board of embalmers a certificate of appointment. The appointees shall qualify by taking and subscribing to the usual oath of office before some person authorized to administer oaths, within ten days after said appointment has been made, which oath shall be filed with the board of embalmers. (Rev., s. 4385; 1901, c. 338, ss. 3, 4; C. S. 6778.)

§ 90-205. Common seal; powers.—The board shall adopt a common seal, and shall have all the powers and privileges conferred on it by the laws of the state. (Rev., s. 4386; 1901, c. 338, s. 6; C. S. 6779.)

§ 90-206. Meetings; quorum; by-laws; officers; president to administer oaths.—The board shall meet at least once every year, during the month of July, at such place as it may determine. Three members shall constitute a quorum. At each annual meeting the board from its members shall select a president and a secretary, who shall hold their offices for one year, and until their successors are elected. The board shall, from time to time, adopt rules, regulations, and by-laws not inconsistent with the laws of this state or of the United States, whereby the performance of the duties of such board and the practice of embalming of dead human bodies shall be regulated. The president of the board (and in his absence a president pro tempore elected by the members present) is authorized to administer oaths to witnesses testifying before the board. (Rev., s. 4387; 1901, c. 338, ss. 5, 6, 7, 8; C. S. 6780.)

§ 90-207. Grant and renewal of licenses; fees; licenses displayed.—Every person not licensed as an embalmer, now engaged or desiring to engage in the practice of embalming dead human bodies, shall make written application to the state board of embalmers for a license, accompanying the same with a license fee of five dollars, whereupon the applicant shall present himself before the board at a time and place to be fixed by the board, and if the board shall find, upon due examination, that the applicant is of good moral character, possessed of skill and knowledge of said science of embalming and the care and disposition of the dead, and has a responsible knowledge of sanitation and the disinfection of bodies of deceased persons and the apartment, clothing, and bedding, in case of death from infectious or contagious disease, and has had a special course in embalming in an approved school, or two years practical experience with a licensed and practical embalmer, who shall make affidavit upon the application that said applicant has had such experience under him, the board shall issue to such applicant a license to practice the art of embalming and the care and disposition of the dead, and shall register such applicant as a duly licensed embalmer. Such license shall be signed by a majority of the board and attested by its seal. All persons receiving a license under the provisions of this article shall also register the fact at the office of the board of health of the city, and where there is no board of health, with the clerk of the superior court in the county or counties in which it is proposed to carry on said practice, and shall display said license in a conspicuous place in the office of such licentiate. Every registered embalmer who desires to continue the practice of his profession shall annually, during the time he shall continue in such practice, on such day as the board may determine, pay to the secretary of the board a fee of two dollars for the renewal registration. (Rev., s. 4388; 1901, c. 338, ss. 9, 10; 1917, c. 36; 1919, c. 88; C. S. 6781.)

Cross Reference.—As to uniform procedure for suspension or revocation of licenses, see §§ 150-1 to 150-8.

§ 90-208. Embalming without license.—If any person shall practice or hold himself out as practicing the art of embalming, without having complied with the provisions of this article, he shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than fifty nor more than one hundred dollars for each offense. (Rev., s. 3644; 1901, c. 338, s. 14; C. S. 6782.)

§ 90-209. Expenses and salaries of board.—All expenses, salary, and per diem to members of this board shall be paid from fees received under the provisions of this article, and shall in no manner be an expense to the state. All moneys received
in excess of said per diem allowance and other expenses provided for shall be held by the secretary of said board as a special fund for meeting the expenses of said board. (Rev., s. 4389; 1901, c. 338, s. 11; C. S. 6783.)

§ 90-210. Embalming schools have privileges of medical schools as to cadavers.—Schools for teaching embalming shall have extended to them the same privileges as to the use of bodies for dissection while teaching as those granted to medical colleges. (Rev., s. 4390; 1901, c. 338, s. 15; C. S. 6784.)


§ 90-211. Board for distribution.—The North Carolina board of anatomy shall consist of three members, one each from the University of North Carolina School of Medicine, the Duke University School of Medicine, and the Bowman Gray School of Medicine of Wake Forest College, appointed by the deans of the respective medical schools. This board shall be charged with the distribution of dead human bodies for the purpose of promoting the study of anatomy in this state, and shall have power to make proper rules for its government and the discharge of its functions under this article. (Rev., s. 4287; 1903, c. 666, s. 1; 1943, c. 100; C. S. 6785.)

Editor's Note.—The 1943 amendment rewrote this section.

§ 90-212. What bodies to be furnished.—All officers, agents or servants of the state of North Carolina, or of any county or town in said state, and all undertakers doing business within the state, having charge or control of a dead body required to be buried at public expense, or at the expense of any institution supported by state, county or town funds, shall be and hereby are required immediately to notify, and, upon the request of said board or its authorized agent or agents, without fee or reward, deliver, at the end of a period not to exceed thirty-six hours after death, such body into the custody of the board, and permit the board or its agent or agents to take and remove all such bodies or otherwise dispose of them: Provided, that such body be not claimed within thirty-six hours after death to be disposed of without expense to the state, county or town, by any relative within the second degree of consanguinity, or by the husband or wife of such deceased person: Provided, further, that the thirty-six hour limit may be prolonged in cases within the jurisdiction of the coroner where retention for a longer time may be necessary: Provided, further, that the bodies of all such white prisoners dying while in Central Prison or road camps of Wake County, whether death results from natural causes or otherwise, shall be equally distributed among the white funeral homes in Raleigh, and the bodies of all such negro prisoners dying under similar conditions shall be equally distributed among the negro funeral homes in Raleigh; but only such funeral homes can qualify hereunder as at all times maintain a regular licensed, embalmer: Provided, further, that nothing herein shall require the delivery of bodies of such prisoners to funeral directors of Wake County where the same are claimed by relatives or friends.

Whenever the dead body is that of an inmate of any state hospital, the state school for the deaf, dumb and blind, or of any traveler or stranger, it may be embalmed and delivered to the North Carolina board of anatomy, but it shall be surrendered to the husband or wife of the deceased person or any other person within the second degree of consanguinity upon demand at any time within ten days after death upon the payment to said board of the actual cost of it of embalming and preserving the body. (Rev., s. 4288; 1903, c. 666, s. 2; 1911, c. 188; 1923, c. 110; 1937, c. 351; 1943, c. 100; C. S. 6786.)

Editor's Note.—The 1943 amendment rewrote this section.

§ 90-213. Autopsies unlawful without consent of board.—It is hereby declared unlawful to hold an autopsy on any dead human body subject to the provisions of this article without first having obtained the consent, in writing, of the chairman of the board or of his accredited agent: Provided, that nothing in this article shall limit the coroner in the fulfillmen of his duties: Provided, further, that nothing in §§ 90-211 through 90-216, inclusive, shall prevent a person from making testamentary disposition of his or her body after death. (Rev., s. 4289; 1903, c. 666, s. 3; 1911, c. 188; 1943, c. 100; C. S. 6787.)

Editor's Note.—The 1943 amendment rewrote this section.

§ 90-214. Bodies to be distributed to medical schools.—The bodies obtained under this article shall be distributed, with due precautions to shield them from the public view, among the several medical schools in a proportion to be agreed upon by a majority of the members of the North Carolina board of anatomy, such bodies to be used within the state for the advancement of science. (Rev., s. 4290; 1903, c. 666, s. 4; 1943, c. 100; C. S. 6788.)

Editor's Note.—The 1943 amendment rewrote this section.

§ 90-215. How expenses paid.—All expenses for the delivery, distribution and embalming of the dead bodies obtained under this article upon the request of the North Carolina board of anatomy, under such rules and regulations as the board may provide shall be borne by the medical school receiving same, and in no case shall the state or any county or town be liable therefor. (Rev., s. 4291; 1903, c. 666, s. 5; 1943, c. 100; C. S. 6789.)

Editor's Note.—The 1943 amendment rewrote this section.

§ 90-216. Violation of article misdemeanor.—Any person failing or refusing to perform any duty imposed by this article, or violating any of its provisions shall be guilty of a misdemeanor, punishable by a fine and/or imprisonment in the discretion of the court. (Rev., s. 5557; 1903, c. 666, s. 6; 1943, c. 100; C. S. 6796.)

Editor's Note.—The 1943 amendment rewrote this section.

§ 90-217. Limitation upon right to perform autopsy.—The right to perform an autopsy upon the dead body of a human being shall be limited to cases specially provided by statute or by direction or will of the deceased; cases where a coroner or the majority of a coroner's jury deem it necessary upon an inquest to have such an autopsy; and cases where the husband or wife or one of the next of kin or nearest known relative or other person charged by law with the duty of
§ 91-1

Chapter 91. Pawnbrokers.

Sec.

91-1. Pawnbroker defined.
91-2. License; business confined to municipalities.
91-3. Municipal authorities to grant and control license; bond.
91-4. Records to be kept.

§ 91-1. Pawnbroker defined.—Any person, firm, or corporation who shall engage in the business of lending or advancing money on the pledge and possession of personal property, or dealing in the purchasing of personal property or valuable things on condition of selling the same back again at stipulated prices, is hereby declared and defined to be a pawnbroker. (1915, c. 198, s. 1; C. S. 7000.)

§ 91-2. License; business confined to municipalities.—No person, firm, or corporation shall engage in the business of a pawnbroker without being duly licensed, nor have full power and authority to revoke such license and sue for forfeiture of the bond upon a breach thereof. Any person who may obtain a judgment against a pawnbroker and upon which judgment execution is returned unsatisfied, may maintain an action in his own name upon the said bond of said pawnbroker, in any court having jurisdiction of the amount due.

Cross References.—As to the state license tax, see § 105-50.

§ 91-3. Municipal authorities to grant and control license; bond.—The board of aldermen, or other governing body, of any city or town in this state may grant to such person, firm, or corporation as it may deem proper, and who shall produce satisfactory evidence of good character, a license authorizing such person, firm, or corporation to carry on the business of a pawnbroker, which said license shall designate the house in which such person, firm, or corporation shall carry on said business, and no person, firm, or corporation shall carry on the business of a pawnbroker without being duly licensed, nor in any other house than the one designated in the said license. Every person, firm, or corporation so licensed to carry on the business of a pawnbroker shall, at the time of receiving such license, file with the mayor of the city or town granting the same, a bond payable to such city or town in the sum of one thousand dollars, to be executed by the persons so licensed and by two responsible sureties, or a surety company licensed to do business in the State of North Carolina, to be approved of by such person, firm, or corporation shall carry on said business, and no person, firm, or corporation shall carry on the business of a pawnbroker without being duly licensed, nor in any other house than the one designated in the said license. Every person, firm, or corporation so licensed to carry on the business of a pawnbroker shall, at the time of receiving such license, file with the mayor of the city or town granting the same, a bond payable to such city or town in the sum of one thousand dollars, to be executed by the persons so licensed and by two responsible sureties, or a surety company licensed to do business in the State of North Carolina, to be approved of by such person, firm, or corporation shall carry on said business, and no person, firm, or corporation shall carry on the business of a pawnbroker without being duly licensed, nor in any other house than the one designated in the said license. Every person, firm, or corporation so licensed to carry on the business of a pawnbroker shall, at the time of receiving such license, file with the mayor of the city or town granting the same, a bond payable to such city or town in the sum of one thousand dollars, to be executed by the persons so licensed and by two responsible sureties, or a surety company licensed to do business in the State of North Carolina, to be approved of by such person, firm, or corporation shall carry on said business, and no person, firm, or corporation shall carry on the business of a pawnbroker without being duly licensed, nor in any other house than the one designated in the said license.

Cross Reference.—As to authority of coroners, see § 152-7.

§ 91-4. Records to be kept.—All books, records and papers of every kind belonging to or appertaining to any such pawnbroker, shall be open to inspection and examination by the auditor and his deputies at any time. (1915, c. 198, s. 1; C. S. 7001.)

§ 90-218. Post-mortem examination of inmates of certain public institutions.—Upon the death of any inmate of any institution now maintained, or in the future established, by the state, or any city, county or other political subdivision of the state, for the care of the sick, the feeble-minded or insane, the superintendent, or other administrative head of such institution in which such death occurs, is empowered to authorize a post-mortem examination of the deceased person. Such examination shall be of such scope and nature as may be thought necessary or desirable to promote knowledge of the human organism and the disorders to which it is subject. (1943, c. 87, s. 1.)

§ 90-219. Post-mortem examinations in certain medical schools.—The post-mortem examinations and studies authorized may be made in the laboratories of incorporate medical schools of colleges and universities on such conditions as may be agreed upon by the superintendent, or other administrative head of such institution, authorizing the examination and the head of the medical school undertaking to make the examination. (1943, c. 87, s. 2.)

§ 90-220. Written consent for post-mortem examinations required.—No superintendent, or other administrative head of such institution, shall authorize any post-mortem examination, as described in §§ 90-218 and 90-219, without first securing the written consent of the deceased person’s husband or wife, or one of the next of kin, or nearest known relative or other person charged by law with the duty of burial, in the order named and as known. A copy of the written consent shall be filed in the office of the superintendent, or other administrative head of the institution wherein said inmates dies. (1943, c. 87, s. 3.)
§ 92-1

Chapter 92. Photographers.

Sec.
92-1. Definitions.
92-2. State board of photographic examiners created; terms of office.
92-3. Chairman and secretary.
92-4. Pay and expenses; principal office; quorum.
92-5. Organization meeting; bond of secretary-treasurer; powers of board.
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92-12. Semi-annual examinations; separate certificates for two branches of photography.
92-13. Application for license; examination fees; examination requirements.
92-14. No fees refunded; fees for additional examinations.
92-15. Registration and licensing of successful applicants.
92-16. Requirements for students or apprentices.

§ 92-1. Definitions.—Words used in this chapter, unless otherwise expressly stated, shall have the following meaning:

“Board”—The board of photographic examiners.

“Person”—Any individual person, firm, corporation or association.

“Photography”—(a) The art or process of reproduction, recording the visible and invisible image through the action of light upon chemically sensitized substance or material. (b) The processes of projecting and registering images by means of lens and camera upon sensitized materials, development and fixation of the latent image to render same visible and permanent and the subsequent reproduction or transfer of such image, either negative or positive, upon sensitized material, by aid of light and chemical action.

“Photo finishing”—The process of reproducing or transferring any image made by means of camera and lens, either negative or positive, upon

§ 91-4. Records to be kept.—Every pawnbroker shall keep a book in which shall be legibly written, at the time of the loan, an account and description of the goods, articles or things pawned or pledged, the amount of money loaned thereon, the time of pledging the same, the rate of interest to be paid on said loan, and the name and residence of the person pawning or pledging the said goods, articles, or things. (1915, c. 198, s. 3; C. S. 7003.)

§ 91-5. Pawn ticket.—And every such pawnbroker shall at the time of each loan deliver to the person pawning or pledging any goods, articles, or things a ticket or memorandum or note signed by him containing the substance of the entry required to be made by him in his book as aforesaid, and a copy of the said ticket, memorandum, or note so given to the person pawning or pledging any goods, articles, or things of value, shall be filed within forty-eight hours in the office of the chief of police of the city or town issuing the license to such pawnbroker. The said tickets or memorandums so issued shall be numbered consecutively and dated the day issued. (1915, c. 198, s. 3; C. S. 7004.)

§ 91-6. Sale of pledges.—No pawnbroker shall sell any pawn or pledge until the same shall have remained sixty days in his possession after the maturity of the debt for which the property was pledged. And no pawnbroker shall advertise or sell at his place of business as unredeemed pledges any articles of property other than those received by him as pawns or pledges in the usual course of his business at the place where he is licensed to do business. (1915, c. 198, s. 4; C. S. 7005.)

§ 91-7. Usury law applicable.—The provisions of this chapter shall not be construed to relieve any person from the penalty incurred under the laws against usury in this state. (1915, c. 198, s. 5; C. S. 7006.)

§ 91-8. Violation of chapter misdemeanor.—Any person, firm, or corporation violating the provisions of this chapter shall be guilty of a misdemeanor and fined or imprisoned, or both, in the discretion of the court. (1915, c. 198, s. 5; C. S. 7007.)
sensitized material by aid of light and chemical action.

"The practice of photography":—The profession or occupation of taking or producing photographs or any part thereof for hire.

"Photographer":—Any individual, person, firm or corporation who shall practice photography.

"Apprentice":—Any individual or person who shall study, train or work under the guidance of a duly registered photographer for the purpose of acquiring the necessary knowledge to practice photography.

"Licensee":—A licensed photographer or apprentice. (1935, c. 155, art. 1; 1939, c. 280, s. 1.)

Editor's Note.—The 1939 amendment changed the designation of a member of the board.

Constitutionality.—This and following sections, providing for regulating and licensing photographers, sets up sufficiently definite standards of competency, ability and integrity, and requires the licensing board to issue licenses to all applicants who meet these qualifications without discrimination, an applicant having recourse at law for any arbitrary acts of the board, and the statute does not violate due process of law, nor deprive any person of fundamental, inalienable rights, nor create a monopoly in contravention of the state constitution. State v. Lawrence, 213 N. C. 647, 197 S. E. 586, 116 L. R. 436.

What Constitutes Engaging in Photography.—To solicit persons to have their photographs taken, arrange for the sitting, and actually have the camera present and take what is popularly called a picture, but in fact is a "negative," which is the outline of the subject on glass, is engaging within the state in the profession or business of photography within the meaning of this section. Lucas v. Charlotte, 14 F. Supp. 163, 167.

§ 92-2. State board of photographic examiners created; terms of office.—A state board of photographic examiners is hereby created, which shall consist of five members, all of whom shall be residents of the State of North Carolina and shall have had not less than five (5) years experience as professional photographers, who shall be commissioned by the governor and hold office as follows: Two for one year, two for two years and one for three years. (1935, c. 155, art. 2, s. 1; 1935, c. 318.)

§ 92-3. Chairman and secretary.—The members of the state board of photographic examiners shall annually elect one of their number to act as chairman, and appoint and at their pleasure may remove any member of the board, and whose compensation shall be fixed by the board. The said secretary shall also act as treasurer and shall perform the duties prescribed by this chapter and such other duties as the board may from time to time direct. (1935, c. 155, art. 2, ss. 2, 3.)

§ 92-4. Pay and expenses; principal office; quorum.—The members of the board upon the certification by the majority of said members shall receive the sum of seven dollars and actual and necessary expenses for each day actually devoted to the performance of their duties under this chapter. The principal office of the board shall be at such place designated by a majority of the members of the board. Three members of the board shall constitute a quorum. (1935, c. 155, art. 2, ss. 4-6.)

§ 92-5. Organization meeting; bond of secretary-treasurer; powers of board.—The board of photographic examiners shall within thirty days after its appointment, meet in the city of Raleigh, and organize and shall elect a chairman and appoint a secretary-treasurer. The secretary-treasurer shall give bond approved by the board for the faithful performance of his duties, in such sum as the board may, from time to time, determine. The board shall have a common seal and shall formulate rules to govern its actions, and it may take testimony and proof concerning all matters within its jurisdiction. (1935, c. 155, art. 3, s. 1.)

§ 92-6. Record of proceedings.—The said board shall keep a record of its proceedings relating to issuance, refusal, renewal, suspension and revocation of certificates of registration. This record shall also contain the name, place of business and residence of every registered photographer and registered apprentice, and the date and number of his certificate of registration. This record shall be open to public inspection at all reasonable times. (1935, c. 155, art. 3, s. 2.)

§ 92-7. Rules and orders.—The board may adopt and enforce all rules and orders necessary to carry out the provisions of this chapter. Every rule or order of the board shall be available for public inspection in the office of the board. (1935, c. 155, art. 3, s. 3.)

§ 92-8. Conduct of hearings.—The board is authorized to conduct hearings in any part of the state or may designate any member of the board so to do, which hearing shall be held pursuant to the rules and regulations adopted and promulgated by the board. (1935, c. 155, art. 3, s. 4.)

§ 92-9. Appointment and removal of assistants.— Said board shall have the power to appoint and at its pleasure remove any technical, legal, or other assistants as may be necessary to carry out the provisions of this chapter and to prescribe their powers and duties and fix their compensation. (1935, c. 155, art. 3, s. 5.)

§ 92-10. Examination and licensing of applicants; temporary certificates.—The board shall provide for the examination of applicants who desire to practice photography in this state, and shall collect fees, as hereinafter provided, for such examinations and issue certificates of registration and licenses to practice photography to anyone who shall qualify as to competency, ability and integrity. The board may issue temporary certificates to practice photography until such time as the board shall hold an examination, provided such applicants are, in the opinion of the board, entitled thereto, and provided that application and deposit for examination is made at the time of application for such temporary license, and such certificate shall be null and void after the next examination held by the board, and provided further, that no such applicant shall, thereafter, be eligible to apply for and receive a temporary certificate. (1935, c. 155, art. 4, s. 1.)

§ 92-11. Qualifications of applicants for examination.—Prior to any applicant being admitted to an examination or licensed, said board shall have the power to require proof as to the technical qualifications, business record and moral
character of such applicant, and if an applicant shall fail to satisfy the board in any or all of these respects, the board may decline to admit said applicant to examination, or to issue license. (1935, c. 155, art. 4, s. 2.)

Section Constitutional.—This section, providing that the board of licensing may require proof as to the business record of an applicant for photographer’s license does not set up an unconstitutional method of ascertaining the qualifications of an applicant, the “business record” not being of itself a test to be applied by the board, but being merely a suggested source which the board may consider in determining the applicant’s competency, ability and integrity. State v. Lawrence, 213 N. C. 674, 197 S. E. 586, 116 A. L. R. 1360.

¶ 92-12. Semi-annual examinations; separate certificate for two branches of photography.—The board shall provide a place and give a written, and/or an oral and/or a practical examination at least twice a year to all duly qualified applicants covering the two branches of photography, to-wit: Photography and photo-finishing. Separate certificates shall be provided for each branch. A certificate for one branch shall not permit the practicing in the other branch, although any photographer may hold certificates in both branches if qualified under this chapter. All applicants may take the examination in either or both branches and the examination fee as hereinafter set forth shall cover both branches if taken at the same time. (1935, c. 153, art. 4, s. 3.)

¶ 92-13. Application for license; examination fees; examination requirements. —Every person desiring to commence the practice of photography in this State shall file an application for a license with the board on a form prescribed by it. At the time of making such application the applicant shall deposit with the board an examination fee of twenty-five ($25.00) dollars: Provided, that the examination fees for persons engaged exclusively in the development, finishing, and/or enlarging of kodak pictures shall be in the sum of fifteen ($15.00) dollars. All applicants must appear for examination at the time and place designated by the board and shall present such references and credentials as the board may require. And shall give satisfactory evidence as to their competency and fitness to conduct the practice of photography based on their technical knowledge, their business record and their moral character. (1935, c. 155, art. 4, s. 4.)

¶ 92-14. No fees refunded; fees for additional examinations.—No fee for examination shall in any case be refunded, but in case the applicant fails in the first examination he may take three subsequent examinations in the branches in which he failed and the fee for each such subsequent examination shall be ten ($10.00) dollars. (1935, c. 155, art. 4, s. 5.)

¶ 92-15. Registration and licensing of successful applicants.—Every applicant successfully passing such examination shall be registered in the records of the board as a qualified photographer in the branch or branches in which he has been successful, and shall receive a license signed by the chairman and secretary of said board authorizing the applicant to practice photography in the branch or branches in which he has been successful in this State. (1935, c. 155, art. 4, s. 6.)

¶ 92-16. Requirements for students or apprentices.—Every person desiring to commence the study of photography in this State for the purpose of practicing photography shall file a certificate signed by a duly licensed photographer that the said person has started to study photography with the said licensed photographer and that said student or apprentice commenced his studies or work prior to the date of the certificate, and such other information as the board may require. (1935, c. 155, art. 4, s. 7.)

¶ 92-17. Licenses not transferable.—No license shall be transferable, nor shall it be issued to any person, firm or corporation, designed to operate under an assumed or fictitious name. (1935, c. 155, art. 4, s. 8.)

¶ 92-18. Licensing without examination of photographers now practicing; license fee. —The board shall, upon application, issue a license to every photographer who has been continuously engaged in the practice of photography and/or photo-finishing in this State for one year next preceding the passage of this chapter, without examination. All applications for license under this section shall be accompanied by a fee of five ($5.00) dollars, in addition to the annual license fee hereinafter prescribed, and such application must be made within thirty days after notification from the board. (1935, c. 155, art. 4, s. 9.)

¶ 92-19. Annual license fees for business establishments and employees.—All licensees who maintain an established place for the practice of photography and/or photo-finishing in the State of North Carolina, or who are not employees of an established place for the practice of photography and/or photo-finishing in the State of North Carolina, shall pay an annual license fee of five ($5.00) dollars. All licensees who are employees of an established place in the State of North Carolina for the practice of photography and/or photo-finishing shall pay an annual license fee of three ($3.00) dollars. (1935, c. 155, art. 4, s. 10.)

Cross References.—As to state-wide privilege tax for photographers, see § 105-41. As to requirement of bond by photographers who sell certain coupons redeemable for photographs, see § 166-62.

Not Interference with Interstate Commerce.—It was contended that the taxes under this section and § 105-41 were a burden upon and an interference with interstate commerce and therefore void. The court held that the fact that the negatives of photographs, after the taking, were sent to another state to be finished, does not make the transaction one of interstate commerce. Lucas v. Charlotte, 86 F. (2d) 394, 396.

¶ 92-20. Conduct of business unless registered prohibited.—No person, firm or corporation shall sell, offer for sale, or solicit orders for any product of photography unless duly registered under the terms of this chapter, or employed by a person, firm or corporation duly registered under the terms of this chapter. (1935, c. 155, art. 4, s. 11.)

¶ 92-21. Display of license.—Every recipient of a license to practice photography or photo-finishing shall keep such license conspicuously displayed on his business premises. (1935, c. 155, art. 4, s. 12.)

¶ 92-22. Time of payment of license fees;
powers conferred by various fees.—All annual license fees prescribed by this chapter shall be paid to the board on or before the first day of July of each year. The board shall issue its receipt for every payment. The annual establishment fee of five ($5.00) dollars shall entitle the licensee, if otherwise qualified, to practice photography and photo-finishing. The annual employees’ fee of three ($3.00) dollars shall entitle the licensee, if otherwise qualified, to practice photography and photo-finishing, but only for and on behalf of a duly registered photographer or photo-finisher. (1935, c. 155, art. 4, s. 13.)

§ 92-23. Revocation of license; reinstatement. —Should any licensee fail or neglect to pay his annual license on or before the first day of July of every year, the board shall notify him that his license will be revoked and unless said fee is paid in full on or before the first day of August of the same year, the board shall revoke said license.

(a) Any photographer and/or photo-finisher whose license has been revoked for failure to pay the annual license fee may make application to the board for reinstatement. Such application shall be accompanied by a fee of five ($5.00) dollars, in addition to the regular license fee required. If the board shall find the applicant to be guilty of no violation of this chapter other than default in payment of annual license fees he may be immediately reinstated.

(b) The board shall have the power to revoke any license granted by it to any photographer and/or photo-finisher or apprentice found by the board to be guilty of fraud or unethical practices or of wilful misrepresentation, or found guilty under the laws of the State of North Carolina of any crime involving moral turpitude.

(c) Before any license is revoked, except for failure to pay the annual license fee, the holder thereof shall be given notice, in writing, either personally or by mailing by registered mail to his last known address, setting forth the charges against him and the time and place for a hearing to be had on such charges, which such charges must be filed in writing under oath with said board, and the said hearing shall be not less than thirty days from the time of the service of the said notice. The person charged shall be given a public hearing at which he may be represented by counsel and he shall have an opportunity to enter a defense and produce witnesses on his behalf. The board on such hearing shall provide a competent stenographer for the purpose of taking a complete record of such hearing, which record shall be filed with the board.

(d) If at such hearing of the accused the board shall be satisfied that the accused has been guilty of the offense charged it shall thereupon, without further notice, revoke the license of the person so accused: Provided, the accused shall not be barred the right of appeal to the superior courts. (1935, c. 155, art. 4, s. 14; 1939, c. 218, s. 1.)

Cross References.—As to uniform procedure for suspension or revocation of licenses, see chapter 150. As to prevention of certain fraudulent practices by photographers, see §§ 66-59 to 66-64.

§ 92-24. Violation of chapter a misdemeanor; separate offenses; disposition of fines and forfeitures.—Any person violating any of the provisions of this chapter, or engaging in any of the activities or practices herein defined without being duly licensed as herein provided, shall be guilty of a misdemeanor, and upon conviction shall be fined the sum of not less than fifty ($50.00) dollars, nor more than two hundred ($200.00) dollars for the first offense, and shall be imprisoned not more than thirty days, and/or fined not exceeding two hundred ($200.00) dollars for any subsequent offense. Each and every violation hereof shall constitute a separate offense: Provided, all fines paid for violations of this chapter or bail forfeiture collected for appearances given by virtue of any process issued pursuant to the courts of this state shall be paid one-half to the treasurer of the county where such process was issued for the general fund of such county and one-half to the state treasurer to be by him deposited to the credit of the general funds of the State. (1935, c. 155, art. 5.)

§ 92-25. Application and examination of non-residents.—All non-resident photographers and/or photo-finishers, desiring to do business in this State, shall apply to the board for examination at least thirty days prior to the next examination and obtain license before entering into said business, and no person, firm or corporation shall represent or in any way solicit or accept business for such non-resident photographers and/or photo-finishers, unless and until they have complied with the provisions of this chapter. (1935, c. 155, art. 6.)

§ 92-26. Records of proceedings and moneys received.—The secretary-treasurer shall keep a record of the proceedings of the said board and shall receive and account for all moneys derived from the operation of this chapter. (1935, c. 155, art. 7, s. 1.)

§ 92-27. Expenses of administration.—All expenses of administering this chapter shall be paid upon order of the board from the funds derived from the examination, license fees and penalties herein prescribed, and, in no event, shall such expense exceed the income from said sources. (1935, c. 155, art. 7, s. 2.)

§ 92-28. Persons exempted.—Nothing in this chapter shall be construed to apply to:

(a) Persons in the employ of or acting under contract to newspapers or periodical publications: Provided, that this exemption shall apply only with respect to negatives and photographs made for newspapers and publication: And provided further, that such negatives or photographs are not sold or offered for sale, or otherwise disposed of for profit to any purchaser or user other than newspapers, publications, press agencies or associations serving newspapers and publications. The provisions of this chapter shall not apply to press photographers with regard to the unsolicited sale of negatives and prints made on regular press assignments.

(b) Any person (not regularly engaged in an occupation in which his compensation depends, in whole or in part, upon his making of negatives or photographs) who makes negatives or photographs for his own pleasure and occasionally sells offers for sale a negative or photograph so
Chapter 93. Public Accountants.

§ 93-1. “Public accounting” defined.—The term “Practice of Public Accounting” as used in this chapter is defined as follows:

A person engages in the practice of public accounting, within the meaning and intent of this chapter, who offers his or her services to the public as one who is qualified to render professional service in the analysis, verification and audit of financial records and the interpretation of such service through statements and reports. (1925, c. 261, s. 1; 1929, c. 219, s. 1.)

In Scott v. Gillis, 197 N. C. 223, 226, 148 S. E. 315, it was held that plaintiff and defendant were certified Public Accountants, citing this and the following sections.

§ 93-2. Qualifications. — Any citizen of the United States, or person who has duly declared his intention of becoming such citizen, over twenty one years of age and of good moral character, and who shall have received from the State Board of Accountancy a certificate of qualification admitting him to practice as a certified public accountant, or who is the holder of a valid and unrevoked certificate issued under the provisions of chapter one hundred and fifty-seven of the Public Laws of one thousand nine hundred and thirteen, shall be licensed to practice and be styled and known as a certified public accountant. (1925, c. 261, s. 2.)

§ 93-3. Unlawful use of title “certified public accountant” by individual. — It shall be unlawful for any person who has not received a certificate of qualification admitting him to practice as a certified public accountant to assume or use such a title, or to use any words, letters, abbreviations, symbols or other means of identification to indicate that the person using same has been admitted to practice as a certified public accountant. (1925, c. 261, s. 3.)

Editor’s Note.—The 1939 amendment changed subsections (a) and (b).

§ 93-3-1. Made by him: Provided, that this exemption shall not extend to any person who solicits or accepts orders for such negatives, or prints or photographs made therefrom, before such negatives are made.

(c) Any person who is in the employ of the United States, the State of North Carolina, or any of its political subdivisions, or of any school, college, university or state institution, who makes negatives or any reproduction thereof solely for public use or for the use of such school, college, university or state institution, or educational or scientific purposes, provided such negatives or photographs are not sold or offered for sale in this state.

(d) Any duly licensed practitioner of medicine and allied occupations, hospitals or institutions who make negatives or photographs for clinical, surgical or medical purposes.

(e) Any motion picture photographer in the making of motion pictures. (1935, c. 155, art. 8; 1939, c. 280, ss. 2, 3.)

Editor’s Note.—The 1939 amendment changed subsections (a) and (b).

§ 93-4. Use of title by firm.—It shall be unlawful for any firm, copartnership, or association to assume or use the title of certified public accountant, unless each of the members of such firm, copartnership or association first shall have received a certificate of qualification from the State Board of Accountancy admitting him to practice as a certified public accountant. (1925, c. 261, s. 4.)

Editor’s Note.—This section was reviewed in 3 N. C. Law Rev. 149.

This act was probably intended to cure defects and omissions of the former statutes. Respass v. Rex Spinning Co., 191 N. C. 889, 813, 133 S. E. 392.

As to construction of prior law, see notes under section 93-12.

§ 93-5. Use of title by corporation.—It shall be unlawful for any corporation to assume or use the title of certified public accountant, or to use any words, letters, abbreviations, symbols or other means of identification to indicate that the members of such firm, copartnership or association have been admitted to practice as certified public accountants, unless each of the members of such firm, copartnership or association first shall have received a certificate of qualification from the State Board of Accountancy admitting him to practice as a certified public accountant. (1925, c. 261, s. 4.)

§ 93-6. Use of title by corporation.—It shall be unlawful for any corporation to assume or use the title of certified public accountant, or to use any words, letters, abbreviations, symbols or other means of identification to indicate that the members of such firm, copartnership or association have been admitted to practice as certified public accountants, unless each of the members of such firm, copartnership or association first shall have received a certificate of qualification from the State Board of Accountancy admitting him to practice as a certified public accountant. (1925, c. 261, s. 5.)

§ 93-6. Practice without certificate unlawful; corporations; exceptions.—It shall be unlawful for
§ 93-7. Registration of accountants already practicing.—Any person, firm, copartnership, association or corporation who shall on March 10, 1925, be engaged in the practice of public accounting and maintaining an office as a public accountant in the State of North Carolina, or an accountant who has served two years or more as a civil service employee of the Federal government in the capacity of senior field auditor. (1925, c. 261, s. 6.)

§ 93-8. Use of title "public accountant" without qualification.—It shall be unlawful for any person, firm, copartnership, association or corporation, not having qualified under this chapter, to assume or use the style of title of public accountant in the State of North Carolina: Provided, however, that nothing herein contained shall be construed to prohibit the practicing of the profession of public accounting by any person, firm, copartnership, association, or corporation who shall on March 10, 1925, be engaged in the practice of public accounting and maintaining an office as a public accountant in the State of North Carolina, or an accountant who has served two years or more as a civil service employee of the Federal government in the capacity of senior field auditor. (1925, c. 261, s. 7.)

§ 93-9. Assistants need not be certified.—Nothing contained in this chapter shall be construed to prohibit the employment by a certified public accountant, or by any person, firm, copartnership, association, or corporation permitted to engage in the practice of public accounting in the State of North Carolina, of persons who have not received certificates of qualification admitting them to practice as certified public accountants, as assistant accountants or clerks: Provided, that such employment work under the control and supervision of certified public accountants or public accountants, and do not certify to any one the accuracy or verification of audits or statements: and provided further, that such employees do not hold themselves out as engaged in the practice of public accounting. (1925, c. 261, s. 9.)

§ 93-10. Persons certified in other states.—A public accountant who holds a valid and unrevoked certificate as a certified public accountant, or its equivalent, issued by authority of any state, or the District of Columbia, and who resides without the State of North Carolina, may perform work within the State: Provided, that he register with the State Board of Accountancy and comply with its rules regarding such registration. (1925, c. 261, s. 10.)

§ 93-11. Not applicable to officers of state, county or municipality.—Nothing herein contained shall be construed to restrict or limit the power or authority of any State, county or municipal officer or appointee engaged in or upon the examination of the accounts of any public officer, his employees or appointees. (1925, c. 261, s. 12.)

Cross References.—As to municipal accounting, see § 150-290. As to county accounting systems, see § 153-30.

§ 93-12. Board of accountancy; powers and duties.—The State Board of Accountancy shall consist of four persons to be appointed by the Governor, all of whom shall be the holders of valid and unrevoked certificates as certified public accountants heretofore issued under the provisions of chapter one hundred and fifty-seven of the Public Laws of one thousand nine hundred and thirteen, or issued under the provisions of this chapter. They shall hold office for the term of three years and until their successors are appointed: Provided, that no appointment to the board shall be made under the provisions of this chapter until the expiration of the terms of the members of the present board. The powers and duties of the board shall be as follows:

1. To elect from its members a president, vice-president and secretary-treasurer. The members of the board shall be paid, for the time actually expended in pursuance of the duties imposed upon them by this chapter, an amount not exceeding ten dollars ($10) per day, and they shall be entitled to necessary traveling expenses.

2. To employ legal counsel and clerical assistance and to fix the compensation of same, and to incur such other expenses as may be deemed necessary to carry into effect the provisions of this chapter.

3. To formulate rules for the government of the board and for the examination of applicants for certificates of qualifications admitting such applicants to practice as certified public accountants.

4. To hold written or oral examinations of applicants for certificates of qualification at least once a year, or oftener, as may be deemed necessary by the board.

5. To issue certificates of qualification admitting to practice as certified public accountants each applicant, who, being the graduate of an acc-
cited high school or having an equivalent education, shall have had at least two years experience or its equivalent next preceding the date of his application on the field staff of a certified public accountant or public accountant, one of which shall have been as a senior or accountant in charge, and who shall receive the endorsement of three certified public accountants of any state as to his eligibility to become a certified public accountant; or who, in lieu of the two years experience or its equivalent, above mentioned, shall have had one year's experience after graduating from a recognized school of accountancy; or an accountant who has served two years or more as a civil service employee of the Federal government in the capacity of senior field auditor, and who shall have passed a satisfactory examination in "theory of accounts," "practical accounting," "auditing," "commercial law" and other related subjects.

(6) In its discretion to grant certificates of qualification admitting to practice as certified public accountants such applicants who shall be the holders of valid and unrevoked certificates as certified public accountants, or the equivalent, issued by or under the authority of any state, or territory of the United States or the District of Columbia; or who shall hold valid and unrevoked certificates or degrees as certified public accountants, or the equivalent, issued under authority granted by a foreign nation; when in the judgment of the board the requirements for the issuing or granting of such certificates or degrees are substantially equivalent to the requirements established by this chapter: Provided, however, that such applicants signify their intention of engaging in the practice of public accounting within the State.

(7) To charge for each examination and certificate provided for in this chapter a fee of twenty-five dollars. This fee shall be payable to the secretary-treasurer of the board by the applicant at the time of filing application. If at any examination an applicant shall have received a passing grade in one subject, he shall have the privilege of one reexamination at any subsequent examination held within eighteen months from the date of his application upon payment of a reexamination fee of fifteen dollars. In no case shall the examination fee be refunded, unless in the discretion of the board the applicant shall be deemed ineligible for examination.

(8) To require the renewal of all certificates of qualification annually on the first day of July, and to charge and collect a fee not to exceed five dollars for such renewal.

(9) The board shall have the power to revoke any certificate issued under the provisions of chapter one hundred and fifty-seven of the Public Laws of one thousand nine hundred and thirteen, or issued under the provisions of this chapter, for good and sufficient cause: Provided, that written notice shall have been mailed to the holder of such certificate at his last known address thirty days before any hearing thereof, stating the cause of such contemplated action, and appointing a time for a hearing thereon by the board, and provided further, that no certificate shall be revoked until such hearing shall have been had. At all such hearings the Attorney General of the State, or one of his assistants designated by him, shall sit with the board with all the powers of a member thereof.

(10) Within sixty days after March 10, 1925, the board shall formulate rules for the registration of those persons, firms, copartnerships, associations or corporations who, not being holders of valid and unrevoked certificates as certified public accountants issued under the provisions of chapter one hundred and fifty-seven of the Public Laws of one thousand nine hundred and thirteen, and who, having on March 10, 1925, been engaged in the practice of public accounting and maintaining an office as a public accountant in the State of North Carolina, shall, under the provisions of § 93-7 apply to the board for registration as public accountants. The board shall maintain a register of all persons, firms, copartnerships, associations or corporations who have made application for such registration and have complied with the rules of registration adopted by the board.

(11) Within sixty days after March 10, 1925, the board shall formulate rules for registration of these public accountants who are qualified to practice under this chapter and who under the provisions of § 93-10 are permitted to engage in work within the State of North Carolina. The board shall have the power to deny or withdraw the privilege herein referred to for good and sufficient reasons.

(12) To submit to the Commissioner of Revenue the names of all persons who have qualified under this chapter as practitioners of public accountancy, and who have complied with the rules of the board. The Commissioner of Revenue shall issue only to those whose names are so submitted to him by the board a license for the privilege of practicing the profession of public accountancy, and the license so issued shall be evidence of his registration with the board.

(13) The board shall keep a complete record of all its proceedings and shall annually submit a full report to the Governor.

(14) All fees collected on behalf of the State Board of Accountancy, and all receipts of every kind and nature, as well as the compensation paid the members of the board and the necessary expenses incurred by them in the performance of the duties imposed upon them by this chapter, shall be reported annually to the State Treasurer. Any surplus remaining in the hands of the board over the amount of three hundred dollars shall be paid to the State Treasurer at the time of submitting the report, and shall go to the credit of the general fund: Provided, that no expense incurred under this chapter shall be charged against the State.

(15) Any certificate of qualification issued under the provisions of this chapter or issued under the provisions of chapter one hundred and fifty-seven of the Public Laws of one thousand nine hundred and thirteen, shall be forfeited for the failure of the holder to renew same and to pay the renewal fee therefor to the State Board of Accountancy within thirty days after demand for such renewal fee shall have been made by the State Board of Accountancy. (1925, c. 261, s. 11; 1939, c. 218, s. 1.)
Cross References.—As to uniform revocation of licenses, see chapter 150. As to privilege tax, see § 105-41.

Editor's Note.—Chapter 157, Public Laws of 1913, codified as C. S. 7008 to 7024, was expressly repealed by the Public Laws of 1925, c. 361. However, as many of the provisions of the old act were reenacted by the repealing act and will be found in this chapter, the constructions of the 1913 act are here inserted.

In General.—The provisions of the act creating and incorporating the State Board of Accountancy, confer upon its members continuous quasi-judicial powers as an arm of the State Government in which the people of the State are interested, both as to their administration and to a certain extent in the funds of the board, the compensation of members being paid by fees fixed by law, any surplus to be deposited in the State Treasury, and in these, and in other respects, its members are to be regarded as State officials to the extent of their duties specified in the statute. State v. Scott, 182 N. C. 865, 109 S. E. 789.

Exercise of Police Power.—Our statutes creating a State Board of Accountancy and giving them authority to pass upon applications and issue licenses to those qualified as public accountants are within the exercise of the police powers of the State, in which the public, as well as one to whom a certificate has been issued, is interested; and the State is also interested in the requirement that moneys collected and not necessary to the purposes of the act be turned into the State Treasury. State v. Scott, 182 N. C. 865, 109 S. E. 789.

When License Not Required.—Section 7023 of the Consolidated Statutes does not embrace within its terms an isolated instance of the employment of a firm of certified public accountants licensed in another state, who send their representative to this state to acquire information from the books of a corporation for a statement of its condition to be made out in the state in which the auditing concern is authorized to do business. Respass v. Rex Spinning Co., 191 N. C. 809, 133 S. E. 391.

Holding Examination Beyond State Boundaries.—The exercise of the powers of the State Board of Accountancy, the members of which are to be regarded as State officials, is coextensive with the State boundaries, and may not be exercised beyond them, the word jurisdiction embracing not only the subject-matter coming within the powers of officials, but also the territory within which the powers are to be exercised. State v. Scott, 182 N. C. 865, 109 S. E. 789.

The legislative intent will not be construed by implication to extend the exercise of a quasi-judicial power by public officers to places beyond the State boundaries, as where the statute creates a State Board of Accountancy, gives it the power to examine and license applicants, and states that the board may do so "at such place as it may designate;" for the presumption being against the exercise of such extra territorial power, the discretion of the board in the exercise of this power will be confined to places within the boundaries of this State. State v. Scott, 182 N. C. 865, 109 S. E. 789.

Where a statute prescribes the means for the exercise of a power granted by the act, no other or different means can be implied as being more effective or convenient, and the Legislature having incorporated a State Board of Public Accountancy, giving it the power to determine upon examination whether applicants for licenses therein are qualified to receive them, it is for the courts of the State, upon proper action, to pass upon the question of whether the board acts ultra vires in holding an examination beyond the boundaries of the State upon the request of non-resident desiring to obtain a certificate, and a declaration in the fixing of such place that it would be the last time the board would hold an examination outside the State is not binding or controlling on the question. State v. Scott, 182 N. C. 865, 109 S. E. 789.

§ 93-13. Violation of chapter; penalty.—Any violation of the provisions of this chapter shall be deemed a misdemeanor, and upon conviction thereof the guilty party shall be fined not less than fifty dollars and not exceeding two hundred dollars for each offense. (1925, c. 261, s. 11.)
Division XIII. Employer and Employee.

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Chapter 94. Apprenticeship.

§ 94-1. Purpose.—The purposes of this chapter are: To open to young people the opportunity to obtain training that will equip them for profitable employment and citizenship; to set up, as a means to this end, a program of voluntary apprenticeship under approved apprentice agreements providing facilities for their training and guidance in the arts and crafts of industry and trade, with parallel instruction in related and supplementary education; to promote employment opportunities for young people under conditions providing adequate training and reasonable earnings; to relate the supply of skilled workers to employment demands; to establish standards for apprentice training; to establish an apprenticeship council and local and state joint apprenticeship committees to assist in effectuating the purposes of this chapter; to provide for a director of apprenticeship within the department of labor; to provide for reports to the legislature and to the public regarding the status of apprentice training in the state; to establish a procedure for the determination of apprentice agreement controversies; and to accomplish related ends. (1939, c. 229, s. 1.)

Editor's Note.—For comment on this enactment, see 17 N. C. Law Rev. 327.

§ 94-2. Apprenticeship council.—The commissioner of labor shall appoint an apprenticeship council, composed of three representatives each from employer and employee organizations respectively. The state official who has been designated by the state board for vocational education as being in charge of trade and industrial education shall ex officio be a member of said council, without vote. The terms of office of the members of the apprenticeship council first appointed by the commissioner of labor shall expire as designated by the commissioner at the time of making the appointment: One representative each of employers, employees, being appointed for one year; one representative of each of employers, employees, being appointed for two years, and one representative of employers and employees for three years. Thereafter, each member shall be appointed for a term of three years. Any member appointed to fill a vacancy occurring prior to the expiration of the term of his predecessor shall be appointed for the remainder of said term. Each member of the council not otherwise compensated by public monies, shall be reimbursed for transportation and shall receive such per diem compensation as is provided generally for boards and commissions under the biennial Maintenance Appropriation Acts for each day spent in attendance at meetings of the apprenticeship council. The apprenticeship council shall meet at the call of the commissioner of labor and shall aid him in formulating policies for the effective administration of this chapter. Subject to the approval of the commissioner, the apprenticeship council shall establish standards for apprentice agreement which in no case shall be lower than those prescribed by this chapter, shall issue such rules and regulations as may be necessary to carry out the intent and purposes of said chapter, and shall perform such other functions as the commissioner may direct. Not less than once a year the apprenticeship council shall make a report through the commissioner of labor of its activities and findings to the legislature and to the public. (1939, c. 229, s. 2.)

§ 94-3. Director of apprenticeship.—The commissioner of labor is hereby directed to appoint a director of apprenticeship which appointment shall be subject to the confirmation of the state apprenticeship council by a majority vote. The commissioner of labor is further authorized to appoint and employ such clerical, technical, and professional help as shall be necessary to effectuate the purposes of this chapter. (1939, c. 229, s. 3.)

§ 94-4. Powers and duties of director of apprenticeship.—The director, under the supervision of the commissioner of labor and with the advice and guidance of the apprenticeship council is authorized to administer the provisions of this chapter; in cooperation with the apprenticeship council and local and state joint apprenticeship committees, to set up conditions and training standards for apprentice agreements, which conditions or standards shall in no case be lower than those prescribed by this chapter; to act as secretary of the apprenticeship council and of each state joint apprenticeship committee; to approve for the council if in his opinion approval is for the best interest of the apprentice, any apprentice agreement which meets the standards established under this chapter; to terminate or cancel any apprentice agreement in accordance with the provisions of such agreement; to keep a record of apprentice agreements and their disposition; to issue certificates of completion of apprenticeship; and to perform such other duties as are necessary to carry out the intent of this chapter: Provided, that the administration and supervision of related and supplemental instruction for apprentices, coordination of instruction with job experiences, and the selection and training of teachers and coordinators for such instruction shall be the responsibility of state and local boards responsible for vocational education. (1939, c. 229, s. 4.)

§ 94-5. Local and state joint apprenticeship committees.—A local joint apprenticeship committee may be appointed, in any trade or group of
trades in a city or trade area, by the apprenticeship council, whenever the apprentice training needs of such trade or group of trades justifies such establishment: Provided, that when a state joint apprenticeship committee in any trade or group of trades shall have been established, as hereinafter authorized, such state committee shall thereafter have the power of appointment of local joint apprenticeship committees in the trade or group of trades which it represents. Such local joint apprenticeship committee shall be composed of an equal number of employer and employee representatives chosen from names submitted by the respective local employer and employee organizations, and in such trade or group of trades. In a trade or group of trades in which there is no bona fide local employer or employee organization, the committee shall be appointed from persons known to represent the interests of employers and of employees respectively. The function of a local joint apprenticeship committee shall be: To cooperate with school authorities in regard to the education of apprentices; in accordance with the standards set up by the apprenticeship committee for the same trade or group of trades, where such committee has been appointed, to work in an advisory capacity with employers and employees in matters regarding schedule of operations, application of wage rates, and working conditions for apprentices and to specify the number of apprentices which shall be employed locally in the trade under apprentice agreements under the chapter; and to adjust apprenticeship disputes, subject to the approval of the director. Until the appointment of local joint apprenticeship committees in the trade or group of trades which it represents; to ascertain the prevailing rate for journeymen in the respective trade areas within the state in such trade or trades and specify the graduated scale of wages applicable to apprentices in such trade or trades in each such area; to ascertain employment needs in such trade or trades and specify the appropriate number of apprentices to journeymen; and to make recommendations for the general good of apprentices engaged in the trade or trades represented by the committee. The members of a state joint apprenticeship committee shall be reimbursed for transportation expenses which shall receive such per diem compensation as is provided generally for boards and commissions under the biennial Maintenance Appropriation Acts for each day spent in attendance at meetings of the committee. (1939, c. 229, s. 5.)

§ 94-6. Definition of an apprentice. — The term "apprentice", as used herein, shall mean a person at least sixteen years of age who is covered by a written agreement, with an employer, an association of employers, or an organization of employees acting as employer's agent, and approved by the apprenticeship council; which apprentice agreement provides for not less than four thousand hours of reasonably continuous employment for such person for his participation in an approved schedule of work experience and for at least one hundred forty-four hours per year of related supplemental instruction. The required hours for apprenticeship agreements may vary in accordance with standards adopted by local or state joint apprenticeship committees, subject to approval of the state apprenticeship council and commissioner of labor. (1939, c. 229, s. 6.)

§ 94-7. Contents of agreement. — Every apprentice agreement entered into under this chapter shall contain:

(1) The names of the contracting parties.
(2) The date of birth of the apprentice.
(3) A statement of the trade, craft, or business which the apprentice is to be taught, and the time at which the apprenticeship will begin and end.
(4) A statement showing the number of hours to be spent by the apprentice in work and the number of hours to be spent in related and supplemental instruction, which instruction shall be not less than one hundred forty-four hours per year; Provided, that in no case shall the combined weekly hours of work and of required related and supplemental instruction of the apprentice exceed the maximum number of hours of work prescribed by law for a person of the age and sex of the apprentice.
(5) A statement setting forth a schedule of the processes in the trade or industry division in which the apprentice is to be taught and the approximate time to be spent at each process.
(6) A statement of the graduated scale of wages to be paid the apprentice and whether the required school time shall be compensated.
(7) A statement providing for a period of probation of not more than five hundred hours of employment and instruction extending over not more than four months, during which time the apprentice agreement shall be terminated by the director at the request in writing of either party, and providing that after such probationary period the apprentice agreement may be terminated by the director by mutual agreement of all parties thereto, or cancelled by the director for good and sufficient reason. The council at the request of a joint apprentice committee may lengthen the period of probation.
(8) A provision that all controversies or differences concerning the apprentice agreement which cannot be adjusted locally in accordance with § 94-5 shall be submitted to the director for determination as provided for in § 94-10.

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(9) A provision that an employer who is unable to fulfill his obligation under the apprentice agreement may with the approval of the director transfer such contract to any other employer: Provided, that no employer who enters into such agreement with an association of employers or an organization of employees as provided in § 94-9, and by the apprentice, and if the apprentice is a minor, by the minor's father: Provided, that if the father be dead or legally incapable of giving consent or has abandoned his family, then by the minor's mother; if both father and mother be dead or legally incapable of giving consent, then by the guardian of the minor. Where a minor enters into an apprentice agreement under this chapter for a period of training extending into his majority, the apprentice agreement shall likewise be binding for such a period as may be covered during the apprentice's majority. (1939, c. 229, s. 8.)

§ 94-8. Approval of apprentice agreements; signatures.—No apprentice agreement under this chapter shall be effective until approved by the director. Every apprentice agreement shall be signed by the employer, or by an association of employers or an organization of employees as provided in § 94-9, and by the apprentice, and if the apprentice is a minor, by the minor's father: Provided, that if the father be dead or legally incapable of giving consent or has abandoned his family, then by the minor's mother; if both father and mother be dead or legally incapable of giving consent, then by the guardian of the minor. Where a minor enters into an apprentice agreement under this chapter for a period of training extending into his majority, the apprentice agreement shall likewise be binding for such a period as may be covered during the apprentice's majority. (1939, c. 229, s. 8.)

§ 94-9. Rotation of employment.—For the purpose of providing greater diversity of training or continuity of employment, any apprentice agreement made under this chapter may in the discretion of the director of apprenticeship be signed by an association of employers or an organization of employees instead of by an individual employer. In such a case, the apprentice agreement shall expressly provide that the association of employers or organization of employees does not assume the obligation of an employer but agrees to use its best endeavors to procure employment and training extending into his majority, the apprentice agreement shall likewise be binding for such a period as may be covered during the apprentice's majority. (1939, c. 229, s. 8.)

§ 94-10. Settlement of controversies or complaints.—Under the complaint of any interested person or upon his own initiative, the director may investigate to determine if there has been a violation of the terms of an apprentice agreement, made under this chapter, and he may hold hearings, inquiries, and other proceedings necessary to such investigations and determination. The parties to such agreement shall be given a fair and impartial hearing, after reasonable notice in writing thereof. All such hearings, investigations and determinations shall be made under authority of reasonable rules and procedures prescribed by the apprenticeship council, subject to the approval of the commissioner of labor.

The determination of the director shall be filed with the commissioner. If no appeal therefrom is filed with the commissioner within ten days after the date thereof, as herein provided, such determination shall become the order of the commissioner. Any person aggrieved by any determination or action of the commissioner, may appeal therefrom to the council, who shall hold a hearing thereon after due notice in writing to the interested parties. Any party to an apprentice agreement aggrieved by an order or decision of the council may appeal to the courts on questions of law. The decision of the council shall be final on the questions of fact. The decision of the council shall be conclusive if such appeal therefrom shall not be filed within thirty days after the date of such order or decision.

No person shall institute any action for the enforcement of any apprentice agreement, or damages for the breach of any apprentice agreement, made under this chapter, unless he shall first have exhausted all administrative remedies provided by this section. (1939, c. 229, s. 10.)

§ 94-11. Limitation.—Nothing in this chapter or in any apprentice agreement approved under this chapter shall operate to invalidate any apprenticeship provision in any collective agreement between employers and employees, setting up higher apprenticeship standards. (1939, c. 229, s. 11.)

Chapter 95. Department of Labor and Labor Regulations.

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Editor's Note.—Public Laws 1931, c. 312, effected a reorganization of the Department of Labor and Printing, henceforth to be known as the Department of Labor. Sec. 17 of the act provided: "This act shall be in force and effect from and after April first, one thousand nine hundred thirty-one. Until this date the provisions of this act shall continue to be in force and effect until June thirtieth in order to complete the year's program of inspections, use printed material and complete statistical studies, but the Executive Secretary, the Commissioner of Labor, with the approval of the Governor, shall proceed to complete plans for reorganization of Department of Labor to be made effective promptly July first, one thousand nine hundred and thirty-one."

In 9 N. C. Law Rev. 413, 414, it is said: "There are some slight omissions or lack of concur between the plan of reorganization. In the first place, the writer is of the opinion that the Commissioner of Labor should be appointed by the Governor rather than elected by popular vote. This office calls for an expert, and there is little reason to think that the person who is likely to be elected will possess the necessary qualifications. Secondly, there is complete absence of advisory boards to confer with and advise the Commissioner or heads of any of the several divisions. There seems little justification for burdening the Division of Standards and Inspections with the duty of collecting information concerning conditions in water-power, agriculture, dairying, etc. To be sure, these matters are important, and have a bearing, directly or indirectly, on the welfare of the working classes of the State. But so does almost any other aspect of economic activity that could be mentioned. Such inquiry properly belongs to other departments, and should not be required of a department that is going to have its hands full with matters with which it should properly concern itself. The practice of making the labor department a catch-all for all sorts of duties which other departments should, but do not, have is one that is altogether too common, and one that is not conducive to effective administration. Finally, the absence of machinery by which the settlement of industrial disputes is a matter of some importance. Even some of the recent experiences in Gastonia, Marion, and elsewhere within the State it is almost incomprehensible. While the presence of such machinery by no means guarantees that disputes will be settled promptly and effectively, or at all, for that matter, the experience of other states which have such machinery, with competent men administering it, would seem to fully warrant its establishment. This omission, together with the other duties imposed upon the Division of Statistics and Inspections which are somewhat foreign to its primary purpose, seem to the writer the most serious defects in the plan of reorganization which, in most other respects is fairly satisfactory."

§ 95-2. Election of commissioner; term; salary; vacancy.—The commissioner of labor shall be elected by the people in the same manner as is provided for the election of the secretary of state. His term of office shall be four years, and he shall receive a salary of six thousand and six hundred dollars ($6600.00) per annum. Any vacancy in the office shall be filled by the governor, until the next general election. The office of the department of labor shall be kept in the city of Raleigh and shall be provided for as are other public offices of the state. (Rev., ss. 3909, 3910; 1919, c. 314, s. 4; 1931, c. 312, s. 2; 1935, c. 293, s. 2; 1933, c. 415; 1939, c. 349; 1943, c. 499, s. 2; C. S. 7310.)

Editor's Note.—The Act of 1931 amended this section by adding the provision omitted by the previous version, and providing an annual salary of six thousand dollars. (Rev., ss. 3909, 3910; 1919, c. 314, s. 4; 1931, c. 312, s. 2; 1935, c. 293, s. 2; 1933, c. 415; 1939, c. 349; 1943, c. 499, s. 2; C. S. 7310.)

§ 95-3. Divisions of department; commissioner; administrative officers.—The Department of Labor shall consist of the following offices, divisions and sections:

A Commissioner of Labor.

A Division of Workmen's Compensation, as a separate and distinct unit, the officers of the Industrial Commission or the Division of Workmen's Compensation acting separately and independently of the other officers, divisions and sections herein provided for.

A Division of Standards and Inspections.

A Division of Statistics.

Each division, except the Division of Workmen's Compensation, shall be in the charge of a chief administrative officer and shall be organized under such rules and regulations as the Commissioner of Labor and the head of the division concerned, with the approval of the Governor, shall prescribe and promulgate. The Commissioner of Labor, with the approval of the Governor, may make provision for one person to act as chief administrative officer of two or more divisions, when such is deemed advisable. The chief administrative officers of the several divisions, except the Industrial Commission, shall be appointed by the Commissioner of Labor with the approval of the Governor, and he shall fix their compensation, subject to the approval of the Budget Bureau. The Commissioner of Labor, with the approval of the Governor may combine or consolidate the activities of two or more of the divisions of the department except the Division of Workmen's Compensation, or provide for the setting up of other divisions when such action shall be deemed advisable for the more efficient and economical administration of the work and duties of the department. (1931, cc. 277, 313, s. 4; 1933, c. 46.)

§ 95-4. Authority, powers and duties of commissioner.—The commissioner of labor shall be the executive and administrative head of the department of labor. In addition to the other powers and duties conferred upon the commissioner of labor by this part, the said commissioner shall have authority and be charged with the duty:

(a) To appoint and assign to duty such clerks, stenographers, and other employees in the various divisions of the department, with approval of said director of division, as may be necessary to perform the work of the department, and fix their compensation, subject to the approval of the Budget Bureau. The commissioner of labor may assign or transfer stenographers, or clerks, from one division to another, or inspectors from one division to another, or combine the clerical force of two or more divisions, or require from one division assistance in the work of another division; he may consider necessary and advisable: Provided, however, the provisions of this subsection shall not apply to the industrial commission, or the division of workmen's compensation.

(b) To make such rules and regulations with reference to the work of the department and of the several divisions thereof as shall be necessary to properly carry out the duties imposed upon the said commissioner and the work of the department; such rules and regulations to be made subject to the approval of the governor.
§ 95-5. Annual report to Governor; recommendation as to legislation needed. — The commissioner of labor shall annually, on or before the first day of January, file with the governor a report covering the activities of the department, and the report so made on or before January first of the years in which the general assembly shall be in session shall be accompanied by recommendations of the commissioner with reference to such changes in the law applying to or affecting industrial and labor conditions as the commissioner may deem advisable. The report of the commissioner of labor shall be printed and distributed in such manner and form as the director of the budget shall authorize. (1931, c. 312, s. 7.)

§ 95-6. Statistical report to Governor; publication of information given by employers.—It shall be the duty of the commissioner of labor to collect in the manner herein provided for, and to assist, systematize, and present to the governor as a part of the report provided for in § 95-5, statistical details relating to all divisions of labor in the State, and particularly concerning the following: The extent of unemployment, the hours of labor, the number of employees and sex thereof, and the daily wages earned; the conditions with respect to labor in all manufacturing establishments, hotels, stores, and workshops; and the industrial, social, educational, moral, and sanitary conditions of the labor classes, in the productive industries of the State. Such statistical details shall include the names of firms, companies, or corporations, where the same are located, the kind of goods produced or manufactured, the period of operation of each year, the number of employees, male or female, the number engaged in clerical work and the number engaged in manual labor, with the classification of the number of each sex engaged in such occupation and the average daily wage paid each: Provided, that the commissioner shall not, nor shall anyone connected with his office, publish or give or permit to be published or given to any person the individual statistics obtained from any employer, and all such statistics, when published, shall be published in connection with other similar statistics and be set forth in aggregates and averages. (1931, c. 312, s. 8.)

§ 95-7. Power of commissioner to compel the giving of such information; refusal as contempt. —The commissioner of labor, or his authorized representative, for the purpose of securing the statistical details referred to in § 95-6, shall have power to examine witnesses on oath, to compel the attendance of witnesses and the giving of such testimony and production of such papers as shall be necessary to enable him to gain the necessary information. Upon the refusal of any witness to comply with the requirements of the commissioner of labor or his representative in this respect, it shall be the duty of any judge of the superior court, upon the application of the commissioner of labor, or his representative, to order the witness to show cause why he should not comply with the requirements of the said commissioner, or his representative, if in the discretion of the judge such requirement is reasonable and proper. Refusal to comply with the order of the judge of the superior court shall be dealt with as for contempt of court. (1931, c. 312, s. 9.)

§ 95-8. Employers required to make statistical report to Commissioner; refusal as contempt. —It shall be the duty of every owner, operator, or manager of every factory, workshop, mill, mine, or other establishment, where labor is employed, to make to the department, upon blanks furnished by said department, such reports and returns as the said department may require, for the purpose of compiling such labor statistics as are authorized by this article, and the owner or business manager shall make such reports and returns within the time prescribed therefor by said Commissioner, and shall certify to the correctness of the same. Upon the refusal of any firm or corporation to comply with the provisions of this section, it shall be the duty of any judge of the superior court, upon application by the commissioner or by any representative of the department authorized by him, to order the person, firm, or corporation to show
§ 95-9. Employers to post notice of laws.—It shall be the duty of every employer to keep posted in a conspicuous place in every room where five or more persons are employed, the sign or notice of any law concerning the employment of adult persons and children and the regulation of hours and working conditions. The Commissioner of Labor shall furnish the printed form of such notice upon request. (1933, c. 244, s. 6.)

§ 95-10. Division of workmen's compensation.—The North Carolina industrial commission, created under the provisions of the workmen's compensation act, § 97-1 et seq., is hereby transferred to the department of labor as one of its integral units. The powers, duties, and personnel of the said industrial commission shall continue as provided for in the workmen's compensation act: Provided, however, that such adjustments shall be made in connection with the statistical work and the work of inspection of said industrial commission and the statistical work and work of inspection of other divisions of the department of labor as the commissioner of labor, with the advice of the industrial commission and of the heads of the divisions directly concerned, may, with the approval of the Governor, prescribe, for the purpose of facilitating, expediting, and improving the work of the department as a whole. (1931, c. 319, s. 11.)

§ 95-11. Division of Standards and Inspection.—(a) The chief administrative officer of the Division of Standards and Inspection shall be known as the director of the division. It shall be his duty, under the direction and supervision of the Commissioner of Labor, and under rules and regulations to be adopted by the Department as herein approved, to make or cause to be made all necessary inspections to see that all laws, rules, and regulations concerning the safety and well-being of labor are promptly and effectively carried out. (b) The Division shall make studies and investigations of special problems connected with the labor of women and children, and create the necessary organization, and appoint an adequate number of investigators, with the consent of the Commissioner of Labor and the approval of the Governor; and the Director of said division, under the supervision and direction of the Commissioner of Labor and under such rules and regulations as shall be prescribed by said Commissioner, with the approval of the Governor, shall perform all duties devolving upon the Department of Labor, or the Commissioner of Labor with relation to the enforcement of laws, rules, and regulations governing the employment of women and children. (c) The Director shall report annually to the Commissioner of Labor the activities of the division, with such recommendations as may be considered advisable for the improvement of the working conditions for women and children. (d) The Division shall collect and collate information and statistics concerning the location, estimated and actual horsepower and condition of valuable water-powers, developed and undeveloped, in this State; also concerning farm lands and farming, the kinds, character, and quantity of the annual farm products in this State; also of timber lands and timbers, truck gardening, dairying, and such other information and statistics concerning the agricultural and industrial welfare of the citizens of this State as may be deemed to be of interest and benefit to the public. The Director shall also perform the duties of mine inspector as prescribed in the chapter on Mines and Quarries. (e) The Division shall conduct such research and carry out such studies as will contribute to the health, safety, and general well-being of the working classes of the State. The finding of such investigations, with the approval of the Commissioner of Labor and the Governor and the cooperation of the chief administrative officer of the Division or Divisions directly concerned, shall be promulgated as rules and regulations governing work places and working conditions. All recommendations and suggestions pertaining to health, safety, and well-being of employees shall be transmitted to the Commissioner of Labor in an annual report which shall cover the work of the Division of Standards and Inspection. (f) The Division shall make, promulgate and enforce rules and regulations for the protection of employees from accident and from occupational disease; and shall upon request, and after such investigation as it deems proper, issue certificates of compliance to such employers as are found by it to be in compliance with the rules and regulations made and promulgated in accordance with the provisions of this paragraph. (1931, c. 312, s. 12, c. 426; 1935, c. 131.)

Editor's Note.—Subsection (f) was added by the 1935 amendment.

§ 95-12. Division of Statistics.—The Division of Statistics shall be in charge of a Chief Statistician. It shall be his duty, under the direction and supervision of the Commissioner of Labor, to collect, assort, systematize, and print all statistical details relating to all divisions of labor in this State as is provided in § 95-6. (1931, c. 312, s. 13.)

§ 95-13. Enforcement of rules and regulations.—In the event any person, firm or corporation shall, after notice by the commissioner of labor, violate any of the rules or regulations promulgated under the authority of this article or any laws amendatory hereof relating to safety devices, or measures, the attorney general of the State, upon the request of the commissioner of labor, may take appropriate action in the civil courts of the state to enforce such rules and regulations. Upon request of the attorney general, any solicitor of the state of North Carolina in whose district such rule or regulation is violated may perform the duties hereinafore required of the attorney general. (1939, c. 398.)

§ 95-14. Agreements with certain federal agencies for enforcement of Fair Labor Standards Act.—The North Carolina state department of labor may and it is hereby authorized to enter into agreements with the wage and hour division, and the children's bureau, United States department of labor, for assistance and cooperation in the enforcement within this state of the
act of Congress known as the Fair Labor Standards Act of one thousand nine hundred thirty-eight, approved June twenty-fifth, one thousand nine hundred thirty-eight, and is further authorized to accept payment and/or reimbursement for its services as provided by said act of Congress. Any such agreement may be subject to the regulations of the administrator of the wage and hour division, or the chief of the children's bureau of the United States department of labor, as the case may be, and shall be subject to the approval of the director of the state budget. Nothing in this section shall be construed as authorizing the state department of labor to spend in excess of its appropriation from state funds, except to the extent that such excess may be paid and/or reimbursed to it by the United States department of labor. All payments received by the state department of labor under this section shall be deposited in the state treasury and are hereby appropriated to the state department of labor to enable it to carry out the agreements entered into under this section. (1939, c. 245.)

Art. 2. Maximum Working Hours.

§ 95-15. Title of article.—This article shall be known and may be cited as the “Maximum Hour Law.” (1937, c. 409, s. 1.)

§ 95-16. Declaration of public policy; enactment under police power.—As a guide to interpretation and application of this article, the public policy of this state is declared as follows: The relationship of hours of labor to the health, morals and general welfare of the people is a subject of general concern which requires appropriate legislation to limit hours of labor to promote the general welfare of the people of the state without jeopardizing the competitive position of North Carolina business and industry.

The general assembly, therefore, declares that in its considered judgment the general welfare of the state requires enactment of this law under the police power of the state. (1937, c. 409, s. 2.)

§ 95-17. Limitations of hours of employment; exceptions.—No employer shall employ a female person for more than forty-eight hours in any one week or nine hours in any one day, or on more than six days in any period of seven consecutive days.

No employer shall employ a male person for more than fifty-six hours in any one week, or more than twelve days in any period of fourteen consecutive days or more than ten hours in any one day, except that in case where two or more shifts of eight hours each or less per day are employed, any shift employee may be employed not to exceed double his regular shift hours in any one day whenever a fellow employee in like work is prevented from working because of illness or other cause: Provided, that any male person employed working in excess of fifty-five hours in any one week shall be paid time and a half at their regular rate of pay for such excess hours: Provided further, that nothing in this section or in any other provision of this article shall apply to the state or to municipal corporations or their employees, or to employees in hotels.

When, by reason of a seasonal rush of business, any employer finds or believes it to be necessary that the employees of his or its manufacturing plant shall work for more than fifty-six hours per week, the employer may apply to the commissioner of labor of the state of North Carolina for permission to allow the employees of such establish
lishment to work a greater number of hours than fifty-six for a definite length of time not exceeding sixty days; and such commissioner, after investigation, may, in his discretion, issue such permit on the condition that all such employees shall receive one and one-half times the usual compensation for all hours worked over fifty-six per week. Provided: This shall not apply to the hours of any female person or any person under the age of eighteen years: Provided further, employees in all laundries and dry cleaning establishments shall not be employed more than fifty-five hours in any one week: Provided further, nothing contained in this article shall be construed to limit the hours of employment of any outside salesmen on commission basis. Provided, that this article shall not apply to male clerks in mercantile establishments. Provided, that this article shall not apply to retail or wholesale florists nor to employees of retail or wholesale florists during the following periods of each year: one week prior to and including Easter, one week prior to and including Christmas, and one week prior to and including Mother's Day. (1937, cc. 406, 409, s. 3; 1939, c. 312, s. 1; 1943, c. 59.)

Cross Reference.—Compare sections 95-26 and 95-27.

Editor's Note.—The 1939 amendment added the last proviso. The 1943 amendment substituted "fifty-six" for "fifty-five" in line two of the second paragraph and in lines four, nine and fourteen of the last paragraph. It also inserted the first proviso in the second paragraph.

§ 95-18. Definitions.—Whenever used in this article
(a) "Employ" includes permit or suffer to work.
(b) "Employer" includes every person, firm, corporation, partnership, stock association, agent, manager, representative or foreman, or other person having control or custody of any employment, place of employment or of any employee.
(c) "Day" includes any period of twenty-four consecutive hours.
(d) "Continuous process operations" includes bleaching, dyeing, finishing, redrying, dry kiln operations, and any other processing requiring continuous handling or work for completion. (1937, c. 409, s. 4.)

§ 95-19. Posting of law.—Every employer shall post and keep conspicuously posted in or about the premises wherein any employee is employed, a printed abstract of this article to be furnished by the state commissioner of labor upon request. (1937, c. 409, s. 5.)

§ 95-20. Time records kept by employers.—Every employer shall keep a time book and/or record which shall state the name and occupation of each employee employed and which shall indicate the number of hours worked by him or her on each day of the week, and the amount of wages paid each pay period to each such employee. Such time book and/or record shall be kept on file at least one year after the expiration of the time therein, or refuses to make such time book and/or record accessible, upon request, to the state commissioner of labor or his duly authorized representative shall be deemed to have violated this section. (1937, c. 409, s. 6.)

§ 95-21. Enforcement by commissioner of labor.—It shall be the duty of the state commissioner of labor to enforce all the provisions of this article. The state commissioner of labor and his authorized representatives shall have the power and authority to enter any place of employment, and, in the enforcement of this article, the state commissioner of labor and his authorized representatives may enter and inspect as often as practicable all such places of employment. They may investigate all complaints of violations of this article received by them, and may institute prosecutions as hereinafter provided for violations of this article. (1937, c. 409, s. 7.)

§ 95-22. Interference with enforcement prohibited.—No person shall hinder or delay the state commissioner of labor or any of his authorized representatives in the performance of his duties; nor shall any person refuse to admit to, or lock out from, any place of employment the state commissioner of labor or any of his authorized representatives, or refuse to give the state commissioner of labor or his authorized representatives information required for the proper enforcement of this article. (1937, c. 409, s. 8.)

§ 95-23. Violation a misdemeanor.—Any person who, whether on his own behalf or for another, or through an agent, manager, representative, foreman or other person, shall knowingly and intentionally violate any provisions of this article, shall be guilty of a misdemeanor. (1937, c. 409, s. 9.)

§ 95-24. Penalties.—Whoever knowingly and intentionally violates any provisions of § 95-17, upon complaint lodged by the state commissioner of labor, shall be punished by a fine of not less than ten ($10.00) dollars nor more than fifty ($50.00) dollars, or by imprisonment for not more than thirty days in the discretion of the court; and whenever any person shall have been notified by the state commissioner of labor or his authorized representative, or by the service of a summons in a prosecution, that he is violating such provision, he shall be subject to like penalties in addition for each and every day that such violation shall have been continued after such notification.

Whoever knowingly and intentionally violates any of the provisions of §§ 95-19, 95-20, or 95-22 of this article shall be punished, for the first offense, by a fine of not less than five ($5.00) dollars nor more than twenty-five ($25.00) dollars, or imprisonment for not more than thirty days, in the discretion of the court, and whenever any person shall have been notified by the state commissioner of labor or his authorized representative that he is violating such provisions, and shall have been given a reasonable time in which to remedy the conditions which shall constitute such violations, he shall be subject to like penalties in addition to the penalties aforesaid, for each and every day that such violation shall have continued after the expiration of the time allowed by the state commissioner of labor or his authorized representative.
§ 95-25
for remedying the aforesaid conditions. (1937, c. 409, s. 10.)

§ 95-25. Intimidating witnesses. — Whoever shall, by force, intimidation, threat of procuring dismissal from employment, or by any other manner whatsoever, induce or attempt to induce an employee to refrain from giving testimony in any investigation or proceeding relating to or arising under this article, or whoever discharges or penalizes any employee for so testifying, shall be subject to a fine of not less than ten ($10.00) dollars or, by imprisonment for not more than thirty days. (1937, c. 409, s. 11.)

Art. 3. Various Regulations.

§ 95-26. Week's work of women to be fifty-five hours.—Not more than fifty-five hours shall constitute a week's work for women over sixteen in any laundry, dry-cleaning establishment, pressing club, work-shop, factory, manufacturing establishment, or mill, of the State, and no woman over sixteen employed in any of the above-named places shall be worked exceeding eleven hours in any one day or over fifty-five hours in any one week. Any employer of labor violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days, and each day's work exceeding the said hours shall constitute a separate offense.

Provided, that this section shall not apply to those employed in the operation of seasonal industries in their process of conditioning and of preserving perishable or semi-perishable commodities, or to those engaged in agricultural work.

Provided, further, that this section shall not apply to retail or wholesale florists during the following periods of each year: one week prior to and including Easter, one week prior to and including Christmas, and one week prior to and including Mother's Day. (1915, c. 149, s. 2; 1931, c. 289; 1935, c. 40; 1939, c. 290; 1935, c. 40; 1939, c. 132; 2; C. S. 6554.)

Cross Reference.—For hours law applicable to employers hiring nine or more employees, see §§ 95-15 to 95-25.

Editor's Note.—The amendment of 1935 omitted a proviso, which formerly appeared in the second paragraph, stating that the section should not apply to establishments in towns of less than five thousand inhabitants.

§ 95-27. Hours of work for women in certain industries.—It shall be unlawful for any person, firm, or corporation, proprietor or owner of any retail, or wholesale mercantile establishment or other business where any female help is employed for the purpose of serving the public in the capacity of clerks, salesladies or waitresses and other employees of public eating places, to employ or permit to work any female longer than ten hours in any one day or over fifty-five hours in any one week; nor shall any female be employed or permitted to work for more than six hours continuously at any one time without an interval of at least half an hour except where the terms of employment do not call for more than six and a half hours in any one day or period.

Nothing in this section shall be construed to apply to females whose full time is employed as bookkeepers, cashiers or office assistants or to any establishment that does not have in its employment three or more persons at any one time.

Every employer shall post in a conspicuous place in every room of the establishment in which females are employed a printed notice stating the provisions of this section and the hours of labor. The printed form of such notice shall be furnished, upon request, by the commissioner of labor.

Any employer of labor violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding one hundred dollars or imprisoned not exceeding sixty days and each day's work exceeding the said hours shall constitute a separate offense. (1933, c. 35; 1935, c. 407.)

Cross Reference.—For hours law applicable to employers hiring nine or more employees, see §§ 95-15 to 95-25.

Editor's Note.—The amendment of 1935 omitted a proviso, which formerly appeared in the second paragraph, stating that the section should not apply to establishments in towns of less than five thousand inhabitants.

§ 95-28. Working hours of employees in state institutions.—It shall be unlawful for any person or official or foreman or other person in authority in the state hospital at Raleigh, the state hospital at Morganton, the state hospital at Goldsboro, or any penal or correctional institution of the State of North Carolina, excepting the state prison and institutions under the control of the state commission of highways and public works, to require any employee to work for a greater number of hours than twelve (12) during any twenty-four (24) hour period, or not more than eighty-four (84) hours during any one week, or permit the same, during which period the said employee shall be permitted to take one continuous hour off duty; except in case of an emergency as determined by the superintendent, in which case the limitation of twelve (12) hours in any consecutive twenty-four (24) shall not apply. Nothing in this section shall be construed to effect the hours of doctors and superintendents in these hospitals. Any violation of this section shall be a misdemeanor, punishable within the discretion of the court. (1935, c. 136.)

§ 95-29. Seats for women employees; failure to provide, a misdemeanor.—All persons, firms, or corporations who employ females in a store, shop, office, or manufacturing establishment, as clerks, operatives, or helpers in any business, trade, or occupation carried on or operated in the state of North Carolina, shall be required to procure and provide proper and suitable seats for all such females, and shall permit the use of such seats, rests, or stools as may be necessary, and shall not make any rules, regulations, or orders preventing the use of such seats, stools, or rests when any such female employee or employees are not actively employed or engaged in their work in such business or employment.

If any employer of female help fails to provide seats, as required in this article, or makes any rules, orders or regulations in his or its shop, store, or other place of business requiring females to remain standing when not necessarily employed or engaged in service or labor therein, he shall be
guilty of a misdemeanor, and upon conviction thereof shall be punished by fine or imprisonment, or both, within the discretion of the court. The Commissioner of Labor, or his duly authorized agents, may at any time enter and inspect all stores, shops, offices, or manufacturing or other establishments coming within the provisions of this section, and he may make such rules and regulations as he deems necessary to enforce the provisions of this section. It shall be unlawful for any person, firm or corporation to refuse permission to enter, obstruct, or prevent any duly authorized agent of the commissioner in his effort to make the inspection herein provided for. (1909, c. 857, ss. 1, 2; 1919, c. 100, s. 12; C. S. 6555.)

§ 95-30. Medical chests in factories; failure to provide, a misdemeanor.—Every person, firm, or corporation operating a factory or shop employing over twenty-five laborers, in which machinery is used for any manufacturing purpose, or for any purpose except for elevation or for heating or hoisting apparatus, shall at all times keep and maintain free of expense to the employees a medical or surgical chest which shall contain two porcelain pans, two tourniquets, gauze, absorbent cotton, adhesive plasters, bandages, antiseptic soap, one bottle of carbolic acid with directions on bottle, one bottle antiseptic tablets, one pair scissors, one folding stretcher, for the treatment of persons injured or taken ill upon the premises. Provided, this section does not require any employer to spend over ten dollars for such equipment.

Any person, firm, or corporation violating this section shall be subject to a fine of not less than five dollars nor more than twenty-five dollars for every week during which such violation continues. (1911, c. 57; C. S. 6556.)

§ 95-31. Acceptance by employer of assignment of wages.—No employer of labor shall be responsible for any assignment of wages to be earned in the future, executed by an employee, unless and until such assignment of wages is accepted by the employer in a written agreement to pay same. (1935, c. 410; 1937, c. 90.)

Editor's Note.—The 1937 amendment struck out the former proviso exempting Rowan, Iredell, Rockingham and Cabarrus counties from the provisions of this section.

Section Applies Only to Wages to Be Earned.—An assignment by an employee of wages earned and due him by the employer is valid without acceptance by the employer, and the assignee may sue the employer thereon, for the payment of wages. —No employer of labor shall be held guilty of the violation of this section unless and until such assignment of wages is accepted by the employer in a written agreement to pay same. (1935, c. 410; 1937, c. 90.)

It Is Constitutional.—The provisions of this section rendering an assignment invalid unless accepted in writing by the employer, does not deprive the assignee of due process of law or the equal protection of the laws. Morris v. Holshouser, 220 N. C. 293, 297, 17 S. E. (2d) 224, 226, 227, 137 A. L. R. 733.

When applied to contracts executed after its effective date this section cannot be held unconstitutional as impairing the obligation of contracts. Morris v. Holshouser, 220 N. C. 293, 17 S. E. (2d) 224, 226, 227, 137 A. L. R. 733.

This section is a regulation of contracts growing out of the relationship of employer and employee imposed for the general welfare and is a valid exercise of the police power of the state. Morris v. Holshouser, 220 N. C. 293, 17 S. E. (2d) 224, 226, 227, 137 A. L. R. 733.

The insertion of the word "assignee" into the contract to make it an assignment of unearned wages existed by his employee does not in itself constitute an unconstitutional discrimination, since in the absence of legis-
employment agency within the meaning of this article shall include any business operated by any person, firm or corporation for profit and engaged in procuring employment for any person, firm or corporation in the State of North Carolina and making a charge on the employee or employer for the service. (1929, c. 178, s. 1.)

§ 95-38. License from Commissioner of Labor; investigation of applicant.—No person, firm or corporation shall engage in the business of operating any employment agency, as designated in § 95-37, in North Carolina without first making a written application to the Commissioner of Labor and being licensed by him as herein provided, to engage in such business. Upon receiving an application from such person, firm or corporation it shall be the duty of the Commissioner of Labor to make an investigation into the character and moral standing of the person, firm or corporation. If after such investigation, the Commissioner of Labor shall be satisfied that such person, firm or corporation is of such character and moral standing as to warrant the issuance of a license to engage in the business covered by this article, he shall issue a license to such person, firm or corporation as provided herein. (1929, c. 178, s. 2; 1931, c. 312, s. 3.)

§ 95-39. Rules and regulations governing issuance of licenses.—The Commissioner of Labor is authorized and empowered to make general rules and regulations in relation to the licensing of such employment agencies and for the general supervision thereof in accordance with this article. (1929, c. 178, s. 3; 1931, c. 312, s. 3.)

§ 95-40. Investigation of records of agencies; hearing; rescission of licenses.—The Commissioner of Labor may investigate the books and records of any employment agency licensed under this article, and may rescind the license of the agency for cause if he finds that the agency is not complying with the terms and conditions of this article. No license shall be revoked until the Commissioner shall hold a hearing at the Court House of the County in which the licensee is doing business. The licensee shall be given ten days' notice to appear at the hearing and show cause why the license should not be revoked. At the hearing the result of the Commissioner's investigation shall be presented under oath, and the licensee may present evidence to show that the license should not be revoked. The licensee may appeal to the Superior Court within ten days after the Commissioner's decision. (1929, c. 178, s. 4; 1931, c. 312, s. 3.)

§ 95-41. Subpoenas; oaths.—The Commissioner of Labor, his Assistant or deputy shall be empowered to subpoena witnesses and administer oaths in making investigations and taking testimony to be presented at the hearing to be held before the Commissioner of Labor as hereinbefore provided for. (1929, c. 178, s. 5; 1931, c. 312, s. 3.)

§ 95-42. Service of subpoenas and fees for, governed by general law.—The County Sheriffs and their respective deputies shall serve all subpoenas of the Commissioner of Labor, and shall receive the same fees as are now provided by law for like services, and each witness who appears in obedience to such subpoena shall receive for attendance the fees and mileage for witnesses in civil cases of courts of the County in which the hearing is held. (1929, c. 178, s. 6; 1931, c. 312, s. 3.)

§ 95-43. Production of books, papers and records.—The Superior Court shall, on the application of the Commissioner of Labor, his assistant or duly authorized deputy, enforce by proper proceedings the attendance and testimony of witnesses and the production and examination of books, papers and records. (1929, c. 178, s. 7; 1931, c. 312, s. 3.)

§ 95-44. License fee to be paid into special fund.—The license fee, charged under the provisions of this article, shall be paid into a special fund of the Department of Labor, and the proceeds of such license fees shall be used for the purpose of the supervision and regulation of the employment agencies, including costs of investigations or hearings to revoke licenses and the necessary traveling expenses and other expenditures incurred in administering this article. (1929, c. 178, s. 8; 1931, c. 312, s. 3.)

§ 95-45. Violations.—Any person, firm or corporation conducting an employment agency in the State of North Carolina, in violation of this article shall be guilty of a misdemeanor, and if a person punishable by a fine of not less than five hundred dollars, or imprisonment of not less than six months, or both; and if a corporation by a fine of not less than five hundred dollars and not more than one thousand dollars. (1929, c. 178, s. 9.)

§ 95-46. Government employment agencies unaffected.—This article shall not in any manner affect or apply to any employment agency operated by the State of North Carolina, the Government of the United States, or any City, County or Town, or any agency thereof. (1929, c. 178, s. 10.)

§ 95-47. License taxes placed upon agencies under Revenue Act, not affected.—This article shall not create any conflict with or affect any license tax placed upon such employment agencies by the General Revenue Act of North Carolina but instead shall be construed as supplementary thereto in exercising the police powers of the State. (1929, c. 178, s. 11.)

Art. 6. Separate Toilets for Sexes and Races.

§ 95-48. When separate toilets required; penalty.—All persons and corporations employing males and females in any manufacturing industry, or other business employing more than two males and females in towns and cities having a population of one thousand persons or more, and where such employees are required to do indoor work chiefly, shall provide and keep in a clean and comfortable condition separate and distinct toilet rooms for such employees, said toilets to be lettered and marked in a distinct manner, so as to furnish separate facilities for white males, white females, colored males and colored females: Provided, that the provisions of this section shall not apply to cases where toilet arrangements or facilities are furnished by said employer off the premises occupied by him. (1913, c. 83, s. 1; C. S. 6559.)
§ 95-49. Location; intruding on toilets misdemeanor.—It shall be the duty of the persons or corporations mentioned under this article to locate their toilets for males and females, white and colored, in separate parts of their buildings or grounds in buildings hereafter erected, and in those now erected all closets shall be separated by substantial walls of brick or timber, and any employee who shall wilfully intrude upon or use any toilet not intended for his or her sex or color shall be guilty of a misdemeanor and upon conviction shall be fined five dollars. (1913, c. 83, s. 4; C. S. 6560.)

§ 95-50. Punishment for violation of article.—If any person, firm, or corporation refuses to comply with the provisions of this article, he or it shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned, or both, in the discretion of the court. (1913, c. 83, s. 2; 1919, c. 100, s. 12; C. S. 6561.)

§ 95-51. Police in towns to enforce article.—The police officers of any town or city shall investigate the places of business of any person or corporation employing males and females and see that the provisions of this article are put in force, and shall swear out a warrant before the mayor or other proper officer of any town or city and prosecute all persons, corporations, and managers of corporations violating any of the provisions of this article. (1913, c. 83, s. 3; C. S. 6562.)

§ 95-52. Sheriff in county to enforce article.—When any persons or corporations locate their manufacturing plant or other business outside of any city or town, the sheriff of the county shall investigate the condition of the toilets used by such manufacturing plant or business and see that the provisions of this article are complied with, and shall swear out a warrant before a justice of the peace and prosecute any one violating the provisions of this article. (1913, c. 83, s. 5; C. S. 6563.)

Local Modification.—Harnett, Lee, Johnston, Northampton, Sampson, Cleveland, Rutherford, Polk, and Henderson: C. S. 6564.

§ 95-53. Enforcement by department of labor.—The department of labor shall investigate the places of business of any person or corporation employing males and females, and shall make such rules and regulations for enforcing and carrying out this article as may be necessary. (1919, c. 100, s. 7; 1931, c. 312, ss. 12, 14; C. S. 6563(a).)

Art. 7. Board of Boiler Rules and Bureau of Boiler Inspection.

§ 95-54. Board of boiler rules created; members, appointment, and qualifications; terms of office; vacancies; meetings.—There is hereby created the North Carolina board of boiler rules consisting of five members, of whom four shall be appointed to the board by the governor, one for a term of one year, one for a term of two years, one for a term of three years and one for a term of four years. At the expiration of their respective terms of office, their successors shall be appointed for terms of four years each. Upon the death or incapacity of any member, the vacancy for the remainder of the term shall be filled with a representative of the same class. Of these four appointed members, one shall be a representative of the owners and users of steam boilers within the State of North Carolina, one a representative of the boiler manufacturers or a boiler maker who has had not less than five years practical experience as a boilermaker within the State of North Carolina, one a representative of a boiler inspection and insurance company licensed to do business within the State of North Carolina, and one a representative of the operating steam engineers in the State of North Carolina. The fifth member shall be the commissioner of labor, who shall be chairman of the board. The board shall meet at least twice yearly at the state capital or other place designated by the board. (1935, c. 326, s. 1.)

§ 95-55. Formulation of rules and regulations.—The board shall formulate rules and regulations for the safe and proper construction, installation, repair, use and operation of steam boilers in this State. The rules and regulations so formulated shall conform as nearly as possible to the boiler code of the American Society of Mechanical Engineers and amendments and interpretations thereto made and approved by the council of the society. (1933, c. 326, s. 1.)

§ 95-56. Approval of rules and regulations by governor.—The rules and regulations formulated by the board of boiler rules shall become effective upon approval by the governor, except that rules applying to the construction of new boilers shall not become effective to prevent the installation of such new boilers until six months after approval by the governor. Changes in the rules which would raise the standards governing the methods of construction of new boilers or the quality of material used in them shall not become effective until six months after approval by the governor. (1935, c. 326, s. 2.)

§ 95-57. Compensation and expenses of board.—The members of the board of boiler rules, exclusive of the chairman thereof, shall serve without salary and shall receive their actual expenses, not to exceed their actual railroad fare plus four dollars ($4.00) per day each, for not to exceed twenty days in any year while in the performance of their duties as members of the board, to be paid in the same manner as in case of other state officers. The chairman of the board of boiler rules shall countersign all vouchers for expenditures under this section. (1935, c. 326, s. 3.)

§ 95-58. Effect of article on boilers installed prior to enactment.—This article shall not be construed as in any way preventing the use or sale of steam boilers in this State which shall have been installed or in use in this State prior to the taking effect of this article and which shall have been made to conform to the rules and regulations of the board of boiler rules governing existing in establishments as provided in § 95-66. (1935, c. 326, s. 4.)

§ 95-59. Commissioner of labor empowered to appoint chief inspector; qualifications; salary.—After the passage of this article and at any time thereafter that the office may become vacant, the commissioner of labor shall appoint, and may remove for cause when so appointed, a citizen of this State who shall have had at the time of such appointment not less than five years' pract-
tical experience with steam boilers as a steam engineer, mechanical engineer, boilermaker or boiler inspector, or who has passed the same kind of examination as that prescribed for deputy or special inspectors in § 95-63, to be chief inspector for a term of two years or until his successor shall have been appointed, at an annual salary to be fixed by the commissioner of labor with the approval of the assistant director of the budget. (1935, c. 326, s. 5; 1943, c. 469.)

Editor's Note.—Prior to the 1943 amendment the salary was fixed at $2,000.

§ 95-60. Certain boilers excepted.—This article shall not apply to boilers under federal control or to stationary boilers used by railroads which are inspected regularly by competent inspectors, or to boilers used solely for propelling motor road vehicles; or to boilers of steam fire engines brought into the state for temporary use in times of emergency to check conflagrations; or to portable boilers used for agricultural purposes only or for pumping or drilling in the open field for water, gas or coal, gold, t alc or other minerals and metals; or to steam heating boilers which carry pressures not exceeding fifteen pounds per square inch, built in accordance with the boiler code of the American Society of Mechanical Engineers. (1935, c. 326, s. 6; 1937, c. 125, s. 1.)

Editor's Note. — Prior to the 1937 amendment this section excepted boilers used for heating purposes.

§ 95-61. Powers of commissioner of labor; creation of bureau of boiler inspection. — The commissioner of labor is hereby charged, directed and empowered:

(a) To set up in the division of standards and inspections of the department of labor, a bureau of boiler inspection to be supervised by the chief inspector provided for in § 95-59 and one or more deputy inspectors of boilers, who shall have passed the examination provided for in § 95-63, at a salary not to exceed the salary of a senior factory inspector, and such office help as may be necessary.

(b) To have free access for himself and his chief boiler inspector and deputies, during reasonable hours, to any premises in the State where a steam boiler is built or where a steam boiler or power plant apparatus is being installed or operated, for the purpose of ascertaining whether such boiler is built, installed and operated in accordance with the provisions of this article.

(c) To prosecute all violators of the provisions of this article.

(d) To issue, suspend and revoke inspection certificates allowing steam boilers to be operated, as provided in this article.

(e) To enforce the laws of the State governing the use of steam boilers and to enforce the rules and regulations of the board of boiler rules.

(f) To keep a complete record of the type, dimensions, age, condition, pressure allowed upon, pressure and temperature to which such boiler is subjected, and its location and date of the last inspection of all steam boilers to which this article applies.

(g) To publish and distribute among boiler manufacturers and others requesting them, copies of the rules and regulations adopted by the board of boiler rules. (1935, c. 326, s. 7.)

§ 95-62. Provision for special inspectors; examination required. — In addition to the deputy boiler inspectors authorized by § 95-61, the commissioner of labor shall, upon the request of any company authorized to insure against loss from explosion of boilers in this State, issue to any boiler inspectors of said company commissions as special inspectors: Provided, that each such inspector before receiving his commission shall pass satisfactorily the examination provided for in § 95-63, or, in lieu of such examination, shall hold a certificate of competency as an inspector of steam boilers for a state that has a standard of examination equal to that of the State of North Carolina, or a certificate from the national board of boiler and pressure vessel inspectors. The fees for such commission shall be one dollar ($1.00) and one dollar ($1.00) for each annual renewal thereof.

Such special inspectors shall receive no salary from, nor shall any of their expenses be paid by, the State, and the continuance of a special inspector's commission shall be conditioned upon his continuing in the employment of a boiler inspector and insurance company duly authorized as aforesaid and upon his maintenance of the standards imposed by this article. Such special inspectors shall inspect all steam boilers insured by their respective companies, and the owners of such insured boilers shall be exempt from the payment of the fees provided for in § 95-68. Each company employing such special inspectors shall, within thirty days following each annual internal inspection made by such inspectors, file a report of such inspection with the commissioner of labor. (1935, c. 326, s. 8.)

§ 95-63. Examination for inspectors; revocation of commission.—Examination for deputy or special inspectors shall be given by the board of boiler rules or by at least two examiners to be appointed by said board and must be written or part written and part oral recorded in writing and must be confined to questions the answers to which will aid in determining the fitness and competency of the applicant for the intended service and must be of uniform grade throughout the State. In case an applicant for an inspector's appointment or commission fails to pass this examination, he may appeal to the board of boiler rules for a second examination which shall be given by said board, or if by examiners appointed by said board, then by examiners other than those by whom the first examination was given and these examiners shall be appointed forthwith to give said second examination. Upon the result of this examination on appeal, the board shall determine whether the applicant be qualified. The record of any applicant's examination, whether original or on appeal, shall be accessible to him and his employer. A commission may be revoked by the commissioner of labor upon the recommendation of the chief inspector of steam boilers, for the incompetence or untrustworthiness of the holder thereof or for willful falsification of any matter or statement contained in his application or in a report of any inspection. A person whose commission is revoked may appeal from the revocation to the board of boiler rules which shall hear the appeal and either set aside or affirm the revocation and its decision shall be final. The person whose commission has been revoked shall
be entitled to be present in person and by coun-
sel on the hearing of the appeal. If a certificate
or commission is lost or destroyed, a new cer-
tificate or commission shall be issued in its place
without another examination. A person who has
failed to pass the examination for a commission
or whose commission has been revoked shall be
entitled to apply for a new examination and com-
mision after ninety days from such failure or
revocation. (1935, c. 326, s. 9.)
§ 95-64. Boiler inspections; fee; certificate; sus-
pension.—On and after April first, nineteen hun-
dred and thirty-five, each steam boiler used or
proposed to be used within this State, except
boilers exempt under § 95-60, shall be thoroughly
inspected internally and externally while not un-
der pressure by the chief inspector or by one of
the deputy inspectors or special inspectors pro-
vided for herein, as to its design, construction,
installation, condition and operation; and if it
shall be found to be suitable, and to conform to
the rules and regulations of the board of boiler
rules, the owner or user of a steam boiler as re-
quired in this article to be inspected shall pay to
the chief inspector the sum of one dollar ($1.00)
for each fire tube boiler as required by this article.
The chief inspector shall issue to the owner or user thereof
an inspection certificate specifying the maximum
pressure which it may be allowed to carry. Such
inspection certificate shall be valid for not more
than fourteen months from its date, and it shall
be posted under glass in the engine or boiler room
containing such boiler, or an engine operated by
it, or, in the case of a portable boiler, in the of-
ifice of the plant where it is located for the time
being. No inspection certificate issued for a
boiler inspected by a special inspector shall be
being. No inspection certificate issued for a
boiler shall cease to be insured by a duly authorized
insurance company. The chief inspector or any
deputy inspector may, at any time, suspend an
inspection certificate when, in his opinion, the
boiler for which it was issued may not continue
to be operated without menace to the public
safety, or when the boiler is found not to com-
ply with the rules herein provided for and a
special inspector shall have corresponding pow-
ers with respect to inspection certificates for
boilers insured by the company employing him.
Such suspension of an inspection certificate shall
continue in effect until said boiler shall have been
made to conform to the rules and regulations of
the board of boiler rules and until said inspection
certificate shall have been reinstated by a state
inspector, if the inspection certificate was sus-
pected by a state inspector, or by a special in-
spector, if it was suspended by a special inspec-
tor. Not more than fourteen months shall elapse
between such inspections and there shall be at
least four such inspections in thirty-seven con-
secutive months. Each such boiler shall also be
inspected externally while under pressure with
at least the same frequency, and at no greater
intervals. (1935, c. 326, s. 10; 1937, c. 125, s. 2;
1939, c. 361, s. 1.)
Editor's Note.—The 1997 amendment, which struck out the
first provision in the first sentence, was repealed by the 1999
amendment.
§ 95-65. Operation of unapproved boiler pro-
hibited.—On and after July first, nineteen hun-
dred and thirty-five, it shall be unlawful for
any person, firm, partnership or corporation to
operate under pressure in this State a steam
boiler to which this article applies without a
valid inspection certificate as provided for in this
article. The operation of a steam boiler without
an inspection certificate, shall constitute a mis-
deemeanor on the part of the owner, user or op-
erator thereof and be punishable by a fine not
exceeding one hundred dollars ($100) or
imprisonment not to exceed thirty days, or both,
in the discretion of the court. (1935, c. 326, s. 11.)
§ 95-66. Installation of boilers not conform-
ing to requirements prohibited; boilers now in
use to conform.—No steam boiler which does
not conform to the rules and regulations formu-
lated by the board of boiler rules governing new
installations shall be installed in this State after
six months from the date upon which the said
rules and regulations shall become effective by
the approval of the governor.
All steam boilers installed and ready for use,
or being used, before the said six months shall
have elapsed, shall be made to conform to the
rules and regulations of the board of boiler rules
governing existing installations and the foruma
therein prescribed shall be used in determining the
maximum allowable working pressure for
such boilers. (1935, c. 326, s. 12.)
§ 95-67. Inspection of boilers during construc-
tion in state; outside state.—All boilers to be
installed after six months from the date upon
which the rules and regulations of the board of
boiler rules shall become effective by the ap-
proval of the governor shall be inspected during
construction by an inspector authorized to in-
spect boilers in this State, or if constructed out-
side the State, by an inspector holding a certifi-
cate of authority from the commissioner of labor
of this State, which certificate shall be issued by
the said commissioner of labor to any inspec-
tor who holds a certificate of authority to inspect
steam boilers issued by a State which shall have
adopted boiler rules that require standards of
construction and operation substantially equal to
those of this State, or an inspector who holds a
certificate of inspection issued by the national
board of boiler and pressure vessel inspectors.
(1935, c. 326, s. 12.)
§ 95-68. Fees for internal and external inspec-
tions.—The owner or user of a steam boiler, re-
quired by this article to be inspected by the
chief boiler inspector or a deputy inspector, shall
pay to the inspector six ($6.00) dollars for each
fire tube boiler over thirty inches in diameter in-
ternally inspected and four ($4.00) dollars for
each fire tube boiler over thirty inches in diame-
ter externally inspected while under pressure
and shall pay to the inspector four ($4.00) dollars
for each fire tube boiler up to and including thirty
inches in diameter externally inspected while under
pressure. All water tube boilers shall be charged six ($6.00) dollars for
each internal inspection and four ($4.00) dollars
for each external inspection while under pressure.

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Not more than ten ($10.00) dollars shall be collected for any one fire tube boiler over thirty inches in diameter for any one year. Not more than seven ($7.00) dollars shall be collected for any one fire tube boiler up to and including thirty inches in diameter for any one year. Not more than ten ($10.00) dollars shall be collected for any water tube boiler for any one year: Provided, that one ($1.00) dollar of each internal inspection fee shall be the fee for the certificate of inspection required by § 95-64. The inspector shall give receipts for said fees and shall pay the same to the treasurer of the state. The treasurer of the state shall hold the fees collected under this section and under § 95-64 in a special account to pay the salaries and expenses incident to the administration of this article, the surplus, with the approval of the director of the budget, to be added to the appropriation of the division of standards and inspections of the department of labor for its general inspectional service. (1935, c. 326, s. 13; 1937, c. 125, s. 3; 1939, c. 361, s. 2.)

Editor's Note.—The 1939 amendment struck out this section as amended and inserted the above in place thereof.

§ 95-69. Bonds of chief inspector and deputy inspectors.—The chief inspector shall furnish a bond in the sum of five thousand dollars ($5,000), and each of the deputy inspectors shall furnish a bond in the sum of one thousand dollars ($1,000), conditioned upon the faithful performance of their duties and upon a true account of moneys handled by them respectively, and the payment thereof to the proper recipient. The cost of said bonds shall be paid by the state treasurer out of the special fund provided for in § 95-68. (1935, c. 326, s. 14; 1937, c. 125, s. 4.)

Editor's Note.—Prior to the 1937 amendment this section excepted certain counties and ground sawmills.


§ 95-70. Creation.—There shall be created in the department of labor a division devoted to the deaf. (1923, c. 122, s. 1; 1931, c. 312, s. 3; C. S. 7312(j)).

§ 95-71. Appointment of chief of bureau; duties.—The commissioner of labor shall appoint a competent deaf man to take charge of such division, who shall devote his time to the special work of labor for the deaf under the supervision of the commissioner of labor, and who shall be designated chief of the bureau of labor for the deaf. He shall collect statistics of the deaf, ascertain what trades or occupations are most suitable for them and best adapted to promote their interest, and use his best efforts to aid them in securing such employment as they may be fitted to engage in. He shall study the methods in use in the education of the deaf as exemplified in the deaf themselves, with a view to determining their practicability and respective values in lifting them to become self-supporting, useful citizens and enabling them to obtain the greatest amount of happiness in life. He shall keep a census of the deaf and obtain facts, information and statistics as to their condition in life, with a view to the betterment of their lot. He shall endeavor to obtain statistics and information of the condition of labor and employment and education of the deaf in other states, with a view to promoting the general welfare of the deaf in this state. He shall make reports and recommendations from time to time as may be provided by law, and he shall also issue special reports or pamphlets as may be deemed necessary, giving results and information that may be helpful. (1923, c. 122, ss. 2, 3; 1931, c. 312, s. 3; C. S. 7312(k).)

§ 95-72. Assignment of other duties.—In case the duties herein enumerated should not occupy all of the time of such chief of the bureau of labor for the deaf, he shall perform such other duties in the department of labor as may be assigned him by the commissioner of labor. (1923, c. 122, s. 5; 1931, c. 312, s. 8; C. S. 7312(m.).)

Art. 9. Earnings of Employees in Interstate Commerce.

§ 95-73. Collections out of state to avoid exemptions forbidden.—No resident creditor or other holder of any book account, negotiable instrument, due bill or other monetary demand arising out of contract, due by or chargeable against any resident wage-earner or other salaried employee of any railway corporation or other corporation, firm, or individual engaged in interstate business shall send out of the state, assign, or transfer the same, for value or otherwise, with intent to thereby deprive such debtor of his personal earnings and property exempt by law from application to the payment of his debts under the laws of the state of North Carolina, by instituting or causing to be instituted thereon against such debtor, in any court outside of this state, in such creditor’s own name or in the name of any other person, any action, suit, or proceeding for the attachment or garnishment of such debtor’s earnings in the hands of his employer, when such creditor and debtor and the railway corporation or other corporation, firm, or individual owing the wages or salary intended to be reached are under the jurisdiction of the courts of this state. (1909, c. 504, s. 1; C. S. 6568.)

§ 95-74. Resident not to abet collection out of state.—No person residing or sojourning in this state shall counsel, aid, or abet any violation of the provisions of § 95-73. (1909, c. 504, s. 2; C. S. 6569.)

§ 95-75. Remedies for violation of section 95-73 or 95-74; damages; indictment.—Any person violating any provision of § 95-73 or 95-74 shall be answerable in damages to any debtor from whom any book account, negotiable instrument, due bill, or other monetary demand arising out of contract shall be collected, or against whose earnings any warrant of attachment or notice of garnishment shall be issued, in violation of the provisions of § 95-73, to the full amount of the debt thus collected, attached, or garnished, to be recovered by civil action in any court of competent jurisdiction in this state; and any person so offending shall likewise be guilty of a misdemeanor, or, punishable by a fine of not more than two hundred dollars. (1909, c. 504, s. 3; C. S. 6570.)

§ 95-76. Institution of foreign suit, etc., evidence of intent to violate.—In any civil or criminal action instituted in any court of competent jurisdiction in this state for any violation of the provisions of §§ 95-73 and 95-74, proof of the in-
CHAPTER 96. UNEMPLOYMENT COMPENSATION

Art. 1. Unemployment Compensation

Sec. 96-1. Title. — This chapter shall be known and may be cited as the "Unemployment Compensation Law." (Ex. Sess., 1936, c. 1, s. 2.)

Editor's Note. — For article discussing unemployment compensation, see 15 N. C. Law Rev. 377.

For article on the 1939 amendments to this chapter, see 17 N. C. Law Rev. 415.

Weight to Be Given Federal Constructions. — Our state unemployment compensation act was passed pursuant to a plan national in scope, and therefore serious consideration is to be given to the construction placed upon similar language of the federal statute by the commissioner of internal revenue, but the interpretation of the act is finally for our courts, and neither the ruling of the commissioner nor that of the state unemployment compensation commission is conclusive. Unemployment Compensation Comm. v. Wachovia Bank, etc., Co., 215 N. C. 491, 2 S. E. (2d) 992.

§ 96-2. Declaration of state public policy. — As a guide to the interpretation and application of this chapter, the public policy of this state is declared to be as follows: Economic insecurity due to unemployment is a serious menace to the health, morals, and welfare of the people of this state. Involuntary unemployment is therefore a subject of general interest and concern which requires appropriate action by the legislature to prevent its spread and to lighten its burden which now so often falls with crushing force upon the unemployed worker and his family. The achievement of social security requires protection against this greatest hazard of our economic life. This can be provided by encouraging employers to provide systematic accumulation of funds during periods of employment to provide benefits for periods of unemployment, thus maintaining purchasing power and limiting the serious social consequences of poor relief assistance. The legislature, therefore, declares that in its considered judgment the public good and the general welfare of the citizens of this state require the enactment of this measure, under the police powers of the state, for the compulsory setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own. (Ex. Sess., 1936, c. 1, s. 2.)

Construction. — The intent of the legislature to provide a wide scope in the application of this chapter to mitigate the economic evils of unemployment, and to bring within its provisions employments therein defined beyond the scope of existing definitions or categories, is apparent from the language used, and all doubts as to constitutionality should be resolved in favor of the validity of the chapter and all its provisions. State v. Willis Barber, etc., Shop, 219 N. C. 709, 15 S. E. (2d) 4.

The various compensation acts of the different states...
should be liberally construed to the end that the benefits thereof should not be denied upon technical, narrow and strict construction. Graham v. Wall, 220 N. C. 84, 90, 16 S. E. (2d) 691.

Provisions of this chapter seeking to maintain neutrality on the part of the state in labor disputes will be given effect. The court's decision that policy is in the exclusive province of the legislature and the courts will not interfere therewith unless the provisions relating thereto have no reasonable relation to the end sought to be accomplished. In re Steelman, 219 N. C. 306, 13 S. E. (2d) 544, 135 A. L. R. 925.

§ 96-3. Unemployment compensation commission.—(a) Organization.—There is hereby created a commission to be known as the unemployment compensation commission of North Carolina. The commission shall consist of seven (7) members to be appointed by the governor on or before July 1, 1941. The governor shall have the power to designate the member of said commission who shall act as the chairman thereof. The chairman of the commission shall not engage in any other business, vocation or employment, and no member of the commission shall serve as an officer or a committee member of any political party organization. Each member shall be appointed for the term of two (2) years. Three (3) members shall be appointed to serve for a term of four (4) years, and upon the expiration of the respective terms, the successors of said members shall be appointed for a term of four (4) years each, thereafter, and the member of said commission designated by the governor as chairman shall be appointed for a term of four (4) years from and after his appointment. Any member appointed to fill a vacancy occurring in any of the appointments made by the governor shall serve until the expiration of the term for which his predecessor was appointed shall be appointed for the remainder of such term. The governor may at any time after notice and hearing, remove any commissioner for gross inefficiency, neglect of duty, malfeasance, misfeasance, or nonfeasance in office.

(b) Divisions.—The commission shall establish two co-ordinate divisions: the North Carolina state employment service division, created pursuant to § 96-20, and the unemployment compensation division. Each division shall be responsible for the discharge of its distinctive functions. Each division shall be a separate administrative unit with respect to personnel and duties, except in so far as the commission may find that such separation is impracticable.

(c) Salaries.—The chairman of the unemployment compensation commission of North Carolina, appointed by the governor, shall be paid from the unemployment compensation administration fund a salary payable on a monthly basis, which salary shall be fixed by the governor with the approval of the council of state; and the members of the commission, other than the chairman, shall each receive ten dollars ($10.00) per day including necessary time spent in traveling to and from their place of residence within the state to the place of meeting while engaged in the discharge of the duties of his office and his actual traveling expenses, the same to be paid from the aforesaid fund.

(d) Quorum.—The chairman and three (3) members of the commission shall constitute a quorum. (Ex. Sess., 1936, c. 1, s. 10; 1941, c. 168, s. 10, c. 279, ss. 1-3; 1943, c. 377, s. 15.)

Editor's Note.—The first 1941 amendment struck out the word "budget" from the last sentence of subsection (b). The second amendatory act effective July 1, 1941, increased the membership of the commission from three to seven and made other changes in subsection (a). It also made changes in subsections (c) and (d).

Section 2 of the second amendatory act provides: "The unemployment compensation commission of North Carolina, created by this act, shall automatically succeed to all the rights, powers, duties, and obligations of the present unemployment compensation commission of North Carolina and of the state advisory council." For comment on the 1941 amendment, see 19 N. C. Law Rev. 444.

The 1943 amendment inserted in subsection (c) the words "including necessary time spent in traveling to and from their place of residence within the state to the place of meeting."
mail to the last known address in cases of special
rules, or by publication as herein provided, and by
one publication as herein provided as to general
rules. General rules shall become effective ten
days after filing with the secretary of state and
publication in one or more newspapers of general
circulation in this state. Special rules shall be-
come effective ten days after notification to or
mailing to the last known address of the individ-
uals or concerns affected thereby. Regulations
may be adopted, amended, or rescinded by the
commission and shall become effective in the man-
ner and at the time prescribed by the commission.
(c) Publication.—The commission shall cause to
be printed for distribution to the public the text of
this chapter, the commission's regulations and
general rules, its biennial reports to the governor,
and any other material the commission deems rel-
evant and suitable, and shall furnish the same to
any person upon application therefor.
(d) Personnel.—Subject to other provisions of
this chapter, the commission is authorized to ap-
point, fix the compensation, and prescribe the du-
ties and the duties of its officers, agents, exam-
iners, attorneys, experts, and other persons as may be nec-
essary in the performance of its duties. It shall
provide for the holding of examinations to deter-
mine the qualifications of applicants for the posi-
tions so classified, and except for temporary ap-
pointments not to exceed six months in duration,
shall appoint its personnel on the basis of efficiency
and fitness as determined in such examinations.
All positions shall be filled by persons selected and
appointed on a nonpartisan merit basis. The com-
mission may delegate to any such person so appointed such power and
authority as it deems reasonable and proper for the
effective administration of this chapter, and may,
in its discretion, bond any person handling moneys
or signing checks hereunder.
(e) Advisory Councils.—The governor shall
appoint a state advisory council and local advisory
councils, composed in each case of an equal num-
ber of employer representatives and employee rep-
resentatives who may fairly be regarded as repre-
sentative because of their vocation, employment,
or affiliations, and have such members represent-
ing the general public as the governor may desig-
nate. Such councils shall aid the commission in formulating policies and discussing problems re-
lated to the administration of this chapter, and in
assuring impartiality and freedom from political
influence in the solution of such problems. Such
local advisory councils shall serve without compen-
sation, but shall be reimbursed for any neces-
sary expenses. The state advisory council shall be
paid ten dollars per day per each member attend-
ing actual sitting of such council, including neces-
sary time spent in traveling to and from their
place of residence within the state to the place of
meeting, and mileage and subsistence as allowed
to state officials.
(f) Employment Stabilization.—The commis-
sion, with the advice and aid of its advisory coun-
cils, and through its appropriate divisions, shall
take all appropriate steps to reduce and prevent
unemployment; to encourage and assist in the
adoption of practical methods of vocational train-
ing, retraining and vocational guidance; to inves-
tigate, recommend, advise, and assist in the estab-
lishment and operation, by municipalities, counties,
school districts, and the state, of reserves for pub-
luc works to be used in times of business depression
and unemployment; to promote the re-employ-
ment of unemployed workers throughout the state
in every other way that may be feasible; and to
these ends to carry on and publish the results of
investigations and research studies.
(g) Records and Reports. — Each employing
unit shall keep true and accurate employment rec-
cords, containing such information as the commis-
sion may prescribe. Such records shall be open to
inspection and be subject to being copied by the
commission or its authorized representatives at
any reasonable time and as often as may be nec-
essary. The commission may require from any
employing unit any sworn or unsworn reports,
with respect to persons employed by it, which the
commission deems necessary for the effective ad-
ministration of this chapter. Information thus ob-
tained shall be subject to public inspection (other than to public employees in the
performance of their public duties) in any manner
revealing the employing unit's identity, but any
claimant at a hearing before an appeal tribunal or
the commission shall be supplied with information
from such records to the extent necessary for the
proper presentation of his claims. Any individual
may be supplied with information as to his poten-
tial benefit rights from such records. Any em-
ployee or member of the commission who violates
any provision of this section shall be fined not less
than twenty dollars ($20.00) nor more than two
hundred dollars ($200.00), or imprisoned for not
longer than ninety days, or both. All reports,
statements, information and communications of
every character so made or given to the com-
m ission, its deputies, agents, examiners and em-
ployees, whether same be written, oral or in the
form of testimony at any hearing, or whether ob-
tained by the commission from the employing
unit's books and records shall be absolute privi-
leged communications in any civil or criminal pro-
ceedings other than proceedings instituted pur-
suant to this chapter and proceedings involving
the administration of this chapter: Provided,
nothing herein contained shall operate to relieve
any employing unit from disclosing any informa-
tion required by this chapter or as prescribed by
the commission involving the administration of
this chapter.
(h) Oaths and Witnesses.—In the discharge of
the duties imposed by this chapter, the chairman
of an appeal tribunal and any duly authorized rep-
resentative or member of the commission shall
have power to administer oaths and affirmations,
take depositions, certify to official acts, and issue
subpoenas to compel the attendance of witnesses
and the production of books, papers, correspond-
ence, memoranda, and other records deemed nec-
esser as evidence in connection with a disputed
claim or the administration of this chapter.
(i) Subpoenas.—In case of contumacy by, or
refusal to obey a subpoena issued to any person, any
court of this state within the jurisdiction of which
the inquiry is carried on or within the jurisdiction
of which said person guilty of contumacy or re-
 refusal to obey is found or resides or transacts
business, upon application by the commission or its duly authorized representative, shall have jurisdiction to issue to such person an order requiring its duly authorized representative, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof. Any person who shall without just cause fail or refuse to attend and testify or to answer any lawful inquiry or to produce books, papers, correspondence, memoranda, and other records in obedience to a subpoena of the commission, shall be punished by a fine of not less than fifty dollars ($50.00) nor more than two hundred dollars ($200.00) or by imprisonment for not longer than sixty days, or by both such fine and imprisonment, and each day such violation continues shall be deemed to be a separate offense.

(j) Protection against Self-Incrimination.—No person shall be excused from attending and testifying or from producing books, papers, correspondence, memoranda, and other records before the commission or in obedience to the subpoena of the commission or any member thereof, or any duly authorized representative of the commission, in any cause or proceeding before the commission, on the ground that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, documentary or otherwise, except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.

(k) State-Federal Co-Operation.—In the administration of this chapter, the commission shall cooperate, to the full extent consistent with the provisions of this chapter, with the social security board created by the Social Security Act, approved August fourteenth, one thousand nine hundred and thirty-five, as amended; shall make such reports, in such form and containing such information as the social security board may from time to time require, and shall comply with such provisions as the social security board may from time to time find necessary to assure the correctness and verification of such reports; and shall comply with the regulations prescribed by the social security board governing the expenditures of such sums as may be allotted and paid to this state under Title III of the Social Security Act for the purpose of assisting in the administration of this chapter. The commission shall further make its records available to the railroad retirement board, created by the Railroad Retirement Act and the Railroad Unemployment Insurance Act, and shall furnish to the railroad retirement board at the expense of the railroad retirement board, such copies thereof as the board shall deem necessary for its purposes in accordance with the provisions of section three hundred three (c) of the Social Security Act as amended.

Upon request therefor, the commission shall furnish to any agency of the United States charged with the administration of public works or assistance through public employment, the name, address, ordinary occupation, and employment status of each recipient of benefits, and such recipient's rights to further benefits under this chapter. The commission is authorized to make such investigations, secure and transmit such information, make available such services and facilities and exercise such of the other powers provided herein with respect to the administration of this chapter as it deems necessary or appropriate to facilitate the administration of any unemployment compensation or public employment service law, and in like manner, to accept and utilize information, services and facilities made available to this state by the agency charged with the administration of such other unemployment compensation or public employment service law.

(l) Reciprocal Benefit Arrangements.—(1) The commission is hereby authorized to enter into reciprocal arrangements with appropriate and duly authorized agencies of other states or of the federal government, or both, whereby:

(A) Services performed by an individual for a single employing unit for which services are customarily performed in more than one state shall be deemed to be services performed entirely within any one of the states (i) in which any part of such individual's service is performed or (ii) in which such individual has his residence or (iii) in which the employing unit maintains a place of business, provided there is in effect, as to such services, an election by the employing unit, approved by the agency charged with the administration of such state's unemployment compensation law, pursuant to which the services performed by such individual for such employing unit are deemed to be performed entirely within such state;

(B) Potential rights to benefits accumulated under the unemployment compensation laws of one or more states or under one or more such laws of the federal government, or both, may constitute the basis for the payment of benefits through a single appropriate agency under terms which the commission finds will be fair and reasonable as to all affected interests and will not result in any substantial loss to the fund;

(C) Wages or services, upon the basis of which an individual may become entitled to benefits under an unemployment compensation law of another state or of the federal government, shall be deemed to be wages for insured work for the purpose of determining his rights to benefits under this chapter, and wages for insured work, on the basis of which an individual may become entitled to benefits under this chapter shall be deemed to be wages or services on the basis of which unemployment compensation under such law of another state or of the federal government is payable, but no such arrangement shall be entered into unless it contains provisions for reimbursements to the fund for such of the benefits paid under this chapter upon the basis of such wages or services, and provisions for reimbursements from the fund for such of the compensation paid under such other law upon the basis of wages for insured work, as the commission finds will be fair and reasonable as to all affected interests; and
(D) Contributions due under this chapter with respect to wages for insured work shall for the purposes of § 96-10 be deemed to have been paid to the fund as of the date payment was made as contributions therefor under another state or federal unemployment compensation law, but no such arrangement shall be entered into unless it contains provisions for such reimbursement to the fund of such contributions and the actual earnings thereon as the commission finds will be fair and reasonable as to all affected interests.

(2) Reimbursements paid from the fund pursuant to clause (C), of paragraph (1) of this subsection shall be entered into the fund of such contributions and the actual earnings thereon as the commission finds will be fair and reasonable as to all affected interests.

(3) To the extent permissible under the law and constitution of the United States, the commission is authorized to enter into or cooperate in arrangements whereby facilities and services provided under this chapter and facilities and services provided under the unemployment compensation law of any foreign government, may be utilized for the taking of claims and the payment of benefits under the employment security law of this state or under a similar law of such government.

(m) The commission after due notice shall have the right and power to hold and conduct hearings for the purpose of determining the rights, status and authority to determine any and all questions and issues of fact or questions of law that may arise under the Unemployment Compensation Law that may affect the rights, liabilities and status of any employing unit or employer as heretofore defined by the Unemployment Compensation Law including the right to determine the amount of contributions, if any, which may be due the commission by any employer. All hearings shall be conducted and held at the office of the commission and shall be open to the public and shall be stenographically reported and the commission shall provide for the preparation of a record of all hearings and other proceedings. The commission may provide for the taking of evidence by a deputy in which event he shall swear or cause the witnesses to be sworn and shall transmit all testimony to the commission for its determination. From all decisions or determinations made by the commission any party affected thereby shall be entitled to an appeal to the superior court. Before such party shall be allowed to appeal, he shall within ten days after notice of such decision or determination, file with the commission exceptions to the decision or the determination of the commission, which exceptions will state the grounds of objection to such decision or determination. If any one of such exceptions shall be overruled then such party may appeal from the order overruling the exceptions, and shall, within ten days after the decision overruling the exceptions, give notice of his appeal. When an exception is made to the facts as found by the commission, the appeal shall be to the superior court in term time but the decision or determination of the commission upon such review in the superior court shall be conclusive and binding as to all questions of fact supported by any competent evidence. When an exception is made to any rulings of law, as determined by the commission, the appeal shall be to the judge of the superior court at chambers. The party appealing shall, within ten days after the notice of appeal has been served, file with the commission exceptions to the decision or determination overruling the exception which statement shall assign the errors complained of and the grounds of the appeal. Upon the filing of such statement the commission shall, within ten days, transmit all the papers and evidence considered by it, together with the assignments of errors filed by the appellant to a judge of the superior court holding court or residing in some district in which such appellant either resides, maintains a place of business or conducts business. If there be no exceptions to any facts as found by the commission that fact so found shall be binding upon the court and it shall be heard by the judge at chambers at some place in the district, above mentioned, of which all parties shall have ten days notice.

(n) The cause shall be entitled "State of North Carolina on Relationship of the Unemployment Compensation Commission of North Carolina against (here insert name of appellant)," and if there are exceptions to any facts found by the commission it shall be placed on the civil issue docket of such court and shall have precedence over other civil actions except those described in § 96-10(b), and such cause shall be tried under such rules and regulations as are prescribed for the trial of other civil causes. By consent of all parties the appeal may be held and determined at chambers before any judge of a district in which the appellant either resides, maintains a place of business or conducts business, or said appeal may be heard before any judge holding court therein, or in any district in which the appellant either resides, maintains a place of business or conducts business. Either party may appeal to the supreme court from the judgment of the superior court under the same rules and regulations as are prescribed by law for appeals, except that if an appeal shall be taken on behalf of the Unemployment Compensation Commission of North Carolina it shall not be required to give any undertaking or make any deposit to secure the cost of such appeal and such court may advance the cause on its docket so as to give the same a speedy hearing.

(o) The decision or determination of the commission when docketed in the office of the clerk of the superior court of any county and when properly indexed and cross indexed shall have the same force and effect as a judgment rendered by the superior court, and if it shall be adjudged in the decision or determination of the commission that any employer is indebted to the commission for contributions, penalties and interest or either of the same, then said judgment shall constitute a lien upon any realty owned by said employer in the county only from the date of [891]
do depriving the said Unemployment Compensation
ment of said contributions, penalties or interest, or
required. 'The superior court or any appellate
court shall have the effect of postponing the pay-
either of the same, imposed by other law, nor
said decision or determination of the commission
§ 96-10. The provisions of this section, how-
the same, imposed by other law, nor
be allowed; provided, that. nothing herein shall
be allowed; provided, that. nothing herein shall
sion made changes in subsections (a) and (e). Prior to the amendment subsection (e) provided also for a state ad-

The 1940 amendment inserted in the fifth sentence of sub-
section (a) the words "including the authority to con-
duct hearings and make decisions and determinations." Prior to the amendment the first clause of the sixth sen-
tence read: "Not later than the first day of February of
each year." The amendment substituted in said sixth sentence the word "biennium" for the words "calendar year." It omitted the proviso to the fourth sentence, thus changing it to "biennium," and omitted the former proviso to the sec-

The commission is not entitled to appeal from judgment of
the superior court or by the supreme court. Graham v. Wall,
220 N. C. 84, 88, 16 S. E. (2d) 691.

Jury Trial.—The provisions of this section that the com-
mision's findings are conclusive on appeal and not subject to review by the
the strain of the evidence, or by technical or
mumly rules of procedure but shall conduct hear-
ings in such manner as to ascertain the substan-
tional rights of the parties.

(q) All subpoenas for witnesses to appear be-
the commission, and all notices to employ-
أشن
§ 96-4
CH. 96. UNEMPLOYMENT COMPENSATION
§ 96-4
[892]
§ 96-5. Unemployment compensation administration fund.—(a) Special Fund.—There is here-
by created in the state treasury a special fund to be known as the unemployment compensation administration fund. All moneys which are de-
posited or paid into this fund shall be continuously available to the commission for expenditure in accordance with the provisions of this chapter, and shall not lapse at any time or be transferred to any other fund. The unemployment compensa-
tion administration fund, except as otherwise provided in this chapter, shall be subject to the provisions of the Executive Budget Act (§ 145-1 et seq.) and the Personnel Act (§ 143-35 et seq.). All moneys in this fund which are received from the federal government or any agency thereof or which are appropriated by this state for the purpose described in § 96-20 shall be expended solely for the purposes and in the amounts found neces-
sary by the Social Security Board for the proper and efficient administration of this chapter. The fund shall consist of all moneys appropriated by this state, all moneys received from the United States of America, or any agency thereof, including the Social Security Board, and all moneys re-
ceived from any other source for such purpose, and shall also include any moneys received from any agency of the United States or any other state as compensation for services or facilities supplied to such agency, any amounts received pursuant to any surety bond or insurance policy or from other sources for losses sustained by the unemployment compensation administration fund or by reason of damage to equipment or supplies purchased from moneys in the fund and any proceeds realized from the sale or disposition of any such equip-
ment or supplies which may no longer be necessary for the proper administration of this chapter. All moneys in this fund shall be deposited, administered, and disbursed in the same manner and under the same conditions and requirements as is provided by law for other special funds in the state treasury, and shall be maintained in a sepa-
rate account on the books of the state treasury. This state treasurer shall be ex officio the treasurer and custodian of the fund who shall disburse such fund in accord-

§ 96-6. Unemployment compensation fund.—(a) Establishment and Control.—There is here-
by established as a special fund, separate and apart from all public moneys or funds of this state, an unemployment compensation fund, which shall be administered by the commission exclu-
sively for the purposes of this chapter. This fund shall consist of (1) all contributions collected un-
der this chapter, together with any interest thereon collected pursuant to § 96-10; (2) all fines and penalties collected pursuant to the provisions of this chapter; (3) interest earned upon any moneys in the fund; (4) any property or se-
curities acquired through the use of moneys be-
longing to the fund; and (5) all earnings in such property or securities. All moneys in this fund shall be mingled and undivided, except that within the unemployment compensation fund "reserve accounts" and a "partially pooled account" shall be maintained as provided in § 96-9. To the "re-
serve accounts" established under § 96-9 shall be credited such portion of the contributions com-
puted as provided in § 96-9, and the "partially pooled account" to be credited with the balance of such contributions paid as well as the remaining portions and additions thereto of the unemploy-
ment compensation fund which have not hereto-
fore been set aside as employer "reserve accounts", within the fund under prior amendments to this chapter. Provided, however, that the "partially pooled account" to establish to said fund subject to withdrawal and transfers as are provided for by this section.

(b) Replacement of Funds Lost or Improperly Expended.—If any moneys received after June thirtieth, one thousand nine hundred and forty-
one, from the Social Security Board under Title III of the Social Security Act, or any unencum-
bered balances in the unemployment compensa-
tion administration fund as of that date, or any moneys granted after that date to this state pur-
suant to the provisions of the Wagner-Peyser Act, or any moneys made available by this state or its political subdivisions and matched by such moneys granted to this state pursuant to the pro-
visions of the Wagner-Peyser Act, are found by the Social Security Board, because of any action or contingency, to have been lost or been ex-
pended for purposes other than, or in amounts in excess of, those found necessary by the Social Security Board for the proper administration of this chapter, it is the policy of this state that such moneys shall be replaced by moneys appropri-
ated for such purpose from the general funds of this state to the unemployment compensation administration fund for expenditure as provided in subsection (a) of this section. Upon receipt of notice of such a finding by the Social Security Board, the commission shall promptly report the amount required for such replacement to the gov-
ernor and the governor shall at the earliest op-
portunity, submit to the legislature a request for the appropriation of such amount. This subsec-
tion shall not be construed to relieve this state of its obligation with respect to funds received prior to July first, one thousand nine hundred and forty-one, pursuant to the provisions of Title III of the Social Security Act. (Ex. Sess. 1936, c.
1, s. 13; 1941, c. 108, ss. 12, 13.)
may be paid from the clearing account upon account. Refunds payable pursuant to § 96-10 warrants issued upon the treasurer by the state auditor under the requisition of the commission. After clearance thereof, all other moneys in the clearing account shall be immediately deposited with the secretary of the treasury of the United States of America to the credit of the account of this state in the unemployment trust fund, established and maintained pursuant to section nine hundred and four of the Social Security Act, as amended, any provision of law in this state relating to the deposit, administration, release, or disbursement of moneys in the possession or custody of this state to the contrary notwithstanding. The benefit account shall consist of all moneys requisitioned from this state's account in the unemployment trust fund. Moneys in the clearing and benefit accounts may be deposited by the treasurer, under the direction of the commission, in any bank or public depository in which general funds of the state may be deposited, but no public deposit insurance charge or premium shall be paid out of the fund. The treasurer shall give a separate bond, conditioned upon the faithful performance of those duties as custodian of the fund, in an amount fixed by the commission and in a form prescribed by law or approved by the attorney general. Premiums for said bond shall be paid from the administration fund.

(c) Withdrawals. — Moneys shall be requisitioned from this state's account in the unemployment trust fund solely for the payment of benefits and in accordance with regulations prescribed by the commission. The commission shall, from time to time, requisition from the unemployment trust fund such amounts, not exceeding the amounts standing to its account therein, as it deems necessary for the payment of benefits for a reasonable future period. Upon requisition thereof the treasurer shall deposit such moneys in the benefit account and shall pay all warrants drawn thereon by the state auditor requisitioned by the commission for the payment of benefits solely from such benefit account. Expenditures of such moneys in the benefit account and refunds from the clearing account shall not be subject to approval of the budget bureau or any provisions of law requiring specific appropriations or other formal release by state officers of money in their custody. All warrants issued upon the treasurer for the payment of benefits and refunds shall bear the signature of the state auditor, as requisitioned by a member of the commission or its duly authorized agent for that purpose. Any balance of moneys requisitioned from the unemployment trust fund which remains unclaimed or unpaid in the benefit account after the expiration of the period for which such sums were requisitioned shall either be deducted from estimates for, and may be utilized for the payment of, benefits during succeeding periods, or, in the discretion of the commission, shall be re-deposited with the secretary of the treasury of the United States of America, to the credit of this state's account in the unemployment trust fund, as provided in subsection (b) of this section.

(d) Management of Funds upon Discontinuance of Unemployment Trust Fund. — The provisions of subsections (a), (b), and (c), to the extent that they relate to the unemployment trust fund, shall be operative only so long as such unemployment trust fund continues to exist, and so long as the secretary of the treasury of the United States of America continues to maintain for this state a separate book account of all funds deposited therein by this state for benefit purposes, together with this state's proportionate share of the earnings of such unemployment trust fund, from which no other state is permitted to make withdrawals. If and when such unemployment trust fund ceases to exist, or such separate book account is no longer maintained, all moneys, properties, or securities therein belonging to the unemployment compensation fund of this state shall be transferred to the treasurer of the unemployment compensation fund, who shall hold, invest, transfer, sell, deposit, and release such moneys, properties, or securities in a manner approved by the commission, in accordance with the provisions of this chapter: Provided, that such moneys shall be invested in the following readily marketable classes of securities: Bonds or other interest-bearing obligations of the United States of America or such investments as are now permitted by law for sinking funds of the state of North Carolina; and provided further, that such investment shall at all times be so made that all the assets of the fund shall always be readily convertible into cash when needed for the payment of benefits. The treasurer shall dispose of securities or other properties belonging to the unemployment compensation fund only under the direction of the commission.

(e) Benefits shall be deemed to be due and payable under this chapter only to the extent provided in this chapter and to the extent that moneys are available therefor to the credit of the unemployment compensation fund, and neither the state nor the commission shall be liable for any amount in excess of such sums. (Ex. Sess. 1936, c. 1, ss. 9, 18; 1939, c. 27, s. 7, c. 52, s. 4, c. 208; 1941, c. 108.)

Editor's Note. — The 1941 amendment added that part of subsection (a) beginning with the word "except" in line sixteen. Public Laws 1939, c. 27, s. 7, which had added somewhat similar provisions at the same place, was not noticed by the amendment.

§ 96-7. Representation in court. — (a) In any civil action to enforce the provisions of this chapter, the commission and the state may be represented by any qualified attorney who is designated by it for this purpose.

(b) All criminal actions for violation of any provision of this chapter, or of any rules or regulations issued pursuant thereto, shall be prosecuted as now provided by law by the solicitor or by the prosecuting attorney of any county or city in which the violation occurs. (Ex. Sess. 1936, c. 1, s. 17; 1937, c. 150.)

Editor's Note. — The 1937 amendment omitted the requirement that the attorney be a regular salaried employee of the commission.
Art. 2. Unemployment Compensation Division.

§ 96-8. Definitions.—As used in this chapter, unless the context clearly requires otherwise:

(a) (1) On and after January first, one thousand nine hundred and forty-one, “annual pay roll” means the total amount of wages paid by an employer (regardless of the time of payment) for employment during a calendar year.

(2) “Average annual pay roll” means the average of the annual pay rolls of any employer for the last three or five preceding calendar years, whichever average is higher.

(b) “Benefits” means the money payments payable to an individual, as provided in this chapter, with respect to his unemployment.

(c) “Commission” means the unemployment compensation commission established by this chapter.

(d) “Contributions” means the money payments to the state unemployment compensation fund required by this chapter.

(e) “Employing unit” means any individual or type of organization, including any partnership, association, trust, estate, joint-stock company, insurance company, or corporation, whether domestic or foreign, or the receiver, trustee in bankruptcy, trustee or successor thereof, or the legal representative of a deceased person which has, on or subsequent to January first, one thousand nine hundred and thirty-six, had in its employ one or more individuals performing services for it with respect to his unemployment. All individuals performing services within this state for any employing unit which maintains two or more separate establishments within this state shall be deemed to be employed by a single employing unit for all the purposes of this chapter. Whenever any employing unit contracts with or has under it any contractor or subcontractor for any employment which is part of its usual trade, occupation, profession, or business, unless the employing unit as well as each such contractor or subcontractor is an employer by reason of subsection (f) of this section, or § 96-11 (c), the employing unit shall, for all the purposes of this chapter, be deemed to employ each individual in the employ of each such contractor or subcontractor for each day during which such individual is engaged in performing such employment, except that each such contractor or subcontractor who is an employer by reason of subsection (f) of this section, or § 96-11 (c), shall alone be liable for the contributions measured by wages paid to individuals in his employ, and except that any employing unit who shall become liable for and pay contributions with respect to individuals in the employ of any such contractor or subcontractor who is not an employer by reason of subsection (f) of this section or § 96-11 (c), may recover the same from such contractor or subcontractor.

(f) “Employer” means (1) Any employing unit which in each of twenty different weeks within either the current or the preceding calendar year (whether or not such weeks are or were consecutive) has, or had in employment, eight or more individuals (not necessarily simultaneously and irrespective of whether the same individuals are or were employed in each such week): Provided, however, that for purposes of this subsection “employment” shall include services which would constitute “employment” but for the fact that such services are deemed to be performed entirely within another state pursuant to an election under and arrangement entered into by the commission pursuant to subsection (1) of § 96-4, and an agency charged with the administration of any other State or Federal Unemployment Compensation Law.

(2) Any employing unit which acquired the organization, trade or business or substantially all the assets thereof, of another which at the time of such acquisition was an employer subject to this chapter;

(3) Any employing unit which acquired the organization, trade, or business, or substantially all the assets thereof, of another employing unit and which, if treated as a single unit with such other employing unit, would be an employer under paragraph (1) of this subsection;

(4) Any employing unit which, having become an employer under paragraphs (1), (2), or (3), has not, under § 96-11, ceased to be an employer subject to this chapter;

(5) For the effective period of its election pursuant to § 96-11 (c) any other employing unit which has elected to become fully subject to this chapter.

(g) Any employing unit not an employer by reason of any other paragraph of this subsection, for which within either the current or preceding calendar year services in employment are or were performed with respect to which such employing unit is liable for any federal tax against which credit may be taken for contributions required to be paid into a state unemployment compensation fund.

(h) (1) “Employment” means service, including service in interstate commerce, except “employment” as defined in the Railroad Retirement Act, performed for remuneration or under any contract of hire, written or oral, express or implied.

(2) The term “employment” shall include an individual’s entire service, performed within or both within and without this state if:

(A) The service is localized in this state; or

(B) The service is not localized in any state but some of the service is performed in this state, and (i) the base of operations, or, if there is no base of operations, then the place from which such service is directed or controlled, is in this state; or (ii) the base of operations or place from which such service is directed or controlled is in any state in which some part of the service is performed, but the individual’s residence is in this state.

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permit states to require any instrumentalities of services performed for such instrumentality of the United States exempt under the employ of the United States government or an instrumentality of the United States to make payments into an unemployment fund under a State Unemployment Compensation Law, all of the provisions of this chapter shall be applicable to such instrumentalities, and services performed for such instrumentalities, in the same manner, to the same extent and on the same terms as to all other employers, employing units, individuals and services: Provided, that if this state shall not be certified for any year by the Social Security Board under section one thousand six hundred and three (c) of the Federal Internal Revenue Code, the payments required of such instrumentalities with respect to such year shall be refunded by the commission from the fund in the same manner and within the same period as is provided in § 96-10(e) with respect to contributions erroneously collected.

(C) Service with respect to which unemployment compensation is payable under an unemployment compensation system established by an act of congress: Provided, that the commission hereby authorized and directed to enter into agreements with the proper agencies under such act of congress, which agreements shall become effective ten days after publication thereof in the manner provided in § 96-4 (b) for general rules, to provide reciprocal treatment to individuals who have, after acquiring potential rights to benefits under this chapter, acquired rights to unemployment compensation under act of congress, or who have, after acquiring potential rights to unemployment compensation under such act of congress, acquired rights to benefits under this chapter;

(D) Agricultural labor;

(E) Domestic service in a private home;

(F) Service performed as an officer or member of the crew of a vessel on the navigable waters of the United States;

(G) Service performed by an individual in the employ of his son, daughter, or spouse, and service performed by a child under the age of twenty-one in the employ of his father or mother;

(H) Service performed in the employ of a corporation, community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual;

(I) Service performed on and after March 10, 1941 by an individual for an employing unit or an employer as an insurance agent or as an insurance solicitor or as a securities salesman if all such service is performed by such individual for such employing unit or employer is performed for remuneration solely by way of commission;

(J) From and after March 10, 1941 service performed in any calendar quarter by any officer, individual or committeeman of any building and loan association organized under the laws of this state, or any federal savings and loan association, where the remuneration for such service does not exceed forty-five dollars in any calendar quarter;

(K) From and after March 10, 1941 service in connection with the collection of dues or premiums for a fraternal benefit society, order or association performed away from the home office, or its ritualistic service in connection with any such society, order or associations;

(L) Service performed by an individual under the age of eighteen in the delivery or distribution of newspapers or shopping news, not including delivery or distribution to any point for subsequent delivery or distribution.

(M) Except as provided in paragraph (1) of subsection (f) of this section, service covered by
an election duly approved by the agency charged with the administration of any other State or Federal Unemployment Compensation Law in accordance with an arrangement pursuant to subsection (l) of § 96-4 during the effective period of such election.

(N) Notwithstanding any of the other provisions of this subsection, services shall be deemed to be in employment if with respect to such services a tax is required to be paid under any federal law imposing a tax against which credit may be taken for contributions required to be paid into a state unemployment compensation fund.

(h) “Employment office” means a free public employment office, or branch thereof, operated by this state or maintained as a part of a state-controlled system of public employment offices.

(i) “Fund” means the unemployment compensation fund established by this chapter, to which all contributions required and from which all benefits provided under this chapter shall be paid.

(j) “State” includes, in addition to the states of the United States of America, Alaska, Hawaii, and the District of Columbia.

(k) “Total and partial unemployment.”

(1) An individual shall be deemed “totally unemployed” in any week with respect to which no remuneration is payable to him and during which he performs no services (other than odd jobs or subsidiary work for which no remuneration, as used in this subsection, is payable to him).

(2) An individual shall be deemed partially unemployed in any week in which, because of lack of work, he works less than sixty per cent of the customary scheduled full time hours of the industry or plant in which he is employed and in which he earns less than the ineligible amount shown in Column III of the table set forth in § 96-12 (b): Provided, however, that the commission may by regulation otherwise prescribe.

(l) “Unemployment compensation administration fund” means the unemployment compensation administration fund established by this chapter, from which administrative expenses under this chapter shall be paid.

(m) From and after March 10, 1941, “wages” means all remuneration for services from whatever source.

(n) From and after March 10, 1941, “wages” shall include commissions and bonuses and the cash value of all remuneration in any medium other than cash. Gratuities customarily received by an individual in the course of his work from persons other than his employing unit shall be treated as wages received from his employing unit. The reasonable cash value of remuneration in any medium other than cash, and the reasonable amount of gratuities, shall be estimated and determined in accordance with rules prescribed by the commission: Provided, that the term “wages” shall not include the amount of any payment with respect to services performed from and after March 10, 1941 or, on behalf of, an individual in its employ under a plan or system established by an employing unit which makes provision for individuals in its employ generally or for a class or classes of such individuals (including any amount paid by an employing unit for insurance or annuities, or into a fund, to provide for any such payment), on account of (A) retirement, or (B) sickness or accident disability, or (C) medical and hospitalization expenses in connection with sickness or accident disability, or (D) death: Provided, the individual in its employ (i) has not the option to receive, instead of provision for such death benefit, any part of such payment, or, if such death benefit is insured, any part of the premiums (or contributions to premiums) paid by its employing unit, and (ii) has not the right under the plan or system providing for such death benefit, to assign such benefit, or to receive cash consideration in lieu of such benefit either upon his withdrawal from the plan or system providing for such benefit or upon termination of such plan or system or policy of insurance or of his services with such employing unit.

(o) “Week” means such period or periods of seven consecutive calendar days ending at midnight as the commission may by regulations prescribe.

(p) “Calendar quarter” means the period of three consecutive calendar months ending on March thirty-first, June thirtieth, September thirty-first, or December thirty-first, excluding, however, any calendar quarter or portion thereof which occurs prior to January first, one thousand nine hundred and thirty-nine, shall have been for an employee subject after July first, one thousand nine hundred and thirty-nine, to the Railroad Unemployment
Insurance Act and some other employer subject to this chapter, such individual's benefit year, if established before July first, one thousand nine hundred and thirty-nine, shall terminate on that date and if again unemployed after July first, one thousand nine hundred and thirty-nine, he shall establish another benefit year after such date with respect to employment subject to this chapter.

For benefit years beginning on or after February fifteenth, one thousand nine hundred thirty-nine, the term "base period" shall mean the completed calendar year immediately preceding the first day of an individual's benefit year as defined in subsection (r) of this section, if the benefit year begins subsequent to July first: and if the benefit year begins prior to July first, the base period shall be the next to the last completed calendar year, notwithstanding the fact that an otherwise eligible individual may have exhausted wage credits to his account prior to February fifteenth, one thousand nine hundred thirty-nine, for any such completed calendar year. Except that for employment of any individual after July first, one thousand nine hundred thirty-nine, who has worked in employment for an employer which, after July first, one thousand nine hundred thirty-nine, is subject to the Railroad Unemployment Insurance Act, then only the wages payable to such an individual earned in employment during the base period for an employer other than one subject to the Railroad Unemployment Insurance Act shall be used in determining his weekly benefit amount after July first, one thousand nine hundred thirty-nine.

Wages payable to an individual with respect to coverage under the chapter, if due in the aggregate more than 8 employees, is an "employer" as defined in this section. State v. Willis Barber, etc., Shop, 219 N. C. 709, 15 S. E. 2d (2d) 4.

Single Employing Unit.—Where the agreed statement of fact disclosed that the three defendant corporations have no control or direction over the performance of such services, that they maintain a central business office where each keeps its records and handles all clerical matters, that wages are paid on the 15th of each month, and that they are directly or indirectly by the same interest within the meaning of subdivision (I) of paragraph (1) of subsection (g) of this section, it was held that the Single Employing Unit rule had not been violated.


The words in the provision of this section that enters into the "business of the employer," all single employing units, but a single employing unit will be given their distinct, definite, and commonly understood meaning.

Services of Insurance Soliciting Agents Constitute Employment.—Where services are rendered to the company in the offices of the company, and not directly or indirectly by the same interest within the meaning of the provision of this section, it was held that such services do not constitute employment.


The general assembly has power to determine scope of the unemployment compensation act, and the definitions and regulations prescribed will be applied by the courts in accordance with the legislative intent. Unemployment Compensation Comm. v. City Ice, etc., Co., 216 N. C. 6, 3 S. E. 2d 290.
nine hundred and forty-one, contributions shall be made by each employer to the commission for the fund in accordance with such regulations as the commission may prescribe, and shall not be deducted in whole or in part from the remuneration of individuals in his employ, provided, further, that if the commission shall be advised by its duly authorized officers or agents that the collection of any contribution under any provision of this chapter will be jeopardized by delay, the commission shall, whether or not the time otherwise prescribed by law for making returns and paying such tax has expired, immediately assess such contributions (together with all interest and penalties, the assessment of which is provided for by law). Such contributions, penalties and interest shall thereupon become immediately due and payable, and immediate notice and demand shall be made by the commission for the payment thereof. Upon failure or refusal to pay such contributions, penalties, and interest, it shall be lawful to make collection thereof as provided by § 96-10 and subsections thereunder and such collection shall be lawful without regard to the due date of contributions herein prescribed, provided, further, that nothing in this paragraph shall be construed as permitting any refund of contributions heretofore paid under the law and regulations in effect at the time such contributions were paid.

(2) In the payment of any contributions a fractional part of a cent shall be disregarded unless it amounts to one-half cent or more, in which case it shall be increased to one cent. For the purposes of this section, the term "wages" shall not include that part of the remuneration which, after remuneration equal to $3,000 has become payable to an individual by an employer with respect to employment, paid by him during such ensuing year, is paid to such individual by such employer with respect to employment during such calendar year one thousand nine hundred and forty-one, and during each calendar year thereafter, with respect to employment occurring after December thirty-first, one thousand nine hundred and forty, which shall be deemed the standard rate of contributions payable by each employer except as provided herein. Variations from the standard rate of contributions shall be determined in accordance with the following requirements:

(A) If, as of any computation date, the commission finds that: Compensation has been payable from an employer's account throughout the year preceding the computation date; and the balance of such account amounts to not less than five times the largest amount of compensation paid from such account within any one of the three years preceding such date; and the balance of such account as of the computation date amounts to not less than two and one-half percentum of that part of the payroll or payrolls in the three years preceding such date by which contributions were measured; and such contributions were payable to such account with respect to the three years preceding the computation date, contribution rates for the calendar year following such computation date shall be determined pursuant to paragraph (B) of this subsection. The term "year" as used in this section (except when preceded by the word "calendar") means the twelve month period ending on June 30th of any calendar year.

(B) If, as of any computation date, the cumulative total of all an employer's contributions which were paid and accredited to his "reserve account" before such computation date exceeds the cumulative total benefits which were chargeable to his "reserve account" and were paid before such computation date; and if such excess of contributions over benefits paid and chargeable to such account exceeds that percentage of his wages by which contributions were measured, computing the thirty-six consecutive month period preceding such computation date, which percentage is shown in Column 1 of the table below, and does not exceed the percentage opposite thereto in Column 2 of the table below, his contribution rate in the ensuing calendar year shall be equal to that percentage of the wages for employment, paid by him during such ensuing year, which is shown in Column 3 of the table below. Of the payments so made, there shall be credited to the "partially pooled account" the percentage shown opposite thereto in Column 4 of the table below, and there shall be credited to the "reserve account" of the employer that percentage of the wages for employment, paid by him during such calendar year, which is shown opposite thereto in Column 5 of the table below:

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<td>Reserve Account</td>
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§ 96-9

(C) The computation date for any contribution rates shall be July first of the calendar year preceding the calendar year with respect to which such rates are effective.

(D) Should the commission be of the opinion that the balance to the credit of the "partially pooled account" is insufficient to provide adequate security in the payment of all compensation to all eligible individuals, it shall direct such fact to the attention of the council of state, and, upon finding of the council that such a situation exists and a declaration that emergency steps are advisable, the commission is hereby authorized and empowered to require the payment by all employers of as much as 60% of the standard rate to be credited entirely to the "partially pooled account," and if such additional credit to the "partially pooled account" as required by this section exceeds the rate for any employer as fixed under § 96-9 (b), (4), (B), his rate shall be such percentage of the standard rate with no credit to his reserve account. If the additional credit to the "partially pooled account" as required by this subsection is less than the standard rate or rate for any employer as fixed under § 96-9 (b), (4), (B), such employer shall pay the standard rate or the rate of contributions as provided in § 96-9 (b), (4), (B) and his reserve account be credited with the balance of payment after crediting the "partially pooled account" with the additional credit as provided in this subsection. Any increased contribution rate thus required by the commission shall be applicable with respect to contributions on wages paid during the quarter in which such finding of the council of state occurred, and shall continue to be applicable with respect to contributions on wages paid up to the last day of the calendar quarter preceding the quarter in which, upon recommendation by the commission, the council of state shall find that the balance to the credit of the "partially pooled account" is sufficient to provide adequate security for the payment of all compensation to all eligible individuals.

(E) Any employer may at any time make voluntary contributions, additional to the contributions required under this chapter, to the fund to be credited to his reserve account and such voluntary contributions when made shall for all intents and purposes be deemed "contributions required" as said term is used in § 96-8 (i). The commission in accepting a voluntary contribution shall not be bound by any condition stipulated in or made a part of such voluntary contribution by any employer.

(F) If within the calendar month next following the computation date, the commission finds that any employing unit failed to file any report required in connection therewith, or has filed a report which the commission finds incorrect or insufficient, the commission shall make an estimate of the information required from such employing unit on the basis of the evidence reasonably available to it at the time, and shall notify the employing unit thereof by registered mail addressed to its last known address. Unless such employing unit shall file the report or a corrected or sufficient report as the case may be, within fifteen days after the mailing of such notice, the commission shall compute such employing unit's rate of contributions on the basis of such estimates, and the rate as so determined shall be subject to increases but not to reduction, on the basis of subsequently ascertained information.

(c) (1) The commission shall maintain a separate fiscal account for each employer and shall furnish him with all the contributions which he has paid or is paid on his own behalf. On and after January 1, 1939, the commission shall establish and maintain an employer's "reserve account" for each employer subject to this chapter, to which account the commission shall credit out of the unemployment compensation fund an amount equal to fifty percent of the contributions paid by such employers pursuant to § 96-9 (b) with respect to employment during the calendar year 1938 for the purpose of paying out of such accounts compensation payable to all eligible individuals in accord with the provisions of paragraph (2) of this subsection. To these "reserve accounts" shall also be credited seventy-five percent of all contributions paid each year pursuant to this act from and after January 1, 1939, the remaining twenty-five percent of the contributions to be credited to the "partially pooled account" and for each calendar year, beginning January 1, 1941, to these "reserve accounts" shall be credited ninety percent of all contributions paid each calendar year pursuant to the act, the remaining ten percent to be credited to the "partially pooled account," except as provided in subsection (b) (4) hereof, and as hereinafter provided. Provided further, that no provision of this section shall in any way be subject to or affected by any provisions of the Executive Budget Act, as amended.

(2) All benefits for weeks of unemployment paid during the twelve months preceding June thirtieth of each year to any eligible individual shall be paid out of the reserve account of such individual's employer or employers by whom he was employed during his base period. In accordance with the regulations of the commission, such payments shall be charged against all employers of such individual during his base period in the same ratio that the wages paid to such individual by each base period employer bears to the total wages paid him by all his employers during the base period. In the event that an employer's credits in his reserve account become exhausted through the payment of benefits chargeable to such account, the benefit payments which are chargeable to such account shall be paid out of the "partially pooled account" and at the same time the reserve account of the employer shall be debited accordingly. Whenever through inadvertence or mistake erroneous charges or credits are found to have been made to reserve accounts, the same shall be readjusted as of the date of discovery and such readjustment shall not affect any computation made under this section prior to the date of discovery.

(3) As of June thirtieth of each year, and at least fifteen days prior to the effective date of any variation from the standard rate of contributions, the commission shall determine the balance of each employer in his reserve account and shall furnish him with a statement of all charges and credits thereto. At the same time the commission shall notify each employer of his rate of contributions as determined for the succeeding calendar year pursuant to this section. Such determination shall become final unless the employer files
an application for review or redetermination.

§ 96-8 (f) and §§ 96-11, the reserve account shall be closed.

(d) In order that the commission shall be kept informed at all times on the circumstances and conditions of unemployment within the state and as to whether the stability of the fund is being impaired by the operation and effect of the system provided herein and the reserve account shall be closed. In the event any employer subject to this chapter ceases to be such an employer through the termination of coverage as provided in § 96-11, the reserve account of such employer shall be closed.

Contributions Constitute a Tax.—Contributions imposed on employers within the purview of the unemployment compensation act are compulsory and therefore constitute a tax, and they are not rendered any less a tax by reason of the provision that they should be segregated in a special fund for distribution in furtherance of the purpose of the act.


Payment of Contributions for Calendar Year 1936 Cannot Be Required.—Since the state unemployment compensation act, ch. 1, Public Laws of 1936, is in effect a tax upon an employer within the coverage of the act, and since the statute was not ratified until 16 December, 1936, and the determination of “employment” within the coverage of the act must be determined from records for the calendar year 1936, and since no benefits therefrom could be obtained by employees for the calendar year 1936, in so far as the act attempts to require the payment of contributions for the calendar year, it is retrospective and being so it is void as being in conflict with Art. I. § 32, of the state Constitution. Unemployment Compensation Comm. v. Wachovia Bank, et al., Co., 215 N. C. 491, 2 S. E. (2d) 592.

State Bank Member of Federal Reserve System Not Exempt.—A bank organized under the laws of this state is not an instrumentality of the federal government so as to exempt it from the tax imposed by this chapter, notwithstanding that the bank may be an employer under the unemployment compensation system. The tax would discriminate against it in favor of national member banks, since to relieve it from such taxation would discriminate in favor of it against nonmember state banks.

Contributions Are Required for Services of Insurance Soliciting Agents.—Since the services of soliciting agents and managers, in their capacity as soliciting agents, constitute employment and fall within the purview of the state unemployment compensation act, there is no statutory provision authorizing such action.

Declaratory Judgment as to Inclusion of Certain Salaries Cannot Be Obtained.—An action to determine whether salaries paid certain employees should be included in computing the contributions to be paid by an employer under the unemployment compensation act is an action against a state agency and directly affects the state, since the amount of tax is intended to collect is involved, and the action is properly dismissed on demurrer, since there is no statutory provision authorizing such action.

§ 96-10. Collection of contributions.—(a) Interest on Past-Due Contributions.—Contributions unpaid on the date on which they are due and payable, as prescribed by the commission, shall bear interest at the rate of one-half of one per centum per month from and after such date until payment plus accrued interest is received by the commission. Interest collected pursuant to this subsection shall be paid into the unemployment compensation fund. If any employer, in good faith, pays contributions to another state, prior to a determination of liability by this commission, which contributions were legally payable to this state, such contributions shall be paid by the state to the claimant thereof, and the state shall be deemed to have been paid by the due date under the law of this state if paid by the due date of such other state.
(b) Collection.—If, after due notice, any employer defaults in any payment of contributions or interest thereon, the amount due shall be collected by the commission in the manner and form prescribed, and the employer adjudged in default shall pay the costs of such action. Civil actions brought under this section to collect contributions or interest thereon from an employer shall be heard by the court at the earliest possible date, and shall be entitled to preference upon the calendar of the court over all other civil actions except petitions for judicial review under this chapter and cases arising under the Workmen's Compensation Law of this state; or, if any contribution imposed by this chapter, or any portion thereof, and/or penalties duly provided for the nonpayment thereof shall not be paid within thirty days after the same become due and payable, and after due notice and reasonable opportunity for hearing, the commission under the hand of its chairman, may certify the same in duplicate and forward one copy thereof to the clerk of the superior court of the county in which the delinquent resides or has property, and additional copies for each county in which the commission has reason to believe such delinquent has property located, which copy so forwarded to the clerk of the superior court shall be immediately docketed by said clerk and indexed on the cross index of judgment, and from the date of such docketing shall constitute a preferred lien upon any property which said delinquent may own in said county, with the same force and effect as a judgment rendered by the superior court. The duplicate of said certificate shall be forwarded by the commission to the sheriff, or sheriffs of such county or counties, or to a duly authorized agent of the commission, and in the hands of such sheriff or agent of the commission shall have all the force and effect of an execution issued to such sheriff or agent of the commission by the clerk of the superior court upon the judgment of the superior court duly docketed in said county. Provided, however, that notwithstanding any provision of this subsection, upon filing a written notice with the commission the sheriff of any county shall have the sole and exclusive right to serve all executions and make all collections mentioned in this subsection and in such case no agent of the commission shall have the authority to serve any executions or make any collections therein in such county. A return of such execution shall be made to the commission, together with all moneys collected thereunder, and when such order or execution is referred to the agent of the commission for service the said agent of the commission shall be vested with all the powers of the sheriff to the extent of serving such order or execution and levying or collecting thereunder. The agent of the commission to whom such order or execution is referred shall give a bond not to exceed two thousand dollars ($2,000.00) approved by the commission for the faithful performance of such duties. The liability of said agent shall be in the same manner and to the same extent as is now imposed on sheriffs in the service of executions. If any sheriff of this state or any agent of the commission who is charged with the duty of serving executions shall wilfully fail, refuse, or neglect to execute any order directed to him by the said commission and within the time provided by law, the official bond of such sheriff or of such agent of the commission shall be liable for the contributions, penalty, interest, and costs due by the employer.

(c) Priorities under Legal Dissolution or Distribution.—In the event of any distribution of an employer's assets pursuant to an order of any court under the laws of this state, including any receivership, assignment for benefit of creditors, adjudicated insolvency, composition, or similar proceeding, contributions then or thereafter due shall be paid in full prior to all other claims except taxes, and claims for remuneration of not more than two hundred and fifty dollars to each claimant, earned within six months of the commencement of the proceeding. In the event of an employer's adjudication in bankruptcy, judicially confirmed extension proposal, or composition, under the Federal Bankruptcy Act of one thousand eight hundred and ninety-eight, as amended, contributions then or thereafter due shall be entitled to such priority as is provided in section sixty-four (b) of that act (U. S. C., Title II, sec. 104 (b), as amended.

(d) Collections of Contributions upon Transfer or Cessation of Business.—The contribution or tax imposed by § 96-9, and subsections thereunder, of this chapter shall be a lien upon the assets of the business of any employer subject to the provisions hereof who shall lease, transfer or sell out his business, or shall cease to do business and such employer shall be required, by the next reporting date as prescribed by the commission, to file with the commission all reports and pay all contributions due with respect to wages payable for employment up to the date of such lease, transfer, sale or cessation of the business and such employer's successor in business shall be required to withhold sufficient of the purchase money to cover the amount of said contributions due and unpaid until such time as the former owner or employer shall produce a receipt from the commission showing that the contributions have been paid, or a certificate that no contributions are due. If the purchaser of a business or a successor of such employer shall fail to withhold purchase money or any money due to such employer in consideration of a lease or other transfer and the contributions shall be due and unpaid after the next reporting date, as above set forth, such successor shall be personally liable to the extent of the assets of the business so acquired for the payment of the contributions accrued and unpaid on account of the operation of the business by the former owner or employer.

(e) Refund.—If not later than three years from the last day of the period with respect to which a payment of any contributions or interest thereon was made, or one year from the date on which such payment was made, whichever shall be the later, an employer who has paid such contributions or interest thereon shall make application for an adjustment thereof in connection with subsequent contribution payments, or for a refund thereof because such adjustment cannot be made, and the commission shall determine that such contributions or interest or any portion thereof was erroneously collected, the commission shall allow such employer to make an adjustment thereof,
§ 96-11. Period, election, and termination of employer's coverage.—(a) Any employing unit which is or becomes an employer subject to this chapter within any calendar year shall be subject to this chapter during the whole of such calendar year; provided, however, that on and after July first, one thousand nine hundred thirty-nine, this section shall not be construed to apply to any part of the business of an employer as may come within the terms of section one (a) of the Federal Railroad Unemployment Insurance Act.

(b) Except as otherwise provided in subsections (a) and (c) of this section, an employing unit shall cease to be an employer subject to this act only as of the first day of January of any calendar year, if it files with the commission prior to the thirtieth day of December next preceding a written application for termination of coverage and the commission finds that there were no twenty different weeks within the preceding calendar year (whether or not such weeks are or were consecutive) within which said employing unit employed eight or more individuals in employment (not necessarily simultaneously and irrespective of whether the same individuals were emp...
ployed in each such week). For the purpose of this subsection, the two or more employing units mentioned in paragraphs two or three of § 96-8, subsection (f), of this chapter shall be treated as a single employing unit. 

(c) (1) An employing unit, not otherwise subject to this chapter, which files with the commission its written election to become an employer subject hereto for not less than two calendar years shall, with the written approval of such election by the commission, become an employer subject hereto to the same extent as all other employers, as of the date stated in such approval, and shall cease to be subject hereto as of January first of any calendar year subsequent to such two calendar years only if, at least thirty days prior to such first day of January, it has filed with the commission a written notice to that effect.

(2) Any employing unit for which services that do not constitute employment as defined in this chapter are performed may file with the commission a written election that all such services performed by individuals in its employ, in one or more distinct establishments or places of business, shall be deemed to constitute employment for all the purposes of this chapter for not less than two calendar years. Upon the written approval of such election by the commission such services shall be deemed to constitute employment subject to this chapter from and after the date stated in such approval. Such services shall cease to be deemed employment subject hereto as of January one of any calendar year subsequent to such two calendar years only if, at least thirty days prior to such first day of January, such employing unit has filed with the commission a written notice to that effect. (Ex. Sess. 1936, c. 1, s. 8; 1939, c. 52, ss. 2, 3; 1941, c. 108, s. 9.)

Editor’s Note.—The 1939 amendment inserted the reference to subsection (a) in the second line of subsection (b). The 1941 amendment rewrote subsection (b). 

§ 96-12. Benefits. — (a) Payment of Benefits. —Twenty-four months after the date when contributions first accrue under this chapter benefits shall become payable from the fund. All benefits shall be paid through employment offices, in accordance with such regulations as the commission may prescribe.

(b) Each eligible individual whose benefit year begins on or after March 10, 1941 and who is totally unemployed in any week (as defined in § 96-8 (k) (2) ) shall be paid with respect to such week a partial benefit equal to the difference between his weekly benefit amount (as defined in § 96-8 (q) ) and five-sixths of his remuneration (as defined in § 96-8 (n) ) for such week.

(c) Weekly Benefit for Partial Unemployment. —Each eligible individual who is partially unemployed (as defined in § 96-8 (k) (2) ) in any week shall be paid with respect to such week a partial benefit. Such partial benefit shall be an amount, figured to the nearest multiple of fifty cents (0.50), equal to the difference between his weekly benefit amount (as defined in § 96-8 (q) ) and five-sixths of his remuneration (as defined in § 96-8 (n) ) for such week.

(d) Duration of Benefits.—The maximum benefits payable to any eligible individual whose benefit year begins after February fifteenth, one thousand nine hundred and thirty-nine, shall be sixteen times his weekly benefit amount during any benefit year. After February fifteenth, one thousand nine hundred and thirty-nine, the commission shall maintain accounts for each individual who earns wages in such manner and form as the commission may prescribe as being adequate to administer the provisions of this chapter.

(e) Benefit Rights of Trainees in Military Service.—(1) Notwithstanding any inconsistent provisions of this chapter, the benefit rights of trainees shall be determined in accordance with the following provisions of this subsection for the periods and with respect to the matters specified herein. Except as herein otherwise provided, all other provisions of this chapter shall continue to be applicable in connection with such benefits.

(2) The term “military service” as used in this subsection means active service in the land or naval forces of the United States, but the service of an individual in any reserve component of the land or naval forces of the United States who is ordered to active duty in any such force for a period of thirty days or less shall not be deemed to be active service in any such force during such period.

(3) The term “trainee” as used in this subsection means an individual who entered military
service after July first, one thousand nine hundred and forty, who continued in such service for not less than ninety consecutive days, and who files a claim within six months after the termination of his military service.

(4) With respect to any trainee, the first benefit year following the termination of his military service, shall be the one-year period beginning with the first day of the first week following the date of such termination; and the second benefit year following the termination of his military service shall be the next one-year period beginning with the first day of the first week following the termination of such first benefit year.

(5) With respect to the first benefit year defined in paragraph (4) of this subsection, the base period shall be the two completed calendar years preceding the date of the trainee’s entry into military service; and with respect to the second benefit year defined in paragraph (4) of this subsection, the base period shall be the complete calendar year preceding the date of the trainee’s entry into military service plus the portion of a calendar year intervening between the date of the entry into military service and the end of such second benefit year; provided that for the purposes of this subsection such portion of a calendar year intervening between the date of a trainee’s entry into military service, plus (but only in the event that the military service ends between July 1 and December 31 of any year) the portion of a calendar year intervening between the date of the trainee’s termination of service and the last day of such calendar year; provided that for the purposes of this subsection such portion of a calendar year intervening between the date of a trainee’s termination of service and the last day of such calendar year shall be deemed to be included in the calendar year in which the trainee entered military service.

(6) The provisions of § 96-13 (d) with respect to waiting period shall not be applicable to the first benefit year defined in paragraph (4) of this subsection.

(7) An otherwise eligible trainee shall be eligible to receive benefits with respect to any week beginning in either of the benefit years defined in paragraph (4) of this subsection or in the second calendar year following the date of such termination; provided that for the purposes of this subsection such portion of a calendar year following the date of such termination shall be deemed to be included in the calendar year in which such trainee entered military service.

(8) A trainee’s weekly benefits amount with respect to each of the two benefit years defined in paragraph (4) of this subsection shall be the amount appearing in Column II of the table of such subsection opposite the amount appearing in Column II of such table which pays able to such individual with respect to “employment” during that calendar year of the base period of such benefit year in which such trainee’s wages payable with respect to “employment” were greatest.

(9) An otherwise eligible trainee shall be entitled during the first benefit year defined in paragraph (4) of this subsection to a total amount of benefits equal to whichever is the lesser of (a) sixty times his weekly benefit amount and (b) thirty-two times his weekly benefit amount less the amount of any benefits paid him under this act for unemployment prior to his entry into military service on the basis of his wages in any part of the base period of such benefit year.

(10) An otherwise eligible trainee shall be entitled during the second benefit year defined in paragraph (4) of this subsection to a total amount of benefits equal to whichever is the lesser of (a) sixteen times his weekly benefit amount, and (b) forty times his weekly benefit amount times the number of calendar quarters (completed or uncompleted) in the base period of such benefit year and less the amount of any benefits paid him under this act for unemployment prior to his entry into military service on the basis of his wages in any part of the base period of such benefit year.

(11) With respect to any benefit year of a trainee as defined in § 96-8 (r) which begins subsequent to the second benefit year defined in paragraph (4) of this subsection and has a base period containing less than four completed calendar quarters in which no military service was performed, the term “wages payable during base period” as used in subsection (b) shall be deemed to mean the wages payable to such individual during such base period with respect to “employment” divided by the number of completed calendar quarters in such base period in which no military service was performed and multiplied by four.

(19) If under an Act of Congress, payments with respect to the unemployment of individuals who have completed a period of military service are payable by the United States, a trainee shall be disqualified for benefits with respect to any week beginning within a benefits year as defined in paragraph (4) of this subsection until he has exhausted all his rights to such payments from the United States. (Ex. Sess., 1936, c. 1, s. 3; 1937, c. 448, s. 1; 1939, c. 27, ss. 1-3, 14, c. 141; 1941, c. 108, s. 1; c. 276; 1943, c. 377, ss. 1-4.)

Editor’s Note—The 1937 amendment inserted a new subsection (e). The 1941 amendments added the provisos to subsections (b), (d) and (e). It also inserted the words “figured to the nearest multiple of fifty cents?” in the second sentence of subsection (c). The 1943 amendment substituted the word “paid” for the word “payable” in the sixth line from the end of the paragraph preceding the table in subsection (b). It also made changes in paragraphs (3) and (4) of subsection (c). The amendment called for further changes that had already been made in the section upon its codification.

§ 96-13. Benefit eligibility conditions—An unemployed individual shall be eligible to receive benefits with respect to any week only if the commission finds that—

(a) He has registered for work at and thereafter has continued to report at an employment office in accordance with such regulations as the commission may prescribe;

(b) He has made a claim for benefits on a form prescribed by the commission.

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work for any week, not to exceed two in any benefit year, in which the commission finds that his unemployment is due to a customary and well-established vacation. This provision shall apply only if it is found by the commission that employment will be available to him at the end of such vacation.

(d) Prior to any week for which he claims benefits he has been totally unemployed for a waiting period of one week (and for the purposes of this subsection two weeks of partial unemployment shall be deemed to be equivalent to one week of total unemployment. Such weeks of partial unemployment need not be consecutive.) No week shall be counted as a week of total unemployment for the purposes of this subsection;

(1) If benefits have been paid with respect thereto;
(2) Unless the individual was eligible for benefits with respect thereto in all respects except for the requirements of subsection (b) of this section.

Any individual whose benefit year begins on or after February fifteenth, one thousand nine hundred thirty-nine, who has served such one waiting period, within his benefit year, as provided in subsection (d) hereof, shall not be required to accumulate any more waiting period weeks during his benefit year. (Ex. Sess. 1936, c. 1, s. 4; 1939, c. 27, ss. 4, 5, c. 141; 1941, c. 108, s. 2; 1943, c. 377, s. 5.)

Editor's Note.—The 1939 amendment added a proviso to former subsection (e).

Prior to the 1941 amendment the waiting period prescribed by subsection (d) was two weeks.

The 1943 amendment added the part of subsection (c) beginning with the first proviso, and called for changes in subsection (d) which had already been made by the 1941 amendment and by the Division of Legislative Drafting and Codification of Statutes.

§ 96-14. Disqualification for benefits.—An individual shall be disqualified for benefits:

(a) For not less than four, nor more than twelve consecutive weeks of unemployment, which occur within a benefit year, beginning with the first day of the first week after the disqualifying act occurs with respect to which week an individual files a claim for benefits (in addition to the waiting period) if it is determined by the commission that such individual is, at the time such claim is filed, unemployed because he left work voluntarily without good cause attributable to the employer, and the maximum benefits due said individual during his then current benefit year shall be reduced by an amount determined by multiplying the number of such consecutive weeks of unemployment by the weekly benefit amount.

(b) For not less than five, nor more than twelve consecutive weeks of unemployment, which occur within a benefit year, beginning with the first day of the first week after the disqualifying act occurs with respect to which week an individual files a claim for benefits (in addition to the waiting period) if it is determined by the commission that such individual is, at the time such claim is filed, unemployed because he was discharged for misconduct connected with his work, and the maximum amount of benefits due said individual during his then current benefit year shall be reduced by an amount determined by multiplying the number of such consecutive weeks of unemployment by the weekly benefit amount.

of remuneration in lieu of notice: Provided, that if such remuneration is less than the benefits which would otherwise be due under this chapter he shall be entitled to receive for such week, if otherwise eligible, benefits reduced by the amount of such remuneration.

(f) If the commission finds he is customarily self-employed and can reasonably return to self-employment.

(g) For any week after June thirtieth, one thousand nine hundred thirty-nine with respect to which he shall have or assert any right to unemployment benefits under an unemployment compensation law of either the federal or a state government, other than the state of North Carolina. (Ex. Sess. 1936, c. 1, ss. 5; 1937, c. 418, ss. 2, 3; 1939, c. 52, ss. 1; 1941, c. 108, ss. 3, 4; 1943, c. 377, ss. 7, 8.)

Editor's Note.—The 1943 amendment struck out former subsections (a), (b), (c), (d) and (e) and inserted new subsections in lieu thereof. The amendment also struck out subsections (a), (b), (c), (d) and (e) and inserted new subsections in lieu thereof. The amendment also struck out subsections (a), (b), (c), (d) and (e) and inserted new subsections in lieu thereof. The amendment also struck out subsections (a), (b), (c), (d) and (e) and inserted new subsections in lieu thereof. The amendment also struck out subsections (a), (b), (c), (d) and (e) and inserted new subsections in lieu thereof. The amendment also struck out subsections (a), (b), (c), (d) and (e) and inserted new subsections in lieu thereof. The amendment also struck out subsections (a), (b), (c), (d) and (e) and inserted new subsections in lieu thereof. The amendment also struck out subsections (a), (b), (c), (d) and (e) and inserted new subsections in lieu thereof. The amendment also struck out subsections (a), (b), (c), (d) and (e) and inserted new subsections in lieu thereof.

This section prevails over the provision of section 96-2 stating that the act is to provide for benefits to workers who are "unemployed through no fault of their own." In re Steelman, 219 N. C. 306, 13 S. E. (2d) 544, 135 A. L. R. 929.

Labor Dispute.—The evidence tended to show that employee-claimants not only did not work during the period of stoppage of work at the employer's plant caused by a labor dispute, but also that they did not resume work after reopening of the plant at the request of the employer that jobs were available. There was also evidence on behalf of claimants that they did not return to their jobs because of the labor dispute. The commission ruled that claimants were not entitled to benefits because of the stoppage of work. It was held that the employer is not prejudiced by the further order of the commission that the eligibility of claimants to benefits subsequent to the resumption of operations at the plant should be determined, since it must be presumed the commission will determine eligibility of each claimant for such benefits in accordance with the general policy of the act to provide for benefits to workers who are "unemployed through no fault of their own." In re Steelman, 219 N. C. 306, 13 S. E. (2d) 544, 135 A. L. R. 929.

Under the provisions of this section employees who participate in, finance or are directly interested in a labor dispute which results in stoppage of work, or who are members of a grade or class of workers who has members employed at the premises at which the stoppage occurs, any of whom, immediately before the stoppage occurs, participate in, finance or are directly interested in such labor dispute, are not entitled to unemployment compensation benefits during the stoppage of work, and each employee-claimant is required to show to the satisfaction of the commission that he is not disqualified for benefits under this section. In re Steelman, 219 N. C. 306, 13 S. E. (2d) 544, 135 A. L. R. 929.

Burden of Proof.—Each claimant is required to show to the satisfaction of the commission that he is not disqualified for benefits under this section. In re Steelman, 219 N. C. 306, 13 S. E. (2d) 544, 135 A. L. R. 929.

§ 96-15. Claims for benefits. — (a) Filing. — Claims for benefits shall be made in accordance with such regulations as the commission may prescribe. Each employer shall post and maintain printed statements of such regulations in places readily accessible to individuals in his service, and shall make available to each such individual, at the time he becomes unemployed, a printed statement of such regulations. Such printed statements shall be supplied by the commission to each employer without cost to him.

(b) Initial Determination. — A representative designated by the commission and hereinafter referred to as a deputy shall promptly examine the claim and, on the basis of the facts found by him, shall either determine whether or not such claim shall be allowed. If, if valid, the week with respect to which benefits shall commence, the weekly benefit amount payable and the maximum duration thereof, or shall refer such claim or any question involved therein to an appeal tribunal or to the commission, which shall make its determination with respect thereto in accordance with the procedure described in subsection (c) of this section. The deputy shall promptly notify the claimant and any other interested party of his decision and the reason therefor. Unless the claimant or any such interested party, within five calendar days after such notification was mailed to his last known address, files an appeal from such decision, such decision shall be final and benefits shall be paid or denied in accordance therewith, and for the purpose of this subsection, the commission shall be deemed an interested party: Provided, however, that any individual who files his claim outside of this state shall have eight calendar days from the date of mailing such notification to his last known address in which to perfect his appeal. If an appeal is duly filed, benefits with respect to the period prior to the final determination of the commission shall be paid only after such determination: Provided further, however, that if an appeal is filed with an appeal tribunal, the commission shall establish one or more impartial appeal tribunals consisting in each case of either a salaried examiner or a body consisting of three members, one of whom shall be a salaried examiner, who shall serve as chairman, one of whom shall be a representative of employers and the other of whom shall be a representative of employees; each of the latter two members shall serve at the pleasure of the commission and be paid a fee of not more than five dollars per day of active service on such tribunal plus necessary expenses. No person shall participate on behalf of the commission in any case in which he is an interested party. The commission may designate alternates to serve in the absence or disqualification of any member of an appeal tribunal. The chairman shall act alone in the ab-
sence or disqualification of any other member and his alternates. In no case shall the hearings proceed unless the chairman of the appeal tribunal is present.

(e) Commission Review.—The commission may on its own motion affirm, modify, or set aside any decision of an appeal tribunal on the basis of the evidence previously submitted in such case, or direct the taking of additional evidence, or may permit any of the parties to such decision to initiate further appeals before it, or may provide for group hearings in such cases as the commission may deem expedient. The commission shall permit such further appeal by any of the parties interested in a decision of an appeal tribunal which is not unanimous. The commission may remove to itself or transfer to another appeal tribunal the proceedings on any claim pending before an appeal tribunal. Any proceedings so removed to the commission shall be heard by a quorum thereof in accordance with the requirements in subsection (c) of this section. The commission shall promptly notify the interested parties of its findings and decision.

(f) Procedure.—The manner in which disputed claims shall be presented, the reports thereon required from the claimant and from employers, and the conduct of hearings and appeals shall be in accordance with rules prescribed by the commission for determining the rights of the parties, whether or not such rules conform to common law or statutory rules of evidence and other technical rules of procedure. A full and complete record shall be kept of all proceedings in connection with a disputed claim. All testimony at any hearing upon a disputed claim shall be recorded, but need not be transcribed unless the disputed claim is further appealed.

(g) Witness Fees.—Witnesses subpoenaed pursuant to this section shall be allowed fees at a rate fixed by the commission. Such fees and all expenses of proceedings involving disputed claims shall be deemed a part of the expense of administering this chapter.

(h) Appeal to Courts.—Any decision of the commission, in the absence of an appeal therefrom as herein provided, shall become final ten days after the date of notification or mailing thereof, and judicial review thereof shall be permitted only after any party claiming to be aggrieved thereby has exhausted his remedies before the commission as provided by this chapter. The commission shall be deemed to be a party to any judicial action involving any such decision, and may be represented in any such judicial action by any qualified attorney who has been designated by it for that purpose.

(i) Appeal Proceedings. —The decision of the commission shall be final, subject to appeal as herein provided. Within ten days after the decision of the commission has become final, any party aggrieved thereby may appeal to the superior court of the county of his residence. In case of such appeal, the court shall have power to make party-defendant any other party which it may deem necessary or proper to a just and fair determination of the case. In every case in which appeal is demanded, the appealing party shall file a certificate with the commission wherein time is allowed for appeal, in which shall be plainly stated the grounds upon which a review is sought and the particulars in which it is claimed the commission is in error with respect to its decision. The commission shall make a return to the notice of appeal, which shall consist of all documents necessary to an understanding of the appeal, and a transcript of all testimony taken in the matter, together with its findings of fact and decision thereon, which shall be certified and filed with the superior court to which appeal is taken within thirty days of said notice of appeal. The commission may also, in its discretion, certify to such court questions of law involved in any decision by it. In any judicial proceeding under this section the findings of the commission as to the facts, if there is evidence to support it, and in the absence of fraud, shall be conclusive, and the jurisdiction of the court shall be confined to questions of law. Such actions and the questions so certified shall be heard in a summary manner, and shall be given precedence over all civil cases, except cases arising under the Workmen’s Compensation Law of this state. An appeal may be taken from the decision of the superior court, as provided in civil cases. No bond shall be required upon such appeal. Upon the final determination of the case or proceeding the commission shall enter an order in accordance with such determination. Such an appeal shall not act as a supersedeas or stay of any judgment, order, or decision of the commission, and no bond shall be required upon such appeal. Upon the final determination of the case or proceeding the commission shall enter an order in accordance with such determination. Such an appeal shall not act as a supersedeas or stay of any judgment, order, or decision of the commission, and no bond shall be required upon such appeal.

Editor's Note.—The first 1937 amendment omitted the requirement that attorneys representing the commission as mentioned in subsection (b) be regular employees of the commission. The first 1937 amendment inserted the words beginning "or may provide" at the end of the first sentence of subsection (e).

The 1941 amendment rewrote subsection (b).

The 1934 amendment added to the third sentence of subsection (b) the provision that the commission shall be deemed an interested party. It also added the proviso to said sentence. The amendment created new words "and any subordinate decision whose decision words "and any subordinate decision whose"

Appeal by Commission.—Under this section the exact status of the commission as a party to an action is not defined and the party it is to play as such is left somewhat in the realm of speculation, and there is nothing in the provision which constitutes the commission guardian or trustee for a claimant or which could warrant the conclusion that it is authorized to prosecute an appeal from a judgment against a claimant when the claimant is content. Nor may it do so for the purpose of adjudicating issues which are merely incidental to the claimant’s cause of action. In re Mitchell, 220 N. C. 65, 67, 16 S. E. (2d) 476, 142 A. L. R. 931.

Finding of Fact on Appeal.—Upon appeal to the superior court from any final decision of the commission, the findings of the commission as to the facts, if supported by evidence, and in the absence of fraud, are conclusive, the jurisdiction of the superior court on appeal being limited to questions of law. In re Steelman, 219 N. C. 306, 13 S. E. (2d) 544, 135 A. L. R. 929.


§ 96-16. Seasonal industries. — Whenever the commission finds that on account of seasonal conditions it is highly impracticable or impossible for an employer in a particular industry or branch thereof to operate for a period or periods of not less than four weeks nor more than thirty-six weeks in a calendar year and the employer cus-
omarily operates entirely or in a branch of his industry only during a regularly recurring period or periods of not less than four weeks nor more than thirty-six weeks in a calendar year, then the rights to benefits payable to an otherwise eligible individual engaged in such a seasonal industry, or branch thereof, shall only be entitled to maximum benefit payments as follows:

If for any weeks of total unemployment which occur and for which benefits are payable during any period not within the seasonal period as prescribed by the commission the maximum benefit amount shall be an amount equal to sixteen times the individual's weekly benefit amount divided by the wages paid in the base period and multiplied by the wages paid in his base period in covered employment not within the seasonal period, and the maximum benefits payable for such individual during the seasonal period shall be an amount equal to sixteen times the individual's weekly benefit amount divided by the wages paid in the base period and multiplied by the wages paid within the seasonal period in covered employment not within the base period. The earnings of a worker who has earned wages in seasonal employment shall be taken into consideration together with all other wages earned in employment subject to this chapter in determining his qualifications and eligibility for benefits. Where an employer in its branches or divisions carries on both seasonal and full-time operations, this section shall apply only to that portion of such industry or occupation as is determined by the commission to be seasonal after application for such determination has been made by the employer, and notice thereof posted conspicuously by the employer in his seasonal establishments. (1939, c. 28; 1941, c. 108, s. 7; 1943, c. 377, s. 14 1/2.)

Editor's Note.—The 1943 amendment changed the proviso to the first sentence.

§ 96-17. Protection of rights and benefits.—
(a) Waiver of Rights Void.—Any agreement by an individual to waive, release, or commute his rights to benefits or any other rights under this chapter shall be void. Any agreement by any individual in the employ of any person or concern to pay all or any portion of an employer's contributions, required under this chapter from such employer, shall be void. No employer shall directly or indirectly make or accept any deduction from the remuneration of individuals in his employ to finance the employer's contributions required from him, or require or accept any waiver of any right hereunder by any individual in his employ. Any employer or officer or agent of an employer who violates any provision of this subsection shall, for each offense, be fined not less than one hundred dollars nor more than one thousand dollars or be imprisoned for not more than six months, or both.

(b) Limitation of Fees.—No individual claiming benefits shall be charged fees of any kind in any proceeding under this chapter by the commission or its representatives or by any court or any officer thereof. Any individual claiming benefits in any proceeding before the commission or a court may be represented by counsel; but no such counsel shall either charge or receive for such services more than an amount approved by the commission. Any person who violation any provision of this subsection shall, for each such offense, be fined not less than fifty dollars nor more than five hundred dollars or imprisoned for not more than six months, or both.

(c) No Assignment of Benefits; Exemptions.—Any assignment, pledge, or encumbrance of any right to benefits which are or may become due or payable under this chapter shall be void; and such rights to benefits shall not be subject to garnishment, attachment, or any other remedy whatsoever provided for the collection of debt; and benefits received by any individual, so long as they are not mingled with other funds of the recipient, shall be exempt from any remedy whatsoever for the collection of all debts except debts incurred for necessaries furnished to such individual or his spouse or dependents during the time when such
§ 96-18. Penalties. — (a) Whoever makes a false statement or representation knowing it to be false or knowingly fails to disclose a material fact, to obtain or increase any benefit or other payment under this chapter, either for himself or for any other person, shall be punished by a fine of not less than twenty dollars ($20.00) nor more than fifty dollars ($50.00), or by imprisonment for not longer than thirty days; and each such false statement or representation or failure to disclose a material fact shall constitute a separate offense.

(b) Any employing unit or any officer or agent of an employing unit or any other person who makes a false statement or representation knowing it to be false, or who knowingly fails to disclose a material fact, to prevent or reduce the payment of benefits to any individual entitled thereto, or to avoid or reduce any contribution or other payment required from an employing unit under this chapter, or who wilfully fails or refuses to furnish any reports required hereunder, or to produce or permit the inspection or copying of records as required hereunder, shall be punished by a fine of not less than twenty dollars nor more than two hundred dollars or by imprisonment for not longer than sixty days, or by both such fine and imprisonment; and each such false statement or representation or failure to disclose a material fact, and each day of such failure or refusal, shall constitute a separate offense.

(c) Any person who shall wilfully violate any provision of this chapter or any rule or regulation thereunder, the violation of which is made unlawful or the observance of which is required under the terms of this chapter, and for which a penalty is neither prescribed herein nor provided by any other applicable statute, shall be punished by a fine of not less than twenty dollars nor more than two hundred dollars, or by imprisonment for not longer than sixty days, or by both such fine and imprisonment, and each day such violation continues shall be deemed to be a separate offense.

(d) Any person who, by reason of the non-disclosure or misrepresentation by him or by another of a material fact (irrespective of whether such non-disclosure or misrepresentation was known or fraudulent), has received any sum as benefits under this chapter or has avoided or reduced any contribution or other payment to any individual entitled thereto, or to avoid or reduce any contribution or other payment, shall be punished by a fine of not less than twenty dollars nor more than two hundred dollars, or by imprisonment for not longer than thirty days; and each such false statement or representation or failure to disclose a material fact shall constitute a separate offense.

(e) An individual shall not be entitled to receive benefits for the remainder of any benefit year during which he has been found to have received any sum as benefits under this chapter by reason of the intentional non-disclosure or misrepresentation by him, or by another with his knowledge, of a material fact.

(f) Any individual discharged for larceny or embezzlement in connection with his employment, if such individual is convicted thereof in a court of competent jurisdiction, or if the commission finds that he has made a voluntary confession of guilt, shall not be entitled to receive any benefits based on wages earned in the base period applicable at the time of such discharge. (Ex. Sess. 1936, c. 1, s. 15; 1937, c. 150.)

Editor's Note.—Prior to the 1937 amendment the individual mentioned in subsection (b) could be represented by a duly authorized agent as well as by counsel.

§ 96-19. Enforcement of unemployment compensation law discontinued upon repeal or invalidation of federal acts.—It is the purpose of this chapter to secure for employers and employees the benefits of Title III and Title IX of the Federal Social Security Act, approved August fourteenth, one thousand nine hundred thirty-five, as to credit on payment of federal taxes, of state contributions, and the receipt of federal grants for administrative purposes, and all other provisions of the said Federal Social Security Act; and it is intended as a policy of the state that this chapter and its requirements for contributions by employers shall continue in force only so long as such employers are required to pay the federal taxes imposed in said Federal Social Security Act by a valid act of congress. Therefore, if Title III and Title IX of the said Federal Social Security Act shall be declared invalid by the United States supreme court, or if such law be repealed by congressional action so that the federal tax cannot be further levied, from and after the declaration of such invalidity by the United States supreme court, or if the repeal of said law be by congressional action, as the case may be, no further levy or collection of contributions shall be made hereunder. The enactment by the Congress of the United States of the Railroad Retirement Act and the Railroad Unemployment Insurance Act shall in no way affect the administration of this law except as herein expressly provided.

All federal grants and all contributions theretofore collected, and all funds in the treasury by virtue of this chapter, shall, nevertheless, be disbursed and expended, as far as may be possible, under the terms of this chapter: Provided, however, that contributions already due from any employer shall be collected and paid into the fund, subject to such distribution; and provided further, that the personnel of the state unemployment commission shall be reduced as rapidly as possible.

The funds remaining available for use by the North Carolina unemployment commission shall be expended, as necessary, in making payment of all such awards as have been made and are fully approved at the date aforesaid, and the payment of the necessary costs for the further administration of this chapter, and the final settlement of all affairs connected with same. After complete pay-
ment of all administrative costs and full payment of all awards made as aforesaid, any and all moneys remaining to the credit of any employer shall be refunded to such employer, or his duly authorized assignee: Provided, that the state employment service, created by chapter one hundred six; Public Laws of one thousand nine hundred thirty-six, and transferred by chapter one, Public Laws of one thousand nine hundred thirty-six, Extra Session, and made a part of the unemployment compensation commission of North Carolina, shall in such event return to and have the same status as it had prior to enactment of chapter one, Public Laws of one thousand nine hundred thirty-six, Extra Session, and under authority of chapter one hundred six, Public Laws of one thousand nine hundred thirty-five, shall carry on the duties there-in prescribed; but, pending a final settlement of the affairs of the unemployment compensation commission of North Carolina, the said state employment service shall render such service in connection therewith as shall be demanded or required under the provisions of this chapter or the provisions of chapter one, Public Laws of one thousand nine hundred thirty-six, Extra Session. (1937, c. 363: 1939, c. 52, s. 8.)

Editor's Note.—The 1939 amendment added the last sentence to the first paragraph.

Art. 3. Employment Service Division.

§ 96-20. Duties of division; conformance to Wagner-Peyser Act; organization; director; employees.—The employment service division of the Unemployment Compensation Commission shall establish and maintain free public employment offices in such number and in such places as may be necessary for the proper administration of this article, and for the purpose of performing such duties as are within the purview of the act of Congress entitled "An act to provide for the establishment of a national employment system and for cooperation with the states in the promotion of such system and for other purposes," approved June sixth, one thousand nine hundred thirty-three (48 Stat, 113; U. S. C., Title 29, sec. 49(c)), as amended. The said division shall be administered by a full-time salaried director, who shall be charged with the duty to cooperate with any official or agency of the United States having powers or duties under the provisions of the said act of congress, as amended, and to do and perform all things necessary to secure to this state the benefits of the said act of congress, as amended, in the promotion and maintenance of a system of public employment offices. The provisions of the said act of congress, as amended, are hereby accepted by this state, in conformity with section four of said act, and this state will observe and comply with the requirements thereof. The state employment service division is hereby designated and constituted the agency of this state for the purpose of said act. The commission is directed to appoint the director, other officers, and employees of the state employment service. Such appointments shall be made in accordance with regulations prescribed by the director of the United States employment service. (Ex. Sess. 1936, c. 1, s. 12; 1941, c. 108, s. 11.)

§ 96-21. Cooperation with federal board for vocational education.—The employment service division shall cooperate with the federal board for vocational education, division for rehabilitation of crippled soldiers and sailors, in endeavoring to secure suitable employment and fair treatment of the veterans of the world war. (1921, c. 131, s. 5; Ex. Sess. 1936, c. 1, s. 12; C. S. 7512(c).)

§ 96-22. Employment of minors; farm employment; promotion of Americanism.—The employment service division shall have jurisdiction over all matters contemplated in this article pertaining to securing employment for all minors who avail themselves of the free employment service. The employment service division shall have power to so conduct its affairs that at all times it shall be in harmony with laws relating to child labor and compulsory education; to aid in inducing minors over sixteen, who cannot or do not for various reasons attend day school, to undertake promising skilled employment; to aid in influencing minors who do not come within the purview of compulsory education laws, and who do not attend day school, to avail themselves of continuation or special courses in existing night schools, vocational schools, part-time schools, trade schools, business schools, library schools, university extension courses, etc., so as to become more skilled in such occupation or vocation to which they are respectively inclined or particularly adapted; to aid in securing vocational employment on farms for town and city boys who are interested in agricultural work, and particularly town and city high school boys who include agriculture as an elective study; to cooperate with various social agencies, schools, etc., in group organization of employed minors, particularly those of foreign parentage, in order to promote the development of real, practical Americanism through a broader knowledge of the duties of citizenship; to investigate methods of vocational rehabilitation of boys and girls who are maimed or crippled and ways and means for minimizing such handicap. (1921, c. 131, s. 4; Ex. Sess. 1936, c. 1, s. 12; C. S. 7512(d).)

Editor's Note.—This section is summarized in 1 N. C. Law Rev. 338.

§ 96-23. Job placement; information; research and reports.—The employment service division shall make public, through the newspapers and other media, information as to situations it may have applicants to fill, and establish relations with employers for the purpose of supplying demands for labor. The division shall collect, collate, and publish statistical and other information relating to the work under its jurisdiction; investigate economic developments, and the extent and causes of unemployment and remedies therefor within and without the state, with the view of preparing for the information of the general assembly such facts as in its opinion may make further legislation desirable. (1921, c. 131, s. 5; Ex. Sess. 1936, c. 1, s. 12; C. S. 7512(e).)

§ 96-24. Local offices; cooperation with United States service; financial aid from United States.—The employment service division is authorized to enter into agreement with the governing authorities of any municipality, county, township, or school corporation in the state for such period of time as may be deemed desirable for the purpose of establishing and maintaining local free employment offices, and for the extension of vocational
guidance in cooperation with the United States employment service, and under and by virtue of any such agreement as aforesaid to pay, from any funds appropriated by the state for the purposes of this article, any part or the whole of the salaries, expenses or rent, maintenance, and equipment of offices and other expenses. (1921, c. 131, s. 6; 1935, c. 106, s. 4; 1931, c. 312, s. 3; Ex. Sess. 1936, c. 1, s. 12; C. S. 7312(f).)

Editor's Note.—Prior to the amendment of 1935, this section applied to vocational guidance of minors. The section was extended by the amendment.

§ 96-25. Acceptance and use of donations.—It shall be lawful for the employment service division to receive, accept, and use, in the name of the people of the state, or any community or municipal corporation, as the donor may designate, by gift or devise, any moneys, buildings, or real estate for the purpose of extending the benefits of this article and for the purpose of giving assistance to deserving maimed or crippled boys and girls through vocational rehabilitation. (1921, c. 131, s. 7; 1931, c. 312, s. 3; Ex. Sess. 1936, c. 1, s. 12; C. S. 7312(g).)

§ 96-26. Cooperation of towns, townships, and counties with division.—It shall be lawful for the governing authorities of any municipality, county, township, or school corporation in the state to enter into cooperative agreement with the employment service division and to appropriate and expend the necessary money upon such conditions as may be approved by the employment service division and to provide the use of public property for the joint establishment and maintenance of such offices as may be mutually agreed upon, and which will further the purpose of this article.

Chapter 97. Workmen's Compensation Act.


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Editor's Note.—The amendment of 1935 inserted the clause reading "upon such conditions as may be approved by the commissioner of labor."

§ 96-27. Method of handling employment service funds.—All federal funds received by this state under the Wagner-Peyser Act (48 Stat. 113; Title 29, U. S. C., § 49) as amended, and all state funds appropriated or made available to the employment service division shall be paid into the unemployment compensation administration fund, and said moneys are hereby made available to the state employment service to be expended as provided in this article and by said act of Congress. For the purpose of establishing and maintaining free public employment offices, said division is authorized to enter into agreements with any political subdivision of this state or with any private, non-profit organization, and as a part of any such agreement the commission may accept moneys, services, or quarters as a contribution to the unemployment compensation administration fund. (1935, c. 106, s. 7; Ex. Sess. 1936, c. 1, s. 12; 1941, c. 108, s. 11.)

Editor's Note.—The 1941 amendment struck out the words "the special employment service account in" formerly appearing after the word "into" in line five of the text of this section.

§ 96-28. Annual appropriation.—There is hereby appropriated to the unemployment compensation commission seventy-five thousand dollars annually, for the purpose of paying the state's contribution towards the expenses of the employment service division. (Ex. Sess. 1936, c. 1, s. 13; 1941, c. 108, s. 12.)
CHAPTER 97. WORKMEN'S COMPENSATION ACT

Sec. 97-24. Right to compensation barred after one year.
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97-82. Memorandum of agreement between employer and employee to be submitted to Commission on prescribed forms for approval.
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§ 97-1 CH. 97. WORKMEN’S COMPENSATION ACT § 97-1


§ 97-1. Official title.—This article shall be known and cited as “The North Carolina Workmen’s Compensation Act.” (1929, c. 120, s. 1.)

In General.—It was the purpose of the General Assembly in providing for compensation for an employee, that the North Carolina Industrial Commission, created by the act for that purpose, shall administer its provisions to the end that both employee and employer shall receive benefits and enjoy the protection of the act. The act contemplates mutual concessions by employee and employer; for that reason, its validity has been upheld, and its policy approved. Winslow v. Carolina Conference Ass’n, 211 N. C. 571, 579, 191 S. E. 403.

It is not the purpose of the Workmen’s Compensation Act to exculpate or absolve employers from the consequences of their negligent conduct. Tscheller v. National Weaving Co., 214 N. C. 449, 452, 199 S. E. 623.

Judicial Notice.—Our courts will take judicial notice of a public statute of the state, which therefore need not be

Sec. 97-103. Membership in Bureau of carriers of insurance; acceptance of rejected risks; rules and regulations for maintenance; Insurance Commissioner or deputy ex-officio Chairman.

97-104. Governing committee; production of books and records for compilation of appropriate statistics; rates subject to approval of Insurance Commissioner.

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97-114. Mutual workmen’s compensation security fund created.

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97-121. Expenses of administering funds.

97-122. Contributions relieving carrier of posting bond or making special deposit.

Construction.—The Workmen’s Compensation Act is to be construed liberally to effectuate the broad intent of the act to provide compensation for employees sustaining an injury arising out of and in the course of the employment, and no technical or strained construction should be given to defeat its purpose. Johnson v. Asheville Hosley Company, 199 N. C. 38, 153 S. E. 591. See Roberts v. City Inc. etc., Co., 210 N. C. 17, 185 S. E. 438; Barbour v. State Hospital, 213 N. C. 515, 196 S. E. 812; Reeves v. Parker-Graham-Sexton, Inc., 199 N. C. 516, 196 S. E. 812.

However, liberal construction cannot be extended beyond the clearly expressed language of the act. Gilmore v. Hoke County Board of Education, 222 N. C. 328, 23 S. E. (2d) 292.

The rule of liberal construction is to be liberally construed to effectuate the legislative intent as gathered from the act to award compensation for the injury or death of an employee arising out of and in the course of his employment, irrespective of the question of negligence. Reeves v. Parker-Graham-Sexton, Inc., 199 N. C. 516, 196 S. E. 812.

The provisions of the Workmen’s Compensation Act are to be construed in their relations to each other as a whole to effectuate the intent of the Legislature to provide compensation for employees sustaining an injury in the course of employment, and in the course of his employment. Rice v. Denny Roll & Panel Co., 199 N. C. 154, 154 S. E. 69.


The Workmen’s Compensation Act will be construed as a whole, and the various provisions must be interpreted harmoniously, with a view to effectuating the legislative intent. Morris v. Laughlin Chevrolet Co., 217 N. C. 428, 8 S. E. (2d) 484, 128 A. L. R. 132.

Constitutionality.—The Workmen’s Compensation Act of North Carolina has been held to be constitutional to be construed for the purpose of determining liability of defendants to the next of kin of a deceased employee should not be brought in the name of the deceased employee. Slade v. Willis Hosley Mills, 209 N. C. 833, 184 S. E. 644.

The Industrial Commission has exclusive jurisdiction to determine liability of defendants to the next of kin of a deceased employee should not be brought in the name of the deceased employee. Slade v. Willis Hosley Mills, 209 N. C. 833, 184 S. E. 644.

Applied in Davis v. Mecklenburg County, 214 N. C. 469, 199 S. E. 604.

§ 97-2. Definitions.—When used in this article, unless the context otherwise requires—

(a) Employment.—The term “employment” includes employment by the State and all political subdivisions thereof, and all public and quasi-public corporations therein and all private employers in which five or more employees are regularly employed in the same business or establishment, except agriculture and domestic services and sawmills and logging operators in which less than fifteen employees are regularly employed.

(b) Employee.—The term “employee” means every person engaged in an employment under any appointment or contract of hire or apprenticeship, who is expressly or impliedly employed, or permitted to work, or handling, or in any manner employed by lawfully employed, but excluding persons whose employment is both casual and not in the course of the trade, business, profession or occupation of his employer, and as relating to those so employed by the State, the term “employee” shall include all officers and employees of the State, except only such as are elected by the people, or by the General Assembly, or appointed by the Governor, either with or without the confirmation of the Senate; as relating to municipal corporations and political subdivisions of the State, the term “employee” shall include all officers and employees therefrom, except such as are elected by the people or appointed by the council or other governing body of said municipal corporation or political subdivision, who act in purely administrative capacities, and to serve for a definite term of office. The term “employee” shall include members of the North Carolina National Guard, except when called into the service of the United States, and members of the North Carolina State Guard, and members of these organizations shall be entitled to compensation for injuries arising out of and in the course of the performance of their duties at drill, in camp, or on special duty under orders of the Governor. The term “employee” shall include deputy sheriffs and all persons acting in the capacity of deputy sheriffs, whether appointed by the sheriff or by the governing body of the county and whether serving on a fee basis or on a salary basis, or whether deputy sheriffs serving upon a full time basis or a part time basis, and including deputy sheriffs appointed to serve in an emergency, but as to those so appointed, only during the continuation of the emergency. The sheriff shall furnish to the board of county commissioners a complete list of all deputy sheriffs named or appointed by him immediately after their appointment, and notify the board of commissioners of the name and residential address of each deputy sheriff promptly after such changes are made. Any reference to an employee who has been injured shall, when the employee is dead, include also his legal representative, dependents, and other persons to whom compensation may be payable: Provided, that the third and fourth sentences herein shall not apply to Pender, Cherokee, Avery, Perquimans.
mans, Gates, Macon, Watauga, Ashe, Union, Wilkes, Hyde, Caswell, Bladen and Carteret Counties.

(c) Employer.—The term “employer” means the State and all political subdivisions thereof, all public and quasi-public corporations therein, every person carrying on any employment and the legal representative of a deceased person or the receiver or trustee of any person. The board of commissioners of each county of the state, for the purposes of this law, shall be considered as “employer” of all deputy sheriffs serving within such county, or persons serving or performing the duties of a deputy sheriff, whether such persons are appointed by the sheriff or by the board of commissioners and whether serving on a fee basis or salary basis. Each county is authorized to insure its compensation liability for deputy sheriffs to the same extent it is authorized to insure other compensation liability for employees thereof: Provided, that the last two sentences hereof do not apply to Pender, Cherokee, Avery, Perquimans, Gates, Macon, Watauga, Ashe, Union, Wilkes, Hyde, Caswell, Bladen and Carteret Counties.

(d) Person.—The term “person” means individual, partnership, association or corporation.

(e) Average Weekly Wage.—“Average weekly wages” shall mean the earnings of the injured employee in the employment in which he was working at the time of the injury, divided by fifty-two; but if the injured employee lost more than seven consecutive calendar days at one or more times during such period, although not in the same week, then the earnings for the remainder of such fifty-two weeks shall be divided by the number of weeks remaining after the time so lost has been deducted. Where the employment prior to the injury extended over a period of less than fifty-two weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee earned wages shall be followed; provided, results fair and just to both parties will be thereby obtained. Where, by reason of a shortness of time during which the employee has been in the employment of his employer or the casual nature or terms of his employment, it is impracticable to compute the average weekly wages as above defined, regard shall be had to the average weekly amount which during the fifty-two weeks previous to the injury was being earned by a person of the same grade and character employed in the same locality or community. But where for exceptional reasons the foregoing would be unfair, either to the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury.

Wherever allowances of any character made to an employee in lieu of wages are specified part of the wage contract they shall be deemed a part of his earnings.

(f) Injury.—“Injury and personal injury” shall mean only injury by accident arising out of and in the course of the employment, and shall not include a disease in any form, except where it results naturally and unavoidably from the accident.

(g) Carrier.—The term “carrier” or “insurer” means any person or fund authorized under §§ 97-93 to insure under this article, and includes self-insurers.

(h) Commission.—The term “commission” means the North Carolina Industrial Commission, to be created under the provisions of this article.

(i) Disability.—The term “disability” means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment.

(j) Death.—The term “death” as a basis for a right to compensation means only death resulting from an injury.

(k) Compensation.—The term “compensation” means the money allowance payable to an employee or to his dependents as provided for in this article, and includes funeral benefits provided herein.

(l) Child, Grandchild, Brother, Sister. — The term “child” shall include a posthumous child, a child legally adopted prior to the injury of the employee, and a stepchild or acknowledged illegitimate child dependent upon the deceased, but does not include married children unless wholly dependent upon him. “Grandchild” means a child as above defined of a child as above defined. “Brother” and “sister” include stepbrothers and stepsisters, half brothers and half sisters, and brothers and sisters by adoption, but does not include married brothers or married sisters unless wholly dependent on the employee. “Child,” “grandchild,” “brother,” and “sister” include only persons who at the time of the death of the deceased employee were under eighteen years of age.

(m) Parent.—The term “parent” includes stepparents and parents by adoption, parents-in-law, and any person who for more than three years prior to the death of the deceased employee stood in the place of a parent to him, if dependent on the injured employee.

(n) Widow.—The term “widow” includes only the decedent’s wife living with or dependent for support upon him at the time of his death; or living apart for justifiable cause or by reason of his desertion at such time.

(o) Widower.—The term “widower” includes only the decedent’s husband who at the time of her death lived with her and was dependent for support upon her.

(p) Adoption.—The term “adoption” or “adopted” means legal adoption prior to the time of the injury.

(q) Singular.—The singular includes the plural and the masculine includes the feminine and neuter.

(r) Hernia.—In all claims for compensation for hernia or rupture, resulting from injury by accident arising out of and in the course of the employee’s employment, it must be definitely proven to the satisfaction of the Industrial Commission:

First. That there was an injury resulting in hernia or rupture.

Second. That the hernia or rupture appeared suddenly.

Third. That it was accompanied by pain.

Fourth. That the hernia or rupture immediately followed an accident.
Fifth. That the hernia or rupture did not exist prior to the accident for which compensation is claimed.

All hernia or rupture, inguinal, femoral, or other, so proven to be the result of an injury by accident arising out of and in the course of employment, shall be treated in a surgical manner by a radical operation. If death results from such operation, the death shall be considered as a result of the injury, and compensation shall be paid in accordance with the provisions of § 97-38. In non-fatal cases, if it is shown by special examination, as provided in § 97-27, that the injured employee has a disability resulting after the operation, compensation for such disability shall be paid in accordance with the provisions of this article.

In case the injured employee refuses to undergo the radical operation for the cure of said hernia or rupture, no compensation will be allowed during the time such refusal continues. If, however, is shown that the employee has some chronic disease, or is otherwise in such physical condition that the Commission considers it unsafe for the employee to undergo said operation, the employee shall be paid compensation in accordance with the provisions of this article. (1929, c. 120, s. 2; 1933, c. 448; 1939, c. 277, s. 1; 1943, cc. 543, 672, s. 1.)

Cross Reference.—As to jurisdiction of commission dependent upon showing of employment of five or more, see note to § 97-1.

Editor's Note.—Public Laws of 1933, c. 448, added, to subsection (a) of this section, the clause applicable to saw-mills and logging operations.

The 1939 amendment inserted the second and third sentences in subsection (b) and added the second and third subsections to subsection (c).

The first 1943 amendment added the proviso at the end of subsection (b) and the proviso at the end of subsection (c). The second 1943 amendment inserted the second sentence in subsection (b).

The condition antecedent to compensation is the occurrence of an injury (1) by accident (2) arising out of and in the course of employment. Wilson v. Mooresville, 222 N. C. 231, 22 S. E. (2d) 907.

Injury Arising out of and in the Course of Employment.

—Under the Compensation Act injuries by accident arising out of and in the course of the employment are compensable. Lee v. American Enka Corp., 212 N. C. 455, 193 S. E. 809.

The words "out of, as well as, in the course of employment. Where an injury cannot fairly be traced to the employment as a whole and servant. Bryan v. Loving Co., 222 N. C. 724, 24 S. E. (2d) 731.

The definition of injury given in § 97-20 also provides that it "shall not include a disease in any form, except where it results naturally and unavoidably from the accident." By applying this to the following case the Commission evinced a willingness to construe definitions liberally. Plaintiff, a truck driver, sustained an injury to his eye while cleaning a carburetor. The injury irritated his eye and resulted in an ulcer. Seven days after the accident the plaintiff was treated by a doctor, who gave the plaintiff some lotions to use. He visited the doctor three times. A carbuncle ophthalmia showed up, which was on the thirteenth day after the accident. As a result of the infection the plaintiff lost one eye and suffered a partial loss of use in the other eye. Compensation was allowed. The Commission said that the disease was "natural" because one infection opened the way for other infections. There was more trouble with the word "unavoidably." "The Commission quotes from the opinions rendered in other jurisdictions to illustrate that "unavoidably" does not mean "absolutely necessary" or "inevitable," but 'inherently, or what is generally considered unavoidable when common prudence and foresight cannot prevent it.' And since no evidence was presented that the plaintiff had been careless, and since the plaintiff had no opportunity to see a physician, the disease was found to have resulted unavoidably from the accident. This liberal construction tends to effectuate the liberal purpose of the Workmen's Compensation Act. 8 N. C. L. Rev. 421.

In construing sub-section (f) of this section the words "arising out of the employment" in regard to injuries compensable are broad and comprehensive, and must be determined in the light and circumstances of each case, and the act, applying only to industries employing more than five workmen, contemplates the gathering together of workmen of varying characteristics, and the risks and hazards of such close contact, joking and pranks by the workmen, are incidents to the business and grow out of it, and are ordinary risks assumed by the employer under the act. Conrad v. American Enka Corp., 222 N. C. 724, 24 S. E. (2d) 731, also, Wilson v. Mooresville, 222 N. C. 283, 22 S. E. (2d) 907.

The question of whether compensation is recoverable under this act depends upon whether the accident complained of arose out of and in the course of the employment of the one injured, and its determination depends largely upon the weight of the facts and circumstances as these facts and circumstances are to be as interpreted by the act, the rules and regulations of the Commission, the decisions of the administrative agencies and the decisions of the courts. The question of whether the accident was such as to entitle the employee to compensation is a question of fact. Harden v. Thomasville Furniture Co., 199 N. C. 733, 155 S. E. 723. If it is not, the injured employee is not entitled to compensation. Thomasville Furniture Co. v. Gaither, 199 N. C. 495, 251 S. E. 120.

If one employee assault another solely from anger, hatred, revenge, or vindictiveness, not growing out of or as an incident to the employment, the injury is to be attributed to the volunteer act of the assaultor and not to the employment. But if the assault be incidental to some duty of the employment, the injuries suffered thereby may properly be said to arise out of the employment. Ashley [917]
of the employment, the words "out of" referring to the employment alone, and these facts are found by the Commission to be the origin or cause of the accident, and the words "in the course of" to the time, place and circumstances under which the accident occurred. Coats v. Cook-Lewis Foundry Co., 198 N. C. 723, 153 S. E. 266.

In order for compensation to be recovered for the death of an employee under this act it is required that the injury occurred during the course of his employment, within the meaning of this section. An injury is one by accident arising out of and in the course of the employment, as a proximate cause, and where compensation is sought for the killing of one employee by another for purely personal and unrelated reasons, the judgment denying the right of compensation will be affirmed on appeal. Harden v. Thomasville Furniture Co., 199 N. C. 733, 153 S. E. 728.

An injury is an accident within the meaning of (1) of this section, is one by accident arising out of and in the course of the employment, the words "out of" referring to the origin or cause of the accident, and the words "in the course of" to the time, place and circumstances under which the accident occurred. Ridout v. Rose's 5-10-25c. Stores, 205 N. C. 435, 171 S. E. 642.

A question and that he rode to work with another employee, but passing a group of boys playing baseball, a baseball struck the windshield and an accident arising out of and the right of compensation will be affirmed on appeal. Perkin v. Sprott, 207 N. C. 462, 177 S. E. 404.

Evidence that claimant was not entitled to compensation for the employee's death, since there was no causal connection between the employment and the accident. Archie v. Greene Bros. Lbr. Co., 222 N. C. 477, 23 S. E. 2d 649.

In order for compensation to be recovered for the death of one employee by another for purely personal and unrelated reasons, the judgment denying the right of compensation will be affirmed on appeal. Archie v. Greene Bros. Lbr. Co., 222 N. C. 477, 23 S. E. 2d 649.

Where intestate died of hydrophobia resulting from a dog bite received by him while engaged in his duties as attending a filling station, it was held that claimant was not entitled to compensation for the employee's death, since there was no causal connection between the employment and the accident. Where the evidence tends to show that a night watchman employed to watch construction came over to a night watchman employed to watch construction and engaged in an altercation relating to matters foreign to the employment, and that one of them killed the other as a result thereof, is sufficient to support the finding of the industrial commission that injury arose out of and in the course of the employment, and therefore such finding is conclusive on the courts. McRae v. Ragland Const. Co., 216 N. C. 744, 6 S. E. (2d) 491.

The findings of fact of the industrial commission, supported by the evidence, were to the effect that deceased employee was a night watchman, that his duties were to make periodic inspection and to attend the furnaces and to get up steam, that on the night in question he procured his son to help him, that he instructed his son to do certain of his duties in the boiler room, that he placed a small box and plank on a walkway eight or nine feet high, with one end of the plank resting on the box, and lay down on the plank, that he became engaged in a personal altercation and that in getting up from his recumbent position, while his son was engaged in the performance of the employee's active duties in the employee's room, that he fell, that he was killed by the fall, and that the injured employee had not deviated from, or abandoned his employment, and that the evidence is sufficient to support the finding of the industrial commission that injury resulted from an accident arising out of and in the course of the employment. Stalleup v. Carolina Wood Turning Co., 217 N. C. 302, 7 S. E. (2d) 550.

Evidence that deceased employee was a night watchman, that his duties were to make periodic inspection and to attend the furnaces and to get up steam, that on the night in question he procured his son to help him, that he instructed his son to do certain of his duties in the boiler room, that he placed a small box and plank on a walkway eight or nine feet high, with one end of the plank resting on the box, and lay down on the plank, that he became engaged in a personal altercation and that in getting up from his recumbent position, while his son was engaged in the performance of the employee's active duties in the employee's room, that he fell, that he was killed by the fall, and that the injured employee had not deviated from, or abandoned his employment, and that the evidence is sufficient to support the finding of the industrial commission that injury resulting from an accident arising out of and in the course of the employment. Stalleup v. Carolina Wood Turning Co., 217 N. C. 302, 7 S. E. (2d) 550.

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day's work were transported back to the office where they were checking out, their working time being computed from the time in question in which they were carried to the job, in a truck, but that the president's car was sent to bring them back because of rain, that when the employee in question started to the job, that is brought to a steady situation, including, the driver, in the car, that the foreman said he could crowd in the car or ride in with another employee who was driving his own car, and that the employee was fatally injured in an accident occurring after they had reached the city in which plaintiff's place of business was maintained and while they were on their way to defendant's office to check out. The evidence was sufficient to support the finding of the Industrial commission that death resulted from an accident arising out of and in the course of the employment, the general rule of nonliability for an accident occurring while an employee is not in the course of his occupation or in the service of his employer, his condition improved and he went back to work and that shortly thereafter he again suffered a similar disability. The findings support the conclusion that the injury did not result from an accident arising out of and in the course of the employee's employment within the purview of this chapter. 


If an employee is injured as a result of the horse-play of a fellow-workman the injured employee is not precluded from recovering his damages under this act if he did not participate therein. Chambers v. Union Oil Co., 199 N. C. 385, 158 S. E. 648.

A newspaper engaged in selling papers is held not to be an employee of the newspaper within the meaning of that term as used in this section, the newspaper not being on the newspaper's payroll and being without authority to solicit subscriptions and being free to select his own methods of effecting sales, although some degree of supervision was exercised by the newspaper. Creswell v. Charlotte News Pub. Co., 204 N. C. 379, 168 S. E. 498.

The restriction of this act excluding injuries sustained in casual employment is to be construed in pari materia with its insurance carrier, under this chapter for the death by accident of an employee of the city is an employee of the city within the meaning of the act, a worker employed by the city under a contract stipulating the wages to be received by the worker is an employee of the city within the meaning of the section, and the fact that the city is a subdivision of the state, nor employees of the same, shall have the right to reject the provisions of the act, and it being required that these sections be construed in pari materia to determine the legislative intent. Rape v. Huntersville, 214 N. C. 305, 199 S. E. 746.

A worker employed by a city under a contract stipulating the wages to be received by the worker is an employee of the city within the meaning of this section, and the fact that the city is a subdivision of the state, and the Reconstruction Finance Corporation is immaterial on the question of the relationship between the worker and the city. Mayze v. Forest City, 207 N. C. 168, 176 S. E. 649, with its insurance carrier, under this chapter for the death by accident of an employee of the city is an employee of the city within the meaning of the act, a worker employed by the city under a contract stipulating the wages to be received by the worker is an employee of the city within the meaning of this section, and the fact that the city is a subdivision of the state, nor employees of the same, shall have the right to reject the provisions of the act, and it being required that these sections be construed in pari materia to determine the legislative intent. Rape v. Huntersville, 214 N. C. 305, 199 S. E. 746.
§ 97-2

CH. 97 WORKMEN'S COMPENSATION ACT § 97-2

§ 97-2


Person Receiving Federal Relief Not an Employee.—A person furnished work for the relief of himself and family and who is not an employee of the state within the provisions of the Compensation Act is not an "employee" of the relief administra-

An employee of the state engaged in the cultivation of food crops on lands of the state used by the state hospital is an employee of the state within the meaning of the Compensation Act § 97-13, and his death from an accident arising out of and in the course of his employment is compensable. Barber v. State Hospital, 213 N. C. 515, 196 S. E. 812.

Deputy sheriff and director of athletics is an employee of a political sub-

division of the State, and is entitled to the benefits of the Compensation Act under this section. Perdue v. State Board of Equalization, 206 N. C. 780, 172 S. E. 296.

Whether an injured person is an executive officer or an employee within the meaning of this section, is to be deter-
determined by the nature of the act performed by him at the time of the injury, but reference to the exigencies of the in-

sufficient to support the finding of the Industrial Commission in

jury was the result of an accident arising out of and in

the course of the employment, and such a finding of fact is


Sufficiency of Evidence of Employee.—Deceased, at the time of his fatal injury, was engaged in selling the products of de-

fendant. Letters to him from defendant's home office were introduced in evidence which contained instructions for the

collection of an account which, as an exception, had been charged directly to the purchaser by defendant, and also a letter stating that defendant would fill his orders C. O. D. without deducting commissions and at the end of the week would then send him the checks. Evidence that the employee, the injury resulting in death, the evidence is suffi-
cient to sustain the finding of the Industrial Commission in

the case, and that certain a sum was due for social secu-

rity number. Held: The evidence, with other evidence in the case, was suffi-
cient to support the finding of the industrial commission that the deceased was an employee of the defendant, and not a jobber or independent contractor. Cloninger v. An-
brosia Cake Bakery Co., 218 N. C. 36, 9 S. E. (2d) 615.

Employee Mowing Employer's Lawn.—When a compensa-
tion insurance policy provides coverage solely in connec-
tion with the usual duties of the employee, the policy does not cover injury to an employee sustained while mowing the lawn at the employer's residence. Burnett v. Palmer-Lite Paint Co., 216 N. C. 204, 4 S. E. 2d 347.

Hernia.—It is sufficient for the Commission to find the facts

required under this section and award compensation if the

pain immediately followed the accident although the hernia

was not discovered until days later. Ussery v. Erlanger Cotton Mills, 201 N. C. 658, 161 S. E. 307.

In Moore v. Engineer, etc., Co., 214 N. C. 424, 199 S. E. 605, it was held that claimant's injury resulted from an

accident within the contemplation of the compensation act and that the evidence justified the Industrial Commission in

awarding the compensation.
tured to contract pneumonia, from which he died: Heflin v. Maxwell, 228 N. C. 483, 46 S. E. (2d) 783.

Injury from Occupational Disease. — Where claimant
worked in an asbestos plant for six or seven years, and a
dust disease was manifestly due to his employment, about a year
before claimant's discharge when a medical examination dis-
closed that he was suffering from asbestosis, the evidence
shows the injury was the result of an occupational disease
not inherent or usual in the nature of the employment, and
prior to its amendment by ch. 123, Public Laws of 1925.

Conclusions Reached Following Resulting Accident Not
Proceded. — Section 97-90 provides that occupational dis-
aseous in the first section of subsection "e," of this
section, would be unfair because of exceptional cir-

Average Weekly Wages. — When, in determining the
amount to be awarded the dependents of a deceased em-
ployee, the method of computing the "average weekly
wage" enumerated in the first paragraph of subsection "e,"
of this section, would be unfair because of exceptional cir-
stances, the second paragraph of said subsection to use such
other method of computation as would most nearly approximate
the amount which the employee would be earning if living,
and in the course of the employment, MacRae v. Unem-
ployment Comm., 217 N. C. 769, 9 S. E. (2d) 595.

showed claimant went to another city to inspect a job
which defendant employer was completing, and did manual
labor on the job in installing radiators, and was injured in an
automobile accident occurring while he was returning
home from the job, it was held that the claimant, at the
time of his injury, had not been off on a mis-
precluded. — Section 97-80 providing that only the occupa-
tional diseases therein specified should be compensable, re-
lates only to occupational diseases, which are those result-
ing from long and continued exposure to risks and condi-
tions inherent and usual in the nature of the employment,
and this section does not preclude compensation for a dis-
ease not inherent in or incident to the nature of the em-
ployment when it results from an accident occurring
in the course of the employment. MacRae v. Unem-
ployment Comm., 217 N. C. 769, 9 S. E. (2d) 595.

The finding of fact of the industrial commission that the
disease causing an employee's death resulted naturally and
unavoidably from an accident is conclusive on appeal when
the finding is conclusive on the courts upon appeal. Lath-

A proceeding before the industrial commission for com-
ensation is not a lawsuit in the strict sense, and many of
the prerequisites of an action at law are not required.
Thus, an infant employee may prosecute his claim directly
without the appointment of a next friend or guardian.

Review of Decision. — If there was no conflicting evidence
and the Industrial Commission decided as a matter of law
that there was no sufficient competent evidence that the in-
jury to plaintiff was "by accident arising out of and in the
course of employment," the finding is conclusive on appeal
viewable by the court upon appeal. Massey v. Board of Ed-
ucation, 204 N. C. 193, 167 S. E. 692.

Where there is any competent evidence in support of the
finding of fact of the industrial commission that the accident
in question arose out of and in the course of the employment,
the finding is conclusive on the courts upon appeal. Lath-

Where Record Silent as to Material Fact at Issue. — Where
provision is made in the statute, or there is otherwise indi-
cated in reference to the content of the employer that
the claimant's injury was occasioned by his willful intention
to injure his assistant, a fellow-servant, the courts have
manded for a definite determination of the question. Conrad

Presumption of Acceptance. — In Pilley v. Greenville Cot-
ton Mills, 212 N. C. 479, it is held by the Workmen's Compensation Act every employer and em-
ployee, except as therein stated, is presumed to have ac-
cepted the provisions of the act and to pay and accept com-
ensation for personal injury or death as therein set forth.
The plaintiff, not being in the excepted class, is bound by
the presumption. Miller v. Roberts, 212 N. C. 136, 191
§ 97-4. Notice of non-acceptance and waiver of exemption.—Either an employer or an employee, who has exempted himself by proper notice from the operation of this article, may at any time give written notice thereof, and hereby accept the provisions of this article by giving notice as herein provided.

The notice of non-acceptance of the provisions of this article and notice of waiver of exemption heretofore referred to shall be given thirty days prior to any accident resulting in injury or death: Provided, that if any such accident occurred less than thirty days after the date of such notice of non-acceptance or acceptance given at the time of injury or death, then all other notice after loss, shall be sufficient notice thereof. The notice shall be in writing or print, in substantially the form prescribed by the Industrial Commission, and shall be given by the employer by posting the same in a conspicuous place in the shop, plant, office, room, or place where the employee is employed, or by serving it personally upon him; and shall be given by the employee by sending the same in registered letter, addressed to the employer at his last known residence or place of business, or by giving it personally to the employer or any of his agents upon whom a summons in civil action may be served under the laws of the State. A copy of the notice in prescribed form shall also be filed with the Industrial Commission.

In any suit by an employer or an employee who has exempted himself by proper notice from the application of this article, a copy of such notice duly certified by the Industrial Commission shall be admitted in evidence as proof of such exemption. (1929, c. 120, s. 5.)

Where, under the facts alleged, the parties were presumed to have accepted the provisions of the Compensation Act, but the complaint further alleged that in respect to the employee's work defendants "were not operating under the Compensation Act," the allegation that defendants were not operating under the act involves both law and fact, and the allegation is sufficient to admit of proof of nonacceptance of the provisions of the act, and it was error for the court to sustain defendants' demurrer on the ground that the industrial commission had exclusive jurisdiction, it being a question of law for the court, when the plaintiff introduces his evidence, to determine whether defendant employer was not operating under the act. Cooke v. Gillis, 218 N. C. 726, 193 S. E. 657.

§ 97-5. Presumption as to contract of service.—

Every contract of service between any employer and employee covered by this article, written or implied, now in operation or made or implied prior to July 1, 1929, shall, after that date, be presumed to have been made subject to the provisions of this article, unless either party shall give notice, as provided in § 97-4, to the other party to such contract that the provisions of this article other than §§ 97-14, 97-15, 97-16, and 97-92 are not intended to apply.

A like presumption shall exist equally in the case of all minors, unless notice of the same character be given by or to the parent or guardian of the minor. (1929, c. 120, s. 6.)

As applied in Miller v. Roberts, 212 N. C. 126, 193 S. E. 286.

§ 97-6. No special contract can relieve an employer of obligations.—No contract or agreement, written or implied, no rule, regulation, or other device shall in any manner operate to relieve an employer, in whole or in part, of any obligation created by this article, except as herein otherwise expressly provided. (1929, c. 120, s. 7.)

§ 97-7. State or subdivision and employees thereof.—Neither the State nor any municipal corporation within the State, nor any political subdivision thereof, nor any employee of the State or of any such corporation or subdivision, shall have the right to reject the provisions of this article relative to payment and acceptance of compensation, and the provisions of §§ 97-4, 97-5, 97-14, 97-15, and 97-16 shall not apply to them: Provided, however, that any county or special school district may, at its option, by action of the governing body of such county or school district at a regular meeting of such governing body, exempt itself entirely from the operation of this article: Provided, however, that such action on the part of such governing body shall not become effective until thirty days after such action is taken, and notice thereof filed with the Industrial Commission: and, Provided further, that such action on the part of any county or special school district exempting itself from the operation of this article shall not have the effect of relieving such county or school dis-

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trict in any degree from any liability against such county or school district already accrued prior to the taking of such action, or accruing during the said thirty-day period after the taking of such action. (1929, c. 120, s. 8; 1931, c. 274, s. 1.)

Editor's Note.—The Act of 1931 added the proviso to this section as it formerly appeared and inserted the above in lieu thereof. A comparison of the old with the new is necessary to determine the changes.

The 1931 act added the third proviso to the first sentence. It also struck out in the second proviso thereto the words "the employer may" and inserted in place thereof the words "or the employer or his carrier has admitted liability in writing and filed same with the industrial commission, the employer or his carrier shall have the exclusive right to." In General.—This section assigns the injured person's right of action against a tort-feasor to the employer or to the employee's insurance carrier. The latter in no event at the discretion of the carrier any other or further rights than those excepted from the action which the employee could have maintained had no such assignment been made. Phifer v. Berry, 202 N. C. 368, 392, 162 S. E. 119.

The remedy under the Workmen's Compensation Act is exclusive and under the express terms of this section an employer is relieved of all further liability for injury to or death of an employee, and where the administrator of a deceased employee brings action against third persons for the employee's wrongful death, the motion of the defendants that the action be stayed until the amount due and payable to the injured employee or his personal representative, shall be granted to an employee where he and his employees, dependents or next of kin, as against his employer, which the employee could have maintained had no such assignment been made. Phifer v. Berry, 202 N. C. 368, 392, 162 S. E. 119.

Manifestly the statute was designed primarily to secure prompt and reasonable compensation for an employee, and at the same time to permit an employer or his insurance carrier, who had made a settlement with the employee, to receive from the person against whom the injury was caused, prompt payment of the amount due and payable to the employer and employee in proportion to the amount each shall receive out of the recovery. If, however, the employer does not commence such action within six months from the date of such injury or death of the employee, or his personal representative, shall thereafter have the right to bring the action in the name of the injured employee or his personal representative; but nothing herein shall be construed as conferring upon the insurance carrier any other or further rights than those existing in the employer at the time of the injury or death of the employee, anything in the policy of insurance to the contrary notwithstanding.

In all cases where an employer and employee have accepted the workmen's compensation act, any injury to a minor while employed contrary to the laws of this state shall be compensation for which the employer is liable, or shall have assumed the liability of the employer. If, however, the employer or his carrier shall have the exclusive right to commence an action in his own name and/or in the name of the injured employee or his personal representative for damages on account of such injury or death, and any amount recovered by the employer shall be applied as follows: First to the payment of actual court costs, then to the payment of attorneys' fees when approved by the industrial commission; the remainder or so much thereof as is necessary shall be paid to the employer to reimburse him for any amount paid and/or to be paid by him under the award of the industrial commission; if there be then remain any excess, the amount thereof shall be paid to the injured employee or other person entitled thereto: Provided further that the amount of attorney's fees paid out in the distribution of the above recovery shall be a charge against the amount due and payable to the employer and employee in proportion to the amount each shall receive out of the recovery.
The remedy is exclusive. Where the allegations and evidence sufficient to warrant the conclusion that the injury in suit was caused by an accident arising out of the employment and in the course of plaintiff's employment, defendant's noncompliance with the duties imposed by statute makes him liable to the injured employee for the injuries sustained, which the statute prescribes shall be first applied to the actual court costs, then to the payment of attorneys' fees when approved by the commission, then to the reimbursement of the insurance carrier for money paid by it under the award, and any remaining excess to the injured employee, and an instruction on the issue of damages that defendant would be liable to the injured employee for the injuries for which he is liable and would fairly compensate the injured employee is error. Rogers v. Southeastern Construction Co., 214 N. C. 270, 193 S. E. 402.

The meaning of this section is both clear and logical, namely, that if after the expiration of six months from the date of the injury or death, the employer has not commenced an action, the employee, or his personal representative, may commence an action against the third person whose tortious act caused his injury. We are impelled to hold, in construing the sentence, that these words are surplusage, and as such must be disregarded. Ikerd v. North Carolina R. Co., 209 N. C. 270, 193 S. E. 402.

Joinder of Insurance Carrier Properly Denied.—More than six months after the injury complained of, the original defendants filed a petition and moved that the insurer's liability carrier also be made a party defendant, the motion was denied, and defendants appealed. The motion for joinder of the insurance carrier was properly denied under the provisions of this section, where the insurer did not have notice of the suit, by the insurer against his employer, as exclusive, but that the provision making the remedy exclusive did not appear in the clause relating to suits against third persons. This statement of the law was cited with approval in Mack v. Marshall Field & Co., 217 N. C. 674, 193 S. E. 393.

But the right of the administrator to maintain an action for death by wrongful act is not defeated, in view of this section, as a result of the widow's acceptance of compensation. However in Bright v. N. B., etc., Motor Lines, 212 N. C. 384, 193 S. E. 391, it was held that an award by the industrial commission to the widow of an employee excludes all other rights and remedies, and the administrator of the employee may not maintain an action against the employer for wrongful death, and the fact that the injury resulted from negligence in the violation of a criminal statute does not alter this result.

The employer of a subcontractor in the construction of a building, and was killed while performing his duties in the process of the work, went into contact with an uninsulated, highly charged electric wire. This action was instituted by the administrator of the employee against defendants upon allegations that defendant had failed to provide a safe place for the work. Turner v. Atlantic Coast Line R. Co., 212 N. C. 312, 193 S. E. 529, it was held that where a high charged wire to remain where it would likely cause injury to the structural steel workers and in failing to give proper warning of the danger. The employer of plaintiff was not a party to the action. Defendants demurred on the ground that upon the face of the complaint it appeared that the superior court was without jurisdiction and that the industrial commission had exclusive original jurisdiction. Under § 28-173 only the personal representative may maintain an action for wrongful death and the complaint alleged a cause of action therefor against defendants, and their defenses were demurred to and overruled. Section 28-173 is thus in the disposition of any recovery in accordance with the provisions of this section. Mack v. Marshall Field & Co., 217 N. C. 55, 6 S. E. (2d) 889.

But Assign ment of Such Claim Is Governed by Law of This State.—The assignment of the right of recovery against a third person under the wrongful death statute of another state, unless there is something in the law of the latter state which so provides. Betts v. Southern Ry. Co., 71 F. (2d) 785, 789.

But Assignment of Such Claim Is Governed by Law of This State.—The assignment of the right of recovery against a third person under the wrongful death statute of one state as the result of acceptance by the beneficiary of compensation from the employer under the compensation act of this state, in the absence of any provision to the contrary in the act of the state from which the compensation was derived, is governed by the law of this state. Betts v. Southern Ry. Co., 71 F. (2d) 787, 789.

Action by Insurer to Be in Name of Employee or Personal Representative.—Whether the employer or insurance carrier who has paid compensation may proceed in the action which has been instituted by a personal representative, or must institute a new and independent action, is a question of procedure and under the law of this state it is proper to proceed in the action which has
shall be reduced ten per cent. The burden of proof shall be upon him who claims an exemption or forfeiture under this section. (1929, c. 120, s. 13.)

The negligence of the employee does not disbar him from compensation, except only in cases where the injury is occasioned by his intoxication or wilful intention to injure himself or another. Archie v. Greene Bros. Lbr. Co., 222 N. C. 477, 23 S. E. (2d) 834.

§ 97-10. Exemptions from Provisions of Act.—No employee shall apply to railroads or railroad employees nor in any way repeal, amend, alter or affect article eight (8) of chapter sixty (60), or any section thereof, relating to the liability of railroad companies for injuries to employees; nor, upon the trial of any action in tort for injuries not coming under the provisions of this article, shall any provision herein be placed in evidence or be permitted to be argued to the jury: Provided, however, that the foregoing exemption to railroads and railroad employees shall not apply to electric street railroads or employees thereof; and this article shall apply to electric street railroads and employees thereof, and to this extent the provisions of article eight (8) of chapter sixty (60) are hereby amended.

(b) Casual Employment, Domestic Servants, Farm Laborers, Federal Government, Employer of Less than Five Employees.—This article shall not apply to casual employees, farm laborers, federal government employees in North Carolina, and domestic servants, nor to employees of such persons, nor to any person, firm or private corporation that has regularly in service less than five employees in the same business within this state, unless such employees and their employers voluntarily elect, in the manner hereinafter specified, to be bound by this article: Provided, however, that when an employee files a claim with the North Carolina industrial commission and it shall appear that the employer has insured his liability under the Workmen's Compensation Act in any authorized corporation, association, or in any mutual insurance association formed by a group of employers so authorized, such employee shall be entitled to receive from such employer and his employees have elected to be bound by this article, and, in such cases upon failure of the defendant and/or the insurance carrier to show by competent and sufficient evidence that the defendant employer was not bound by, or subject to the provisions of, the Workmen's Compensation Act at the time of the injury, compensation may be awarded by the industrial commiss-
without any express findings in their award as to acceptance of the article by the parties.

(c) Prisoners.—This article shall not apply to prisoners being worked by the State or any subdivision thereof, except to the following extent: Whenever any prisoner assigned to the State Highway and Public Works Commission shall suffer accidental injury arising out of and in the course of the employment to which he had been assigned, if the results of such injury continue until after the date of the lawful discharge of such prisoner to such an extent as to amount to a disability as defined in this article, then such discharged prisoner may have the benefit of this article by applying to the Industrial Commission as any other employee; provided, such application is made within twelve months from the date of discharge; and provided, further, that the maximum compensation to any prisoner shall not exceed fifteen dollars per month and the period of compensation shall be computed from the date of his discharge rather than to the date of the accident, and prisoners who have been discharged prior to March 15, 1941, who are covered by the terms of the subsection may have twelve months from March 15, 1941, in which to apply for its benefits, but as to such prisoners their compensation shall be computed only from the date of their application and shall not be cumulative for any prior period; and no award shall be made for facial disfigurement, and no award other than burial expenses shall be made for any prisoner whose accident results in death; and no award shall be made for any injury where there is no apparent or outward physical evidence of such injury, unless it is clearly established by medical opinion and supporting testimony that the matter complained of results solely from the accident arising out of and in the course of employment. If any person who has been awarded compensation under the provisions of this section shall be recommitted to prison upon conviction for an offense committed subsequent to the accident arising out of and in the course of the employment to which he had been assigned, the defense of contributory negligence is properly overruled when it does not appear on the face of the complaint that the defendant employed more than five men in this State. Hanks v. Southern Public Utilities Co., 204 N. C. 155, 157 S. E. 560. See also Allen v. American Cotton Mills, 206 N. C. 704, 175 S. E. 98.

Prima Facie Evidence.—This section merely facilitates proof that the employer and its employees are subject to the terms and provisions of the workmen's compensation act. Proof that the employer obtained insurance and a claim was filed is, under this section, prima facie evidence that the employer and the employee have been bound to the extent of making an agreement creating a presumption that an executive officer injured in the course of his duties was at the time engaged in the duties of an employee rather than those of an executive. Gassaway v. Gassaway, 220 N. C. 694, 698, 18 S. E. (2d) 120.

The provisions of this section that proof that the employer obtained insurance and filed claim should be prima facie evidence that the employer and the employee have been bound to the extent of making an agreement creating a presumption that an executive officer injured in the course of his duties was at the time engaged in the duties of an employee rather than those of an executive. Gassaway v. Gassaway, 220 N. C. 694, 698, 18 S. E. (2d) 120.

§ 97-16. Employers not bound by article may not use certain defenses in damage suit.—An employer who elects not to operate under this article shall not, in any suit at law instituted by an employee subject to this article to recover damages for personal injury or death brought against an employer who elects not to operate under this act does not have the effect of raising a presumption that an executive officer injured in the course of his duties was at the time engaged in the duties of an employee rather than those of an executive. Gassaway v. Gassaway, 220 N. C. 694, 18 S. E. (2d) 120.

§ 97-15. Employer may employ those men other than himself, and another innocent employee, who at the time of the accident were two men working beside the employer and that the other employees were on vacation, the evidence is insufficient to find a fact that the cause of the injury was due to the conduct of an employee who had withdrawn his acceptance of the terms of the workmen's compensation act, since the evidence tends to show that the employer regularly employed less than five employees. Thompson's Dependents v. Johnson Funeral Home, 205 N. C. 172, 175 S. E. 100.

The provisions of this section that proof that the employer obtained insurance and filed claim should be prima facie evidence that the employer and the employee have been bound to the extent of making an agreement creating a presumption that an executive officer injured in the course of his duties was at the time engaged in the duties of an employee rather than those of an executive. Gassaway v. Gassaway, 220 N. C. 694, 698, 18 S. E. (2d) 120.

This section cannot be held to have abolished the simple tool doctrine as a ground of defense. Newbern v. Great Atlantic, etc., Tea Co., 68 F. (2d) 523, 526, 91 A. I, R. 781.

Contributory Negligence.—Where it is admitted that defendant had a sufficient number of employees to make him liable for damages, there is no provision in this act providing for the effect of raising a presumption that an executive officer injured in the course of his duties was at the time engaged in the duties of an employee rather than those of an executive. Gassaway v. Gassaway, 220 N. C. 694, 18 S. E. (2d) 120.

§ 97-15. Electing employer may use such defenses against non-electing employee.—An employer who elects not to operate under this article shall, in any action to recover damages for personal injury or death brought against an employer accepting the compensation provisions of this article, proceed at common law, and the employer may avail himself of the defenses of contributory negligence, negligence of a fellow servant, and assumption of risk, as such defenses exist at common law. (1929, c. 120, s. 15.)

§ 97-16. Defenses denied to non-electing employer as against non-electing employee.—When both the employer and employee elect not to
operate under this article, the liability of the employer shall be the same as though he alone
rejected the terms of this article, and in any
suit brought against him by such employee the
employer shall not be permitted to avail himself
of any of the common-law defenses cited in §
97-14. Provided, however, that in Pender, Cher-
ookee, Avery, Perquimans, Gates, Macon, Watauga,
Ashe, Union, Wilkes, Hyde, Caswell, Bladen and
Carteret Counties any sheriff may exempt himself
and any and all deputies appointed by him from
the provisions of this article by notice in writing
in regard to the matter of the insurance. Such notice to be
made on forms prescribed by the industrial com-
mision. (1928, c. 120, s. 17; 1931, c. 274, s. 2;
1939, c. 277, s. 2; 1943, c. 548.)

Editor's Note.—The 1901 amendment added a proviso per-
mitting sheriffs to exempt themselves and their deputies
from the act. The 1939 amendment deleted the proviso.
The cases treated below were decided prior to the 1939
amendment. The 1943 amendment added the proviso.
The amendment permitting a sheriff to exempt himself
from the operation of the act by giving the notice prescribed,
cannot have the effect of bringing deputies sheriff within the
intention and meaning of the act, nor may the fact that a
sheriff purchases insurance to cover his compensation lia-

§ 97-19. Liability of principal contractors; cer-
tificate that sub-contractor has complied with law;
right to recover compensation of those who
would have been liable; order of liability.—Any
principal contractor, intermediate contractor, or
sub-contractor who shall sublet any contract for
the performance of any work without requiring from
such sub-contractor or obtaining from the
Industrial Commission a certificate, issued by
the Industrial Commission, stating that such sub-
contractor has regularly in service less than five
employees in the same business within this state,
to the same extent as such sub-contractor would
be if he had accepted the provisions of this
article for the payment of compensation and
other benefits under this article on account of
the injury or death of any employee of such
sub-contractor, due to an accident arising out
of and in the course of the performance of the
work covered by such sub-contract. If the
principal contractor, intermediate contractor, or
sub-contractor shall obtain such certificate at
the time of sub-letting such contract, and sub-con-
tactor, he shall not thereafter be held liable to
any employee of such sub-contractor for compen-
sation or other benefits under this article. The
Industrial Commission, upon demand, shall fur-
nish such certificate, and may charge therefor the
cost thereof, not to exceed twenty-five (25) cents.
Any principal contractor, intermediate con-
tactor, or sub-contractor paying compensation or other benefits under this article, under the
foregoing provisions of this section, may recover

the amount so paid from any person, persons, or corporation who, independently of such provision, would have been liable for the payment thereof.

Every claim filed with the Industrial Commission under this section shall be instituted against all parties liable for payment, and said Commission, in its award, shall fix the order in which said parties shall be exhausted, beginning with the immediate employer. (1929, c. 120, s. 19; 1941, c. 358, s. 1.)

Editor's Note.—The 1941 amendment added the words "irrespective of whether such sub-contractor has regularly in service less than five employees in the same business within the state in the first sentence.

In General.—This section is not in reality an amendment in the sense that it changed an existing law, but really amounts to an amendment for the purpose of expressing the full legislative intent under the existing law. Graham v. Wall, 220 N. C. 84, 90, 16 S. E. (2d) 691.

This section relates to contractors and subcontractors and not to employers and independent contractors. Beach v. McLain, 219 N. C. 531, 14 S. E. (2d) 315.

Cited in Sylas v. Loftis, 217 N. C. 674, 9 S. E. (2d) 393.

§ 97-20. Priority of compensation claims against assets of employer.—All rights of compensation granted by this article shall have the same preference or priority for the whole thereof against the assets of the employer as is allowed by law for any unpaid wages for labor. (1929, c. 120, s. 20.)

§ 97-21. Claims assignables and exempt from taxes and debts; agreement of employee to contribute to premium or waive right to compensation, void; unlawful deduction by employer.—No claim for compensation under this article shall be assignable, and all compensation and claims thereof shall be exempt from all claims of creditors and from taxes.

No agreement by an employee to pay any portion of premium paid by his employer to a carrier or to contribute to a benefit fund or department maintained by such employer for the purpose of providing compensation or medical services and supplies as required by this article shall be valid, and any employer who makes a deduction for such purpose from the pay of any employee entitled to the benefits of this article shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not more than $500.00. No agreement by an employee to waive his right to compensation under this chapter shall be valid. (1929, c. 120, s. 21.)

Editor's Note.—For a discussion of this section, see 8 N. C. Law Rev. 477, et seq. And see 15 N. C. Law Rev. 286.

§ 97-22. Notice of accident to employer. — Every injured employee or his representative shall immediately on the occurrence of an accident, or as soon thereafter as practicable, give or cause to be given to the employer a written notice of the accident, and the employee shall not be entitled to physician's fees nor to any compensation which may have accrued under the terms of this article prior to the giving of such notice, unless it can be shown that the employer, his agent or representative, had knowledge of the accident, or that the party required to give such notice had been prevented from doing so by reason of physical or mental incapacity, or the fraud or deceit of some third person; but no compensation shall be payable unless such written notice is given within thirty days after the occurrence of the accident or death, unless reasonable excuse is made to the satisfaction of the Industrial Commission for not giving such notice, and the Commission is satisfied that the injured employee has not been prejudiced thereby. (1929, c. 120, s. 22.)

Finding That Employer Not Prejudiced.—A finding by the commission that the employer has not been prejudiced by the failure of the plaintiff to give notice of the injury within 30 days after the accident, suffices to sustain the award (from and after such notice), but not for benefits which may have accrued prior thereto. Eller v. Lawrence Leather Co., 222 N. C. 604, 24 S. E. (2d) 244.

A finding by the commission that plaintiff was not capable of coherent, normal thought at the time of his examination by physicians falls short of a finding that he was prevented from giving written notice of his injury by reason of physical or mental incapacity so as to entitle him to the benefits which may have accrued prior to the giving of such notice. Eller v. Lawrence Leather Co., 222 N. C. 604, 24 S. E. (2d) 244.

It is not required that an injured employee, or the dependents of a deceased employee, file claim with the industrial commission, it being incumbent on the employer to file a written report of the accident with the industrial commission upon notice given by the injured employee, or his representative, and where the employer has filed a report with the commission within the prescribed time upon verbal information elicited from the representative of the employee by its claim agent, the representative being unable to reach the scene of the accident, and the employee assigning liability, the report has been filed with the industrial commission as a claim within one year from date of the accident and contains all facts necessary to make an award. Hanks v. Southern Public Utilities Co., 219 N. C. 312, 186 S. E. 262.


§ 97-23. What notice is to contain; defects no bar; notice personally or by registered letter.

—The notice provided in the foregoing section shall state in ordinary language the name and address of the employee, the time, place, nature, and cause of the accident, and of the resulting injury or death; and shall be signed by the employee or by a person on his behalf, or, in the event of his death, by any one or more of his dependents, or by a person in their behalf.

No defect or inaccuracy in the notice shall be a bar to compensation unless the employer shall prove that his interest was prejudiced thereby, and then only to such extent as the prejudice. Said notice shall be given personally to the employer or any of his agents upon whom a summons in civil action may be served under the laws of the State, or may be sent by registered letter addressed to the employer at his last known residence or place of business. (1929, c. 120, s. 23.)


§ 97-24. Right to compensation barred after one year. — (a) The right to compensation under this article shall be forever barred unless a claim be filed with the industrial commission within one year after the accident, and if death results from the accident, unless a claim be filed with the commission within one year thereafter.

(b) If any claim for compensation is hereafter made upon the theory that such claim or the injury upon which said claim is based is within the jurisdiction of the industrial commission under the provisions of this article, and if the
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§ 97-25. Medical treatment and supplies. — Medical, surgical, hospital, and other treatment, including medical and surgical supplies as may reasonably be required, for a period not exceeding ten weeks from date of injury to effect a cure or give relief and for such additional time as in the judgment of the commission will tend to lessen the period of disability, and in addition thereto such original artificial members as may reasonably be necessary at the end of the healing period shall be provided by the employer. In case of a controversy arising between the employer and employee relative to the continuance of medical, surgical, hospital, or other treatment, the industrial commission may order such further treatments as may in the discretion of the commission be necessary.

The commission may at any time upon the request of an employee order a change of treatment and designate other treatment suggested by the injured employee subject to the approval of the commission, and in such a case the expense thereof shall be borne by the employer upon the same terms and conditions as hereinbefore provided in this section for medical and surgical treatment and attendance.

The refusal of the employee to accept any medical, surgical, hospital, or other treatment when ordered by the industrial commission, shall bar said employee from further compensation until such refusal ceases, and no compensation shall at any time be paid for the period of suspension unless in the opinion of the industrial commission the circumstances justified the refusal, in which case, the industrial commission may order a change in the medical or hospital service.

If in an emergency on account of the employer's failure to provide the medical or other care as herein specified, a physician other than provided by the employer is called to treat the injured employee, the reasonable cost of such service shall be paid by the employer if so ordered by the industrial commission. However, if he so desires, an injured employee may select a physician of his own choosing to attend, prescribe and assume the care and charge of his case, subject to the approval of the industrial commission.

Editor's Note.——The Act of 1931 amended this section by striking out all of the provisions on voluntary treatment furnished by the employer and inserting a sentence empowering the commission on request of the employee to order a change of treatment at the employer's expense.

Editor's Note.——The Act of 1931 amended this section by striking out all of the provisions on voluntary treatment furnished by the employer and inserting a sentence empowering the commission on request of the employee to order a change of treatment at the employer's expense. 

Medical, etc., Expenses Not Included in Maximum Amount Recoverable for One Injury.——See Morris v. Laugh. 

limitation, as to employee under eighteen years of age, who is without guardian or other legal representative, is tolled until he arrives at the age of 18.
Additional Medical Treatment to Lessen Period of Disability.—The provision of this section that the employer should be liable for additional medical treatment to effect a cure or give relief is limited by the provision of this section to cases in which such additional medical treatment would tend to lessen the period of the employee’s disability, and the discretionary power to award such additional medical treatment is also subject to this limitation; nor may liability for medical attention be extended upon the ground that public policy demands that the care of a permanently disabled employee should not be cast upon the state, the extent of liability being definitely prescribed by this provision. Millwood v. Firestone Cotton Mills. 215 N. C. 319, 2 S. E. (2d) 560.

§ 97-26. Liability for medical treatment measured by average cost in community; malpractice of physician.—The pecuniary liability of the employer for medical, surgical, hospital service or other treatment required, when ordered by the Commission, shall be limited to such charges as prevail in the same community for similar treatment of injured persons of a like standard of living when such treatment is paid for by the injured person, and the employer shall be liable in damages for malpractice by a physician or surgeon furnished by him pursuant to the provisions of this section, but the consequences of any such malpractice shall be deemed part of the injury resulting from the accident, and shall be compensated for as such. (1929, c. 120, s. 26.)

Injury or suffering sustained by an employee in consequence of the malpractice of a physician or surgeon furnished by the employer or carrier is not ground for an independent action; under this section it is a constituent element of the employee’s injury for which he is entitled to compensation. The employer, or the Industrial Commission, shall have the right in any case of obstruction. The employer, or the Industrial Commission, shall have the right to require an autopsy at the expense of the party requesting the same. (1929, c. 120, s. 27.)

§ 97-27. Medical examination; facts not privileged; refusal to be examined suspends compensation; autopsy.—After an injury, and so long as he claims compensation, the employee, if so requested by his employer or ordered by the Industrial Commission, shall submit himself to examination, at reasonable times and places, by a duly licensed physician or surgeon designated and paid by the employer or the Industrial Commission. The employee shall have the right to have present at such examination any duly qualified physician or surgeon provided and paid by him. No fact communicated to or otherwise learned by any physician or surgeon who may have attended or examined the employee, or who may have been present at any examination, shall be privileged, either in hearings provided for by this article or any action at law brought to recover damages against any employer who may have accepted the compensation provisions of this article. If the employee refuses to submit himself to or in any way obstructs such examination requested by and provided for by the employer, his right to compensation and his right to take or prosecute any proceedings under this article shall be suspended until such refusal or objection ceases, and no compensation shall at any time be payable for the period of obstruction, unless in the opinion of the Industrial Commission the circumstances justify the refusal or obstruction. The employer, or the Industrial Commission, shall have the right in any case of death to require an autopsy at the expense of the party requesting the same. (1929, c. 120, s. 27.)

§ 97-28. Seven-day waiting period; exceptions. No compensation shall be allowed for the first seven calendar days of disability resulting from an injury, except the benefits provided for in § 97-25. Provided, however, that in the case the injury results in disability of more than twenty-eight (28) days, the compensation shall be allowed from the date of the disability. (1929, c. 120, s. 28.)

§ 97-29. Compensation rates for total incapacity. Where the incapacity for work resulting from the injury is total, the employer shall pay, or cause to be paid, as hereinafter provided, to the injured employee during such total disability, a weekly compensation equal to 60 per centum of his average weekly wages, but not more than twenty-one dollars, nor less than seven dollars, a week; and in no case shall the period covered by such compensation be greater than four hundred weeks, nor shall the total amount of all compensation exceed six thousand dollars. In case of death the total sum paid shall be six thousand dollars less any amount that may have been paid as partial compensation during the period of disability, payable in one sum to the personal representative of deceased. The basis for compensation of members of the North Carolina national guard and the North Carolina state guard shall be the maximum amount of eighteen dollars per week as fixed herein. The basis for compensation of deputy sheriffs, or those acting in the capacity of deputy sheriffs, who serve upon a fee basis shall be the minimum amount of seven dollars a week as fixed federated, that the last sentence herein shall not apply for Polkoe, Avery, Perquimans, Gates, Macon, Watauga, Union, Wilkes, Hyde, Caswell, Bladen and Carteret Counties. (1929, c. 120, s. 29; 1939, c. 277, s. 1; 1943, c. 502, s. 3; 1943, c. 672, s. 2.)

Editor’s Note.—For a discussion of this section, see § 97-29. Compensation rates for total incapacity.


§ 97-30. Partial incapacity. — Except as otherwise provided in § 97-31, where the incapacity for work resulting from the injury is partial, the employer shall pay, or cause to be paid, as hereinafter provided, to the injured employee during such disability, a weekly compensation equal to 40 per cent of the difference between his average weekly wages before the injury and the average weekly wages which he is able to earn thereafter, but not more than twenty-one dollars a week, and in no case shall the period covered by such compensation be greater than three hundred weeks from the date of injury. In case the partial disability begins after a period of total disability, the latter period shall be deducted from the maximum period herein allowed for partial disability. (1929, c. 120, s. 30; 1943, c. 502, s. 4.)

Editor's Note.—The 1943 amendment increased the maximum weekly compensation from eighteen to twenty-one dollars.

The employee sustained injuries resulting in disability of a general nature such as would entitle him to compensation under § 97-29. In addition to such injuries, he had also sustained injuries of a specific nature such as to entitle him to compensation under section 97-31. He is entitled to compensation for the specific injuries under section 97-31, and then, if still disabled as a result of the other injuries, compensation will be paid under this section. Morgan v. Norwood, 211 N. C. 600, 601, 191 S. E. 345, citing Baughn v. Richmond Forging Co., Claim No. 70-597 which latter case gives a construction of the corresponding sections of the Virginia law by the Virginia Industrial Commission.

When an award has been entered for total disability for a certain length of time, and for partial disability thereafter for a total of three hundred weeks, under this section, the Industrial Commission may not increase the award of compensation as for serious facial disfigurement.

§ 97-31. Schedule of injuries; rate and period of compensation.—In cases included by the following schedule the compensation in each case shall be paid for disability during the healing period and in addition the disability shall be deemed to continue for the periods specified, and shall be in lieu of all other compensation, including disfigurement, to wit:

(a) For the loss of a thumb, sixty per centum of the average weekly wages during sixty-five weeks.

(b) For the loss of a first finger, commonly called the index finger, sixty per centum of the average weekly wages during forty weeks.

(c) For the loss of a second finger, sixty per centum of the average weekly wages during thirty-five weeks.

(d) For the loss of a third finger, sixty per centum of the average weekly wages during twenty-two weeks.

(e) For the loss of a fourth finger, commonly called the little finger, sixty per centum of the average weekly wages during sixteen weeks.

(f) The loss of the first phalange of the thumb or any finger shall be considered to be equal to the loss of one-half of such thumb or finger, and the compensation shall be for one-half of the periods of time above specified.

(g) The loss of more than one phalange shall be considered the loss of the entire finger or thumb. Provided, however, that in no case shall the amount received for more than one finger exceed the amount provided in this schedule for the loss of a hand.

(b) For the loss of a great toe, sixty per centum of the average weekly wages during thirty-five weeks.

(j) For the loss of one of the toes other than a great toe, sixty per centum of the average weekly wages during ten weeks.

(k) The loss of the first phalange of any toe shall be considered to be equal to the loss of one-half of such toe, and the compensation shall be for one-half of the periods of time above specified.

(l) The loss of more than one phalange shall be considered as the loss of the entire toe.

(m) For the loss of a hand, sixty per centum of the average weekly wages during one hundred and seventy weeks.

(n) For the loss of an arm, sixty per centum of the average weekly wages during two hundred and twenty weeks.

(o) For the loss of a foot, sixty per centum of the average weekly wages during one hundred and forty-four weeks.

(p) For the loss of a leg, sixty per centum of the average weekly wages during two hundred weeks.

(q) For the loss of an eye, sixty per centum of the average weekly wages during one hundred and twenty weeks.

(r) The loss of both hands, or both arms, or both feet, or both legs, or both eyes, or any two thereof, shall constitute total and permanent disability, to be compensated according to the provisions of § 97-29.

(s) For the complete loss of hearing in one ear, sixty per centum of the average weekly wages during seventy weeks; for the complete loss of hearing in both ears, sixty per centum of the average weekly wages during one hundred and fifty weeks.

(t) Total loss of use of a member or loss of vision of an eye shall be considered as equivalent to the loss of such member or eye. The compensation for partial loss of or for partial loss of use of a member or for partial loss of vision of an eye shall be such proportion of the payments above provided for total loss as such partial loss bears to total loss, except that in cases where there is eighty-five per centum, or more, loss of vision in an eye, this shall be deemed "industrial blindness" and compensated as for total loss of vision of such eye.

(u) The weekly compensation payments referred to in this section shall all be subject to the same limitations as to maximum and minimum as set out in § 97-29.

(v) In case of serious facial or head disfigurement, the industrial commission shall award proper and equitable compensation not to exceed two thousand five hundred dollars. In case of enucleation where an artificial eye cannot be fitted and used, the industrial commission may award compensation as for serious facial disfigurement.
In case of serious bodily disfigurement, including the loss or permanent injury to any important organ of the body for which no compensation is payable under any other provisions of this Act, but excluding disfigurement resulting from permanent loss or permanent partial loss of use of any member of the body for which compensation is fixed in the above schedule, the industrial commission may award proper and equitable compensation not to exceed two thousand five hundred dollars. (1929, c. 120, s. 31; 1931, c. 104; 1943, c. 502, s. 2.)

Editor's Note.—The Act of 1931 added a proviso making serious or permanent injury to any member or organ of the body, not provided for, disfigurement, in an apparent effort to meet the decisions in the cases of Henninger v. Industrial Commission, 1 N. C. I. C. 3; Porter v. Jennings Cotton Mills, 1 N. C. I. C., 218. See 8 N. C. Law Rev. 421-424; 9 N. C. Law Rev. 465.

The 1941 act added 216 N. C. 276, 34 section.

The cases treated below were decided under former provisions of this section.

Prior Astigmatism Does Not Bar Recovery.—In Schrum v. Catawba Upholstering Co., 214 N. C. 253, 199 S. E. 385, claimant was held entitled to full compensation for total loss of vision of eye by this section. It was held error to first deduct forty per cent loss due to astigmatism and award claimant eighty per cent of the amount recoverable for total loss of vision, and this result was not altered by § 97-33.

The effect of the proviso in subsec. (t) of this section relating to serious disfigurement is to exclude the compensation for facial and head disfigurement only from the "weekly compensation payments" contained in the "foregoing schedule of compensation" and does not exclude compensation from the limitation upon total compensation under the act. Arp v. Wood & Co., 207 N. C. 41, 42, 175 S. E. 569.

Section Is Constitutional.—This section, authorizing the industrial commission to award compensation for bodily disfigurement, is sufficiently certain and prescribes the standard and manner for determining an award, is sufficiently definite, and the provision is valid and constitutional and not void as a delegation of legislative power in contravention of Art. I, § 8 of the state Constitution. Baxter v. Arthur Co., 216 N. C. 276, 22 S. E. (2d) 621.

Determining Award for Serious Disfigurement.—In awarding compensation for serious disfigurement the commission, in arriving at the consequent diminution of earning power, should consider the natural physical handicap resulting, the probable effect of the handicap on earning power, the age, training, experience, education, occupation and adaptability of the employee to obtain and retain employment. Stanley v. Hyman-Michaels Co., 222 N. C. 257, 22 S. E. (2d) 570.

Such Award Is Separate.—Weekly compensation under the schedules cannot be increased by the inclusion of compensation for disfigurement. Compensation for disfigurement, if allowed, must be a separate award and the aggregate awards in no case may exceed the total compensation fixed in this section. Stanley v. Hyman-Michaels Co., 222 N. C. 257, 261, 22 S. E. (2d) 570.

Award If One Made for Total Permanent Disability.—No award can be made for disfigurement where an award has been made for total permanent disability. Likewise, disfigurement must be serious in order that compensation may be allowed; therefore, claimant in Hyman-Michaels Co., 222 N. C. 257, 265, 22 S. E. (2d) 570.

Disfigurement and Partial Loss of Arm.—Under this section the industrial commission has authority to award compensation for facial and bodily disfigurement, in this case resulting from scar tissue from burns, and to award compensation for partial loss of the use of the arm resulting from such scar tissue, when such awards are supported by competent evidence, provided the award for the disfigurement does not exceed the $2,500 maximum provided by the act, and provided further that the aggregate of all awards does not exceed the amount payable under the Act of 1929. Baxter v. Arthur Co., 216 N. C. 276, 4 S. E. (2d) 621.

Loss of Eye and Loss of Vision.—In construing this chapter, the words of the statute must be taken in their natural or ordinary meaning, and upon such construction the phrases "the loss of an eye" and "total loss of vision of an eye" in prescribing the amount of compensation to be allowed for injury thereto, mean the state or fact of losing an eye or total destruction of the vision of an eye as distinguished from the partial loss of such vision. Logan v. Johnson, 218 N. C. 200, 10 S. E. (2d) 653.

The evidence before the industrial commission was to the effect that plaintiff has "slight peripheral vision but only 0.001 percent of the center of cone of one eye, and that he had only a small percentage of normal vision in the eye." Held: The evidence does not support a finding that claimant had total loss of vision in the eye, and such finding and the award of compensation based thereon, is set aside and the cause remanded to the industrial commission for a proper finding from the evidence as to the extent or percentage of loss of vision claimant had sustained.

Enumeration of Total Permanent Disabilities Is Not Exclusive.—The fact that this section states that certain injuries shall be deemed permanent and total disabilities does not mean that permanent and total disabilities can be found in cases not enumerated, but that such injuries are conclusively presumed to be permanent total disabilities, and the commission shall so find. Stanley v. Hyman-Michaels Co., 222 N. C. 257, 22 S. E. (2d) 570.


§ 97-32. Refusal of injured employee to accept suitable employment as suspending compensation. If an injured employee refuses employment procured for him suitable to his capacity he shall not be entitled to any compensation at any time during the continuance of such refusal, unless in the opinion of the Industrial Commission such refusal was justified. (1929, c. 120, s. 32.)

§ 97-33. Prorating permanent disability received in other employment. —If any employee has a permanent disability or has sustained a permanent injury in service in the Army or Navy of the United States, or in another employment other than that in which he received a subsequent permanent injury by accident, such as specified in § 97-31 he shall be entitled to compensation only for the degree of disability which would have resulted from the later accident if the earlier disability or injury had not existed. (1929, c. 120, s. 33.)

§ 97-34. Employee receiving an injury when being compensated for former injury.—If an employee receives an injury for which compensation is payable, while he is still receiving or entitled to compensation for a previous injury in the same employment, he shall not at the same time be entitled to compensation for both injuries; employer liable only for subsequent injury. If any employee receives a permanent injury as specified in § 97-31 after having sustained another permanent injury in the same employment, he shall be entitled to compensation for both injuries, but the total compensation shall be paid by extending the period and not by increasing the amount of weekly compensation, and in no case exceeding five hundred weeks.

If an employee has previously incurred permanent partial disability through the loss of a hand, arm, foot, leg, or eye, and by subsequent accident incurs total permanent disability through the loss of another member, the employ-
er's liability is for the subsequent injury only. (1929, c. 120, s. 35.)

§ 97-36. Accidents taking place outside state; employee receiving compensation from another state.—Where an accident happens while the employee is employed elsewhere than in this State which would entitle him or his dependents to compensation if it had happened in this State, the employee or his dependents shall be entitled to compensation, if the contract of employment was made in this State, if the employer's place of business is in this State, and if the residence of the employee is in this State; provided his contract of employment was not expressly for service exclusively outside of the State; provided, however, if an employee shall receive compensation or damages under the laws of any other State nothing herein contained shall be construed so as to permit a total compensation for the same injury greater than is provided for in this article. (1929, c. 120, s. 36.)

Editor's note.—For a discussion of this section, see 8 N. C. L. Rev. 427, et seq.


Exclusion of Non-Resident Employees Involves No Unconstitutional Discrimination.—The provision of the North Carolina compensation act excluding from its coverage non-resident employees involves no unconstitutional discrimination, the inadvisability of attempting to give the act territorial effect being a sufficient basis for the provision. Reaves v. Earle-Chesapeake Mill Co., 216 N. C. 462, 5 S. E. (2d) 305; Mallard v. Bohannon, 220 N. C. 536, 543, 18 S. E. (2d) 189.

Whether a contract of employment is expressly for service exclusively outside the state is a question of fact for the determination of the industrial commission. Mallard v. Bohannon, 220 N. C. 536, 18 S. E. (2d) 189.

Burden of Proof.—Where claimant establishes the jurisdictional facts, the burden is upon the employer and the insurance carrier to show that the contract of employment was expressly for service exclusively outside the state and thus bring themselves within the proviso of this section. Mallard v. Bohannon, 220 N. C. 536, 18 S. E. (2d) 189.

§ 97-37. Where injured employee dies before total compensation is paid.—When an employee receives or is entitled to compensation under this article for an injury covered by § 97-31 and dies from any other cause than the injury for which he was entitled to compensation, payment of the balance of compensation shall be made to his next of kin dependent upon him for support, in lieu of the compensation the employee would have been entitled to had he lived.

Provided, however, that if the death is due to a cause that is compensable under this article, and the dependents of such employee are awarded compensation therefor, all right to unpaid compensation provided by this section shall cease and determine. (1929, c. 120, s. 37.)

An award inadvertently entered by the Industrial Commission after the death of the claimant on appeal from the award is irregular, but not void, and the proceedings do not abate, this section providing that payment of the unpaid balance should be made to his next of kin dependent upon him at the time of his death. Butts v. Montague, 204 N. C. 389, 168 S. E. 215.

§ 97-38. Where death results proximately from the accident or injury; benefits; compensation to aliens; election by partial dependents.—If death results proximately from the accident and within two years thereafter, or while total disability still continues, and within six years after the accident, the employer shall pay for or cause to be paid, subject, however, to the provisions of the other sections of this article in one of the methods hereinafter provided, to the dependents of the employee, wholly dependent upon his earnings for support at the time of accident, a weekly payment equal to 60 per centum of his average weekly wages, but not more than twenty-one dollars, nor less than seven dollars, a week, for a period of three hundred and fifty weeks from the date of the injury, and burial expenses not exceeding two hundred dollars. If the employee leaves dependents only partly dependent upon his earnings for support at the time of the injury, the weekly compensation to be paid, as aforesaid, shall equal the same proportion of the weekly payments for the benefit of persons wholly dependent as the amount contributed by the employee to such partial dependents bears to the annual earnings of the deceased at the time of his injury: Provided, when the partial dependents are all next of kin as defined in § 97-40, and all so elect, they may receive benefits under § 97-40 instead of under this section. When weekly payments have been made to an injured employee before his death, the compensation to dependents shall begin from the date of the last of such payments, but shall not continue more than three hundred and fifty weeks from the date of the injury. Compensation under this article to aliens not residents (or about to become non-residents) of the United States or Canada shall be the same in amount as provided for residents, except that dependents in any foreign country shall be limited to surviving wife and child or children, or if there be no surviving wife or child, or children, to surviving father or mother whom the employee has supported, either wholly or in part for the period of one year prior to the date of the injury, and except that the Commission may, at its option, or upon the application of the insurance carrier shall, commute all future installments of compensation to be paid to such aliens by paying or causing to be paid to them one-half of the commuting amount of such future installments of compensation as determined by the Commission. (1929, c. 120, s. 38; 1943, cc. 163, 502, s. 5.)

Cross Reference.—For definitions of terms, see § 97-2.

Editor's note.—The first amendment added this provision to the second sentence, and the second 1943 amendment increased the maximum weekly payment specified in the first sentence from eighteen to twenty-one dollars. For a discussion of this section, see 8 N. C. L. Rev. 427, et seq.

Proximate Cause.—The employer is required to pay com-
§ 97-39. Widow, widower, or child to be conclusively presumed to be dependent; other cases determined upon facts; division of death benefit among those wholly dependent; when division among partially dependent. — A widow, a widower, and/or a child shall be conclusively presumed to be wholly dependent for support upon the deceased employee. In all other cases questions of dependency, in whole or in part, shall be determined in accordance with the facts as the facts may be at the time of the accident; but no allowance shall be made for any payment made in lieu of board and lodging or services, and no compensation shall be allowed unless the dependency existed for a period of three months or more prior to the accident. If there is more than one person wholly dependent, the death benefit shall be divided among them; the persons partly dependent, if any, shall receive no part thereof. If there is no one wholly dependent, and more than one person partially dependent, the death benefit shall be divided among them according to the relative extent of their dependency.

The widow, widower and all children of deceased employees shall be conclusively presumed to be dependent of deceased and shall be entitled to receive the benefits of this article for the full periods specified herein. (1929, c. 120, s. 30.)

Cross Reference.—For definition of terms "widow", "widower", and "child!", see § 97-2.

Editor's Note.—The determination of the extent of the dependency of deceased depends has proven troublesome. See 8 N. C. L. Rev. 426.

The common-law wife of a deceased employee is not entitled to compensation under the provisions of this act. Reeves v. Parker-Graham-Sexton, Inc., 199 N. C. 236, 237, 198 S. E. 577.

§ 97-40. Widow, widower, or child to be conclusively presumed to be dependent; other cases determined upon facts; division of death benefits among those wholly dependent; when division among partially dependent. — A widow, a widower, and/or a child shall be conclusively presumed to be wholly dependent for support upon the deceased employee. In all other cases questions of dependency, in whole or in part, shall be determined in accordance with the facts as the facts may be at the time of the accident; but no allowance shall be made for any payment made in lieu of board and lodging or services, and no compensation shall be allowed unless the dependency existed for a period of three months or more prior to the accident. If there is more than one person wholly dependent, the death benefit shall be divided among them; the persons partly dependent, if any, shall receive no part thereof. If there is no one wholly dependent, and more than one person partially dependent, the death benefit shall be divided among them according to the relative extent of their dependency.

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Cross Reference.—For definition of terms "widow", "widower", and "child!", see § 97-2.

Editor's Note.—The determination of the extent of the dependency of deceased depends has proven troublesome. See 8 N. C. L. Rev. 426.

The common-law wife of a deceased employee is not entitled to compensation under the provisions of this act. Reeves v. Parker-Graham-Sexton, Inc., 199 N. C. 236, 237, 198 S. E. 577.

§ 97-40. Commutation of benefit and payment on absence of dependents; second injury fund. —If the deceased employee leaves no dependents the employer shall pay to the next of kin herein defined the commuted amount provided for under § 97-39 for whole dependents; but if the deceased left one or more dependents as herein defined, then said commuted amount shall be paid to the Industrial Commission to be held and disbursed by it in the manner hereinafter provided; one-half of said commuted amount shall be retained by the Industrial Commission and the other one-half paid to the personal representative of the deceased to be by him distributed to the next of kin as defined in the Statutes of Distribution; but if there be no next of kin as defined in the Statutes of Distribution, then the personal representative shall pay the same to the Industrial Commission after payment of costs of administration. For the purpose of this section the term "next of kin" shall include only the father, mother, widow, child, brother or sister of the deceased.

Amounts paid to the Industrial Commission under this section shall constitute a Second Injury Fund, to be held by the commission and disbursed by it in unusual cases of second injuries as follows: (1) To provide additional compensation in case of second injuries referred to in § 97-33: Provided, however, such additional compensation when added to the compensation awarded under said section shall not exceed the amount which would have been payable for both injuries had both been sustained in the subsequent accident. (2) To provide for an injured employee who has sustained permanent total disability, in the manner referred to in § 97-35, compensation in addition to the compensation which shall be awarded under said section; such additional compensation, however, when added to the compensation awarded under said section shall not exceed the compensation for permanent total disability as provided in § 97-29. The additional compensation herein provided for is to be paid out of the Second Injury Fund exclusively and only to the extent which the assets of said fund shall permit. (1929, c. 120, s. 40; 1931, c. 274, s. 5; 1931, c. 310.)

Editor's Note.—This section formerly provided for payment to the personal representative of a deceased employee who left no dependents. It was amended by the Act of 1931 so as to direct payment to a narrow class of next of kin specially defined by the section. Failing such persons, a more complicated arrangement is provided. The original Act was criticized as providing an unjustifiable windfall for non-dependent next of kin. The present amendment makes a half-hearted move toward cutting off this bounty for relatives at the expense of the employer, the industry and eventually the public, by turning a part of the money over to the Commission in unusual cases of second injuries. A clerical error in the amending Act was corrected by Public Laws 1931, c. 319. 9 N. C. L. Rev. 427, et seq.

For a discussion of this section, see 8 N. C. L. Rev. 427, et seq.

While there is no commuted amount provided by this section for payment to the personal representative of a deceased employee for death resulting from an injury compensable thereunder, the act provides the method by which such amount can be commuted, which is payable to the personal representative for the benefit of the heirs at law of the deceased employee. Reeves v. Parker-Graham-Sexton, Inc., 199 N. C. 236, 237, 198 S. E. 577.

When a deceased employee leaves no dependents, an award of compensation should be made to his next of kin, under this section, the employee's mother in this case, and the evidence is held sufficient in this case to support the
§ 97-41. **Total compensation not to exceed $6,000.**—The total compensation payable under this article shall in no case exceed Six Thousand ($6,000) Dollars. (1929, c. 120, s. 41.)

The amount allowed by the Industrial Commission for serious facial or head disfigurement is to be included with other amounts allowed an injured employee in determining the total compensation allowed such employee, which in no case may exceed six thousand dollars. Ap. v. Wood & Co., 207 N. C. 41, 175 S. E. 719.

The amount allowed the injured employee or his dependents, including funeral benefits provided by the act; Morris v. Laughlin Chevrolet Co., 217 N. C. 428, 8 S. E. (2d) 484, 128 A. L. R. 132.

## § 97-42. Deduction of payments.—Any payments made by the employer to the injured employee during the period of his disability, or to his dependents, which by the terms of this article were not due and payable when made, may, subject to the approval of the Industrial Commission, be deducted from the amount to be paid as compensation. Provided, that in the case of disability such deductions shall be made by shortening the period during which compensation must be paid, and not by reducing the amount of the weekly payment. (1929, c. 120, s. 42.)

§ 97-43. **Commission may prescribe monthly or quarterly payments.**—The Industrial Commission, upon application of either party, may, in its discretion, having regard to the welfare of the employee and the convenience of the employer, authorize compensation to be paid monthly or quarterly instead of weekly. (1929, c. 120, s. 43.)

§ 97-44. **Lump sums.**—Whenever any weekly payment has been continued for not less than six weeks, the liability therefor may, in unusual cases, where the parties agree and the Industrial Commission deems it to be to the best interest of the employee or his dependents, or where it will prevent undue hardships on the employer or his insurance carrier, without prejudicing the interests of the employee or his dependents, be redeemed, in whole or in part, by the payment by the employer of a lump sum which shall be fixed by the Commission, but in no case to exceed the commutable value of the future installments which may be due under this article. The Commission, however, in its discretion, may at any time in the case of a minor who has received permanently disabling injuries, either partial or total, provide that he be compensated, in whole or in part, by the payment of a lump sum, the amount of which shall be fixed by the Commission, but in no case to exceed the commutable value of the future installments which may be due under this article. (1929, c. 120, s. 44.)

**Editor's Note.** For a discussion of this section, see 8 N. C. L. Rev. 427, et seq.

§ 97-45. **Reducing to judgment outstanding liability of insurance carriers withdrawing from state.**—Upon the withdrawal of any insurance carrier from doing business in the state that has any outstanding liability under the workmen's compensation act, the insurance commissioner shall immediately notify the North Carolina industrial commission, and thereupon the said North Carolina industrial commission shall issue an award against said insurance carrier and commute the installments due the injured employee, or employees, and immediately have said award docketed in the superior court of the county in which the claimant resides, and the said North Carolina industrial commission shall fix a "change in condition" of the claimant, in the state of the residence of any such insurance carrier, and the proceeds from said judgment after deducting the cost, if any, of the proceeding, shall be turned over to the injured employee, or employees, taking from such employee, or employees, the proper receipt in satisfaction of his claim. (1933, c. 474.)

§ 97-46. **Lump sum payments to trustee; receipt to discharge employer.**—Whenever the Industrial Commission deems it expedient, any lump sum, subject to the provisions of § 97-45, shall be paid by the employer to some suitable person or corporation appointed by the Superior Court in the county wherein the accident occurred, as trustee, to administer the same for the benefit of the person entitled thereto, in the manner provided by the Commission. The receipt of such trustee for the amount as paid shall discharge the employer or any one else who is liable therefor. (1929, c. 120, s. 45.)

§ 97-47. **Change of condition; modification of award.**—Upon its own motion or upon the application of any party in interest on the grounds of a change in condition, the Industrial Commission may review any award, and on such review may make an award ending, diminishing, or increasing the compensation previously awarded, subject to the maximum or minimum provided in this article, and shall immediately send to the parties a copy of the award. No such review shall affect such award as regards any moneys paid but no such review shall affect the date of the last payment of compensation pursuant to an award under this article. (1929, c. 120, s. 46; 1931, c. 274, s. 6.)

**Editor's Note.**—The Act of 1931 struck out the words "last award" formerly ending this section and inserted in lieu thereof the words "last payment of compensation pursuant to an award under this chapter."

Change in Condition.—The industrial commission is given authority to review an award and end, diminish or increase the compensation previously awarded only when there has been a "change in condition" of the claimant. Murray v. Nebel Knitting Co., 214 N. C. 437, 199 S. E. 699.

Where there is ample evidence to support a finding of a change in condition, the Commission may, in the light of all the evidence which would support a contrary finding, the finding of the industrial commission from the conflicting evidence is conclusive. Knight v. Ford Body Co., 214 N. C. 197 S. E. 563.

Delay in Seeking Review.—Where the findings of the Industrial Commission, supported by evidence, are to the effect that the claimant's condition is such as to require further compensation, the order of the Commission denying further compensation will be upheld by the courts in view of the findings of the Lee v. Rose's 5-10-25c. Stores, 205 N. C. 310, 171 S. E. 87.


§ 97-48. Receipts relieving employer; payment to minors; when payment of claims to dependents subsequent in right discharges employer.
(a) Whenever payment of compensation is made to a widow or widower for her or his use, or for her or his use and the use of the child or children, the written receipt thereof of such widow or widower shall acquit the employer: Provided, however, that in order to protect the interests of minors or incompetents the Industrial Commission in its discretion may change the terms of any agreement with respect to whom compensation for the benefit of such minors or incompetents shall be paid.
(b) Whenever payment is made to any person eighteen years of age or over, the written receipt of such person shall acquit the employer.
(c) Payment of death benefits by an employer in good faith to a dependent subsequent in right to another or other dependents shall protect and discharge the employer, unless and until such dependents prior in right shall have given notice of his or their claims. In any case the employer is in doubt as to the respective rights of rival claimants, he may apply to the Industrial Commission to decide between them. (1929, c. 120, s. 47; 1931, c. 274, s. 7.)

Editor's Note.—The Act of 1931 struck out the former section and substituted the above. Cited in Lineberry v. Mebane, 219 N. C. 257, 11 S. E. (2d) 429.

§ 97-49. Benefits of mentally incompetent or minor employees under 18 may be paid to a trustee, etc.—If an injured employee is mentally incompetent or is under eighteen years of age at the time when any right or privilege accrues to him under this article, his guardian, trustee, or committee may in his behalf claim and exercise such right or privilege. (1929, c. 120, s. 48.)

This section is a mere declaration of the common law rule. Lineberry v. Mebane, 219 N. C. 257, 11 S. E. (2d) 429.

§ 97-50. Limitation as against minors or mentally incompetent.—No limitation of time provided in this article for the giving of notice or making claim under this article shall run against any person who is mentally incompetent, or a minor dependent, as long as he has no guardian, trustee, or committee. (1929, c. 120, s. 49.)

This section is applicable only to the mentally incompetent and the minor dependent. Lineberry v. Mebane, 219 N. C. 257, 11 S. E. (2d) 429.


§ 97-51. Joint employment; liabilities.—Whenever an employer, for whose injury or death compensation is payable under this article, shall at the time of the injury be in joint service of two or more employers subject to this article, such employers shall contribute to the payment of such compensation in proportion to their wages liability to such employee; provided, however, that nothing in this section shall prevent any reasonable arrangement between employers for a different distribution as between themselves of the ultimate burden of compensation. (1929, c. 120, s. 50.)

§ 97-52. Occupational disease made compensable; “accident” defined.—Disability or death of an employee resulting from an occupational disease described in § 97-53 shall be treated as the happening of an injury by accident within the meaning of the North Carolina Workmen’s Compensation Act and the procedure and practice and compensation and other benefits provided by said act shall apply in all such cases except as hereinafter otherwise provided. The word “accident,” as used in the Workmen’s Compensation Act, shall not be construed to mean a series of events in employment, of a similar or like nature, occurring continuously or at frequent intervals in the course of one employment, over extended periods of time, whether such events may or may not be attributable to fault of the employer, and disease attributable to such causes shall be compensable only if culminating in an occupational disease mentioned in and compensable under this article: Provided, however, no compensation shall be payable for asbestosis and/or silicosis as hereinafter defined if the employee, at the time of entering into the employment of the employer by whom compensation would otherwise be payable, falsely represented himself in writing as not having previously been disabled or laid off because of asbestosis or silicosis. (1935, c. 123.)

The rights and remedies of an employee under the Compensation Act exclude all other rights and remedies, and an employee bound by the act, may not maintain an action at law against the employer for injuries caused by an occupational disease not enumerated in this and the following section, even though the disease is the result of negligence. Murphy v. American Enka Corp., 213 N. C. 218, 195 S. E. 536.

This section, providing that only the occupational diseases therein specified should be compensable, relates only to occupational diseases, which are those resulting from long and continued exposure to risks and conditions inherent and usual in the nature of the employment, and does not provide for compensation for a disease not inherent in or incident to the nature of the employment when it results from an accident arising out of and in the course of the employment. MacRae v. Unemployment Compensation Comm., 217 N. C. 769, 9 S. E. (2d) 595. See also, Blassingame v. Southern Asbestos Co., 217 N. C. 223, 7 S. E. (2d) 478.

§ 97-53. Occupational diseases enumerated; when due to exposure to chemicals.—The following diseases and conditions only shall be deemed to be occupational diseases within the meaning of this article:
1. Anthrax.
2. Arsenic poisoning.
4. Zinc poisoning.
5. Manganese poisoning.
Provided the employee shall have been exposed to the hazard of lead poisoning for at least thirty days in the preceding twelve months’ period, and; provided further only the employer in whose employment such employee was last employed by exposed shall be liable.
7. Mercury poisoning.
8. Phosphorus poisoning.
9. Poisoning by carbon bisulphide, methanol, naphtha or volatile halogenated hydrocarbons.
10. Chrome ulceration.
11. Compressed-air illness.
12. Poisoning by benzol, or by nitro and amido derivatives of benzol (dinitrol-benzol, anilin, and others).
13. Infection or inflammation of the skin or eyes or other external contact surfaces or oral or nasal cavities due to irritating oils, cutting compounds, chemical dust, liquids, fumes, gases or vapors.
14. Epitheliomatous cancer or ulceration of the skin or of the corneal surface of the eye due to radium poisoning or injury by X-rays.
15. Blisters due to use of tools or appliances in the employment.
16. Bursitis, of the knee or elbow, due to intermittent pressure in the employment.
17. Miner's nystagmus.
18. Synovitis, caused by trauma in employment.
19. Tenosynovitis, caused by trauma in employment.
20. Carbon monoxide poisoning.
21. Poisoning by sulphuric, hydrochloric or hydrofluoric acid.
22. Asbestosis.
23. Silicosis.

Occupational diseases caused by chemicals shall be deemed to be due to exposure of an employee to the chemicals herein mentioned only when as a part of the employment such employee is exposed to such chemicals in such form and quantity, and used with such frequency as to cause the occupational disease mentioned in connection with such chemicals. (1935, c. 123.)

§ 97-54. "Disablement" defined. — The term "disablement" as used in this article as applied to cases of asbestosis and silicosis means the event of becoming actually incapacitated, because of such occupational disease, from performing normal labor in the last occupation in which remuneratively employed; but in all other cases of occupational disease shall be equivalent to "disability" as defined in § 97-54, paragraph (i). (1935, c. 123.)

Conflicting expert testimony on the question of whether the deceased employee died as a result of an occupational disease, caused by exposure to benzol poisoning, arising out of and in the course of his employment, was sufficient to sustain the commission's award of compensation to the employee's dependent. Tindall v. American Furniture Co., 216 N. C. 306, 4 S. E. (2d) 894.

§ 97-55. "Disability" defined. — The term "disability" as used in this article means the state of being incapacitated as the term is used in defining "disablement" in § 97-54. (1935, c. 123.)

§ 97-56. Limitation on compensable diseases. — The provisions of this article shall apply only to cases of occupational disease in which the last exposure in an occupation subject to the hazards of such diseases occurred on or after March 26, 1935. (1935, c. 123.)

§ 97-57. Employer liable. — In any case where compensation is payable for an occupational disease, the employer in whose employment the employee was last injuriously exposed to the hazards of such disease, and the insurance carrier, if any, which was on the risk when the employee was so last exposed under such employer, shall be liable. (1935, c. 123.)

This section makes no provision for a partnership in responsibility, has nothing to say as to the length of the last employment or the degree of injury which the deleterious exposure must inflict to merit compensation. It takes the breakdown practically where it occurs— with the last injurious exposure. Haynes v. Polspart Producing Co., 222 N. C. 163, 170, 22 S. E. (2d) 255.

§ 97-58. Claims for certain diseases restricted; time limit for filing claims. — An employer shall not be liable for any compensation for asbestosis, silicosis or lead poisoning unless disablement or death results within three years after the last exposure to such disease, or, in case of death, unless death follows continuous disability from such disease, commencing within the period of three years limited herein, and for which compensation has been paid or awarded or timely claim made as hereinafter provided and results within seven years after such last exposure. Claims for all other occupational diseases shall be barred unless claims shall be filed with the industrial commission within one year from the disablement or death caused by such occupational disease. (1935, c. 123.)

§ 97-59. Employer to provide treatment. — In the event of disablement from an occupational disease, the employer shall provide reasonable medical and/or other treatment for such time as in the judgment of the industrial commission will tend to lessen the period of disability or provide needed relief; provided, however, medical and/or other treatment for asbestosis and/or silicosis shall not exceed a period of three years nor cost in excess of three hundred thirty-four ($334.00) dollars in any one year; and, provided further, all such treatment shall be first authorized by the industrial commission after consulting with the advisory medical committee. (1935, c. 123.)

§ 97-60. Examination of employees by advisory medical committee; designation of industries with dust hazards. — The compulsory examination of employees and prospective employees as herein provided applies only to persons engaged or about to engage in an occupation which has been found by the industrial commission to expose them to the hazards of asbestosis and/or silicosis. The industrial commission shall designate by order each industry found subject to any such hazard and shall notify the employers therein before such examinations are required. On and after March 26, 1935, it shall be the duty of every employer, in the conduct of whose business his employees or any of them are subjected to the hazards of asbestosis and/or silicosis, to provide prior to employment necessary examinations of all new employees for the purpose of ascertaining if any of them are in any degree affected by asbestosis and/or silicosis or peculiarly susceptible thereto; and every such employer shall from time to time, as ordered by the industrial commission, provide similar examinations for all of his employees whose employment exposes them to the hazards of asbestosis and/or silicosis. At least one member of the advisory medical committee or other physician designated by the industrial commission shall make such examinations or be present when any such examination is made. The refusal of an employee to submit to any such examination shall bar such employee from compensation or other benefits provided by this article in the event of disablement and/or death resulting from exposure to the hazards of asbestosis and/or silicosis subsequent to such refusal. It shall be the duty of the industrial commission to make and/or order inspections of employment and to keep a record of all employment subjecting employees to the hazards of asbestosis and/or silicosis, and
to notify the employer in any case where such hazard shall have been found to exist. The unreasonable failure of an employer to provide for any examination or his unreasonable refusal to permit any inspection herein authorized shall constitute a misdemeanor and shall be punishable as such. (1935, c. 123.)

§ 97-61. Compensation for employee temporarily removed from hazardous employment; payment for training for readjustment to other work; waiver of right to compensation.—Where an employee, though not actually disabled, is found by the industrial commission to be affected by asbestosis and/or silicosis, and it is also found by the industrial commission that such employee would be benefited by being taken out of his employment and that such disease with such employee has progressed to such a degree as to make it hazardous for him to continue in his employment and is in consequence removed therefrom by order of the industrial commission, he shall be paid compensation as for temporary total or partial disability, as the case may be, until he can obtain employment in some other occupation in which there are no hazards of such occupational disease: Provided, however, compensation in no such case shall be paid for a longer period than twenty weeks to an employee without dependents, nor for a longer period than forty weeks to an employee with dependents, and in either case said period shall begin from the date of removal from the employment, unless actual disablement from such disease results later and within the time limited in § 97-58. When in any such case the forced change of occupation shall in the opinion of the industrial commission require that the employee be given special training in order to properly readjust himself there shall be paid for such training and incidental traveling and living expenses an additional sum which shall not exceed three hundred ($500.00) dollars, in the case of an employee without out dependents, and which shall not exceed five hundred ($500.00) dollars in the case of an employee with dependents, such payment to be made for the benefit of the employee to such person or persons as the industrial commission may direct; provided, however, no such payment shall be made unless the employee accepts the special training herein provided, nor shall payment be made for a longer period of time than the employee shall accept such special training. If an employee has been so compensated, and whether or not specially trained for another occupation, and he thereafter engages in any occupation which exposes him to hazards of silicosis and/or asbestosis without first having obtained the written approval of the industrial commission, neither he, his dependents, personal representatives nor any other person shall be entitled to any compensation for disablement or death from silicosis and/or asbestosis: Provided, however, that an employee so affected, as an alternative to forced change of occupation, may, subject to the approval of the industrial commission, waive in writing his right to compensation for any aggravation of his condition that may result from his continuing in his hazardous occupation; but in the event of total disablement and/or death as a result of asbestosis and/or silicosis with which the employee was so affected compensation shall nevertheless be payable, but in no case, whether for disability or death or both, for a longer period than one hundred (100) weeks. Such written waiver must be filed with the industrial commission, and the commission shall keep a record of each waiver, which record shall be open to the inspection of any interested person. (1935, c. 123.)

§ 97-62. "Silicosis" and "asbestosis" defined. —The word "silicosis" shall mean the characteristic fibrotic condition of the lungs caused by the inhalation of dust of silica or silicates. "Asbestosis" shall mean a characteristic fibrotic condition of the lungs caused by the inhalation of asbestosis dust. (1935, c. 123.)

§ 97-63. Period necessary for employee to be exposed. — Compensation shall not be payable for disability or death due to silicosis and/or asbestosis unless the employee shall have been exposed to the inhalation of dust of silica or silicates or asbestosis dust in employment for a period of not less than two years in this state, provided no part of such period of two years shall have been more than ten years prior to the last exposure. (1935, c. 123.)

§ 97-64. General act to control as regards benefits. — Except as herein otherwise provided, in case of disablement or death from silicosis and/or asbestosis, compensation shall be payable in accordance with the provisions of the North Carolina Workmen's Compensation Act. (1935, c. 123.)

§ 97-65. Reduction of rate where tuberculosis develops.—In case of disablement or death due primarily from silicosis and/or asbestosis and complicated with tuberculosis of the lungs compensation shall be payable as hereinbefore provided, except that the rate of payments may be reduced one-sixth. (1935, c. 123.)

§ 97-66. Requirement as to written notice of disease to employer or industrial commission; waiver of notice and claim where payments are made; claim where benefits are discontinued. — Unless written notice of the first distinct manifestation of an occupational disease shall be given to the employer in whose employment the employee was last injuriously exposed to the hazards of such disease or to the industrial commission within thirty (30) days after such manifestation and, in case of death, unless also written notice of such death shall be given to the beneficiary hereunder to the employer or the industrial commission within ninety (90) days after occurrence, and unless claim for disability and/or death shall be made within one (1) year after the disablement or death, respectively, all rights to compensation for disability or death from an occupational disease shall be forever barred: Provided, however, that notice and/or claim shall be deemed waived in case of disability or death where the employer or insurance carrier voluntarily makes compensation payments therefor, or, within the time above limited, has actual knowledge of the occurrence of the disease or of the death and its cause, or by his or its...
of a case of occupational disease shall notify the employee, or, in case he is dead, his dependents or personal representative, and his employer to appear before the advisory medical committee at a time and place stated in the notice. If the employee be living, he shall appear before the advisory medical committee at the time and place specified then or thereafter and he shall submit to such examinations including clinical and x-ray examinations as the advisory medical committee may require. The employee, or, if he be dead, the claimant and the employer shall be entitled to have present at all such examinations, a physician admitted to practice medicine in the state who shall be given every reasonable facility for observing every such examination whose services shall be paid for by the claimant or by the employer who engaged his services. If a physician admitted to practice medicine in the state shall certify that the employee is physically unable to appear at the time and place designated by the advisory medical committee, such committee may, upon the advice of the industrial commission, and on notice to the employer, change the place and/or time of the examination so as to reasonably facilitate the examination of the employee, and in any such case the employer shall furnish transportation and provide for other reasonably necessary expenses incidental to necessary travel. The claimant and the employer shall produce to the advisory medical committee all reports of medical and x-ray examinations which may be in their respective possession or control showing the past or present condition of the employee to assist the advisory medical committee in reaching its conclusions. (1935, c. 123.)

§ 97-70. Report of committee to industrial commission.—The advisory medical committee, shall, as soon as practicable after it has completed its consideration of a case, report to the industrial commission its opinion regarding all medical questions involved in the case. The advisory medical committee shall include in its report a statement of what, if any, physician or physicians were present at the examination on behalf of the claimant or employer and what, if any, medical reports and x-rays were produced by or on behalf of the claimant or employer. (1935, c. 123.)

§ 97-71. Filing report; right of hearing on report.—The advisory medical committee shall file its report in triplicate with the industrial commission, which shall send one copy thereof to the claimant and one copy to the employer by registered mail. Unless within thirty days from receipt of the copy of said report the claimant and/or employer shall request the industrial commission in writing to set the case for further hearing for the purpose of examining and/or cross-examining the members of the advisory medical committee respecting the report of said committee, said report shall become a part of the record of the case and shall be accepted by the industrial commission as expert medical testimony to be considered as such in connection with all the evidence in the case in arriving at its decision. (1935, c. 123.)

§ 97-72. Appointment of advisory medical committee; terms of office; duties and functions;
§ 97-73. Expenses of making examinations. —The industrial commission shall establish a schedule of reasonable charges to defray expenses incurred in making examinations pursuant to §§ 97-60 and 97-67, such charges to be collected in accordance with rules and regulations which shall be adopted by the industrial commission. Said charges shall be collected from employers who by order of the industrial commission are determined to be subject to the hazards of asbestosis and/or silicosis. (1935, c. 123.)

§ 97-74. Expense of hearings taxed as costs in compensation cases; fees collected directed to general fund. —In hearings arising out of claims for disability and/or death resulting from occupational diseases the industrial commission shall tax as a part of the costs in cases in which compensation is awarded a reasonable allowance for the services of members of the advisory medical committee attending such hearings and reasonable allowances for the services of members of the advisory medical committee for making investigations in connection with all claims for compensation on account of occupational diseases, including uncontested cases, as well as contested cases, and whether or not hearings shall have been conducted in connection therewith. All such charges, fees and allowances to be collected by the industrial commission shall be paid into the general fund of the state treasury to constitute a fund out of which to pay the expenses of the advisory medical committee. (1935, c. 123.)

§ 97-75. Making up deficiency by assessment upon employers in hazardous industries; provision for annual fund. —In the event the amount appropriated by the general assembly and the charges, fees and allowances so assessed and collected and paid into the state treasury shall not be sufficient to pay the full cost incurred by the advisory medical committee in making examinations of employees and conducting post-mortem examinations, and in making investigations of claims arising under this article, and in testifying before the industrial commission, the industrial commission shall assess against the employers found by the industrial commission to be subject to the hazards of asbestosis and/or silicosis an amount sufficient to pay such cost, said amount to be assessed against such employers pro rata on the basis of annual payroll. The industrial commission is authorized to assess and collect in advance in the beginning of any year from the employers subject to such hazard an amount estimated as necessary to pay such cost. Said amount when so assessed shall be paid by such employers within ten days after the notice of assessment, and when collected by the industrial commission shall be paid into the state treasury as a part of the fund out of which to pay the expenses of the advisory medical committee. In the event such amount so assessed shall be found to be in excess of the cost incurred by such advisory medical committee in the performance of its duties under this article, such excess shall be credited against the estimate of the cost to be incurred by said committee for the succeeding year. In case the amount so assessed shall be insufficient to pay such cost the industrial commission is authorized to make an additional assessment to be made at the end of the regular assessment period and to be collected from the employers subject to the hazards of asbestosis and/or silicosis. (1935, c. 123.)

§ 97-76. Inspection of hazardous employments; refusal to allow inspection made misdemeanor. —The industrial commission shall make inspections of employers for the purpose of ascertaining whether such employers, or any of them, are subject to the hazards of asbestosis and/or silicosis, and for the purpose of making studies and recommendations with a view to reducing and/or eliminating such hazards. The industrial commission, and/or any person selected by it, is authorized to enter upon the premises of employers where examinations covered by this article are being carried on to make examinations and studies as aforesaid. Any employer, or any officer or agent of an employer, who unreasonably prevents or obstructs any such examinations or study shall be guilty of a misdemeanor. (1935, c. 123.)

§ 97-77. North Carolina Industrial Commission created; members appointed by Governor; terms of office; chairman. —There is hereby created a commission to be known as the North Carolina Industrial Commission, consisting of three commissioners who shall devote their entire time to the duties of the Commission. The Governor shall appoint the members of the Commission, one for a term of two years, one for a term of four years, and one for a term of six years. Upon the expiration of each term as above
§ 97-78. Salaries and expenses; secretary and other clerical assistance; annual report.—(a) The salaries of the chairman and each of the other Commissioners shall be fixed by the Governor, subject to the approval of the Advisory Budget Commission, such salaries to be payable in monthly installments.

(b) The Commission may appoint a secretary whose duties shall be prescribed by the Commission, and whose salary shall be fixed by the Governor, and fund for the payment of such salary shall be made available from the State treasury. The salary of the Secretary shall be determined by the Governor and the amount of such fund shall be determined by the Advisory Budget Commission. The Secretary shall receive such salary as may be fixed by the Commission and who may be removed at the will of the Commission.

(c) The Commission may employ such clerical or other assistance as it may deem necessary by the Commission. Such clerical or other assistance so employed shall be entitled to receive from the State, or other departments, commissions and agencies of the State government, such compensation as may be deemed necessary by the Commission.

(d) All salaries and expenses of the Commission shall be audited and paid out of the State treasury, in the manner prescribed for salaries and expenses of the State government.

Editor's Note.—Prior to the 1931 amendment the salary of the chairman was fixed at $4500 a year and each of the other Commissioners received $4000. Prior to the 1941 amendment the salary of the secretary was to be not more than $3,600 a year.

§ 97-79. Offices and supplies; deputies with power to subpoena witnesses and to take testimony; meetings; hearings.—(a) The Commission shall be provided with adequate offices in which the records shall be kept and its official business transacted during regular business hours; it shall also be provided with necessary office furniture, stationery, and other supplies.

(b) The Commission may appoint deputies, who shall have the power to subpoena witnesses and administer oaths, and who may take testimony in such cases as the Commission may deem proper. Such testimony shall be transmitted in writing to the Commission, and the Commission shall fix the compensation of such deputies.

(c) The Commission or any member thereof may hold sessions at any place within the State as may be deemed necessary by the Commission.

(d) Hearings before the Commission shall be open to the public and shall be stenographically reported, and the Commission is authorized to contract for the reporting of such hearings. The Commission shall by regulation provide for the preparation of a record of the hearings and other proceedings. (1929, c. 120, s. 53; 1931, c. 274, s. 10.)

Editor's Note.—The Act of 1931 amended subsection (a) of this section by striking out after the word "offices" the following: "in the capitol, or some other suitable building in the City of Raleigh."

§ 97-80. Rules and regulations; subpoena of witnesses; examination of books and records; depositions; costs.—(a) The Commission may make rules, not inconsistent with this article, for carrying out the provisions of this article. Processes and procedure under this article shall be as summary and simple as reasonably may be, and may be deemed necessary, and fix the compensation of all persons so employed, such compensation to be in keeping with the compensation paid to the persons employed to do similar work in other State departments.

(b) The City Sheriffs and their respective deputies shall serve all subpoenas of the Commission or its deputies, and shall receive the same fees as are now provided by law for like services; each witness who appears in obedience to such subpoena of the Commission shall receive for attend-
ance the fees and mileage for witnesses in civil cases in courts of the county where the hearing is held.

(c) The Superior Court shall, on application of the Commission or any member or deputy thereof, enquire by proper proceedings the attendance and testimony of witnesses and the production and examination of books, papers and records. (1929, c. 120, s. 54.)

Editor's Note.—For a discussion of this section, see § N. C. L. Rev. 427, et seq.

Rehearing.—While there is no direct statutory provision giving the Industrial Commission power to order a rehearing of any case, many decisions of this court have determined that the Commission has such power in proper instances in accordance with its rules and regulations, as provided by this section, it being the intent of the Legislature, as gathered from the whole act, to give the Industrial Commission continuing jurisdiction of all proceedings begun before it with appellate jurisdiction in the Superior Court on matters of law only. Butts v. Montague Bros., 208 N. C. 186, 179 S. E. 799.

Construction of Rules.—Under this section the North Carolina Industrial Commission has the power not only to make rules governing its administration of the act, but also to construe and apply such rules. Its construction and application of rules adopted and made after proceedings received from employers in accordance with § 97-92 and shall publish the same in inspection of the parties directly involved, and only those at issue, and for a ruling thereon.

(a) The rules of the industrial commission, adopted pursuant to this section, relative to the introduction of new evidence at a review by the full commission, are in accord with the decisions of the supreme court as to granting new trials for newly discovered evidence. Tindall v. American Furniture Co., 216 N. C. 306, 4 S. E. (2d) 894.

(b) The Commission shall tabulate the accident reports received from employers in accordance with § 97-92 and shall publish the same in the annual report of the Commission and as often as may be deemed advisable, in such detailed or aggregate form as it may deem best. The name of the employer or employee shall not appear in such publications, and the employers' reports shall be private records of the Commission, and shall not be open for public inspection except for the inspection of the parties directly involved, and only to the extent of such interest. These reports shall not be used as evidence against any employer in any suit at law brought by any employee for the recovery of damages.

(c) The Commission shall make studies and investigations with respect to safety provisions and the causes of injuries in employments covered by this article, and shall from time to time make to the General Assembly and to employers and carriers such recommendations as it may deem proper as to the best means of preventing such injuries.

(d) In making such studies and investigations the Commission is authorized (1) to co-operate with any agency of the United States charged with the duty of enforcing any law securing safety against injury in any employment covered by this article, or with any State agency engaged in enforcing any laws to assure safety for employees, and (2) to permit any such agency to have access to the records of the Commission. In carrying out the provisions of this section the Commission or any officer or employee of the Commission is authorized to enter at any reasonable time upon any premises, tracks, wharf, dock, or other landing place, or to enter any building, where an employment covered by this article is being carried on, and to examine any tool, appliance, or machinery used in such employment. (1929, c. 120, s. 55.)

§ 97-82. Memorandum of agreement between employer and employee to be submitted to Commission on prescribed forms for approval.—If after seven days after the date of the injury, or any day in case of death, the employer and the injured employee or his dependents reach an agreement in regard to compensation under this article, a memorandum of the agreement in the form prescribed by the Industrial Commission, accompanied by a full and complete medical report, shall be filed with and approved by the Commission; otherwise such agreement shall be voidable by the employee or his dependents.

If approved by the Commission, therewith the memorandum shall be held for all purposes to be enforceable by the court's decree as hereinafter specified. (1929, c. 120, s. 56.)

§ 97-83. In event of disagreement, Commission is to make award after hearing.—If the employer and the injured employee or his dependents fail to reach an agreement, in regard to compensation under this article within fourteen days after the employee has knowledge of the injury or death, or if they have reached such an agreement which has been signed and filed with the Commission, and compensation has been paid or is due in accordance therewith, and the parties thereto then disagree as to the continuance of any weekly payment under such agreement, either party may make application to the Industrial Commission for a hearing in regard to the matters at issue, and for a ruling thereon.

Immediately after such application has been received the Commission shall set the date for a hearing, which shall be held as soon as practicable, and shall notify the parties at issue of the time and place of such hearing. The hearing shall be held in the city or county where the injury occurred, unless otherwise agreed to by the

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§ 97-84. Determination of disputes by Commission.—The Commission or any of its members shall hear the parties at issue and their representatives and witnesses, and shall determine the dispute in a summary manner. The award, together with a statement of the findings of fact, rulings of law, and other matters pertinent to the questions at issue shall be filed with the record of the proceedings, and a copy of the award shall immediately be sent to the parties in dispute. The parties may be heard by a deputy, in which event he shall swear or cause the witnesses to be sworn, and shall transmit all testimony to the Commission for its determination and award. (1929, c. 120, s. 58.)

§ 97-85. Review of award.—If application is made to the Commission within seven days from the date when notice of the award shall have been given, the full Commission shall review the award, and, if good ground be shown therefor, reconsider the evidence, receive further evidence, rehear the parties or their representatives, and, if proper, amend the award. (1929, c. 120, s. 59.)

§ 97-86. Award conclusive as to facts; appeal; certified questions of law.—The award of the Commission, as provided in § 97-84, if not reviewed in due time, or an award of the Commission upon such review, as provided in § 97-85, shall be conclusive and binding as to all questions of fact; but either party to the dispute may, within thirty days from the date of such award, or within thirty days after receipt of notice to be sent by registered mail of such award, but not thereafter, appeal from the decision of the Commission to the Superior Court of the county in which the alleged accident happened, or in which the employer resides or has its principal office, for errors of law, under the same terms and conditions as govern appeals in ordinary civil actions. The Commission, of its own motion, may certify questions of law to the Supreme Court, for decision and determination by the said Court. In case of an appeal from the decision of the Commission, or of a certification by said Commission of questions of law, to the Supreme Court, said appeal or certification shall operate as a supersedeas, and no employer shall be required to make payment of the award involved in said appeal or certification until the questions at issue therein shall have been fully determined in accordance with the provisions of this article. (1929, c. 120, s. 60.)

Jurisdictional Facts Not Conclusive on Appeal.—Both a proper construction of the language of this section, and well-settled principles of law lead to the conclusion that where the jurisdiction of the Industrial Commission to hear and determine controversies arising under the provisions of the Workmen's Compensation Act, is challenged by an employer, on the ground that he is not subject to the provisions of the Act, the findings of fact made by the Commission, on which its jurisdiction is dependent, are not conclusive on the Superior Court, and that said court has both the power and the duty, on the appeal of either party to the proceeding, to consider all of the evidence in the record, and find therefrom the jurisdictional facts, without regard to the finding of such facts by the Commission. Aycock v. Cooper, 202 N. C. 500, 163 S. E. 590.

Evidence Not Considered on Appeal.—Under this section an award of the Industrial Commission is conclusive and binding as to all questions of fact when supported by sufficient, competent evidence, and neither the Supreme Court nor the Superior Court can consider the evidence for the purpose of determining the facts on appeal. Reed v. Lavender Bros., 206 N. C. 588, 172 S. E. 877. See Walker v. Jeffreys, 216 N. C. 142, 11 S. E. (2d) 834.

The findings of fact by the Industrial Commission as to whether injury to an employee was by accident arising out of and in the course of employment are conclusive on the courts upon appeal when the findings are supported by competent evidence of sufficient probative force. Perdue v. State Board of Equalization, 203 N. C. 730, 172 S. E. 306.

The jurisdiction of the Superior Court is limited to questions of law only. Byrd v. Gloucester Lbr. Co., 207 N. C. 2176, 197 S. E. 272.

On appeal from the North Carolina Industrial Commission, the Superior Court has no power to review the findings of fact by the Commission. It can consider only errors of law appearing upon the record, and it is not competent to employ the courts upon appeal, but findings not supported by competent evidence of sufficient probative force. Perdue v. State Board of Equalization, 203 N. C. 730, 172 S. E. 306.

Findings supported by competent evidence are conclusive on appeal. Evidence not considered on appeal.—Under this section an award of the Industrial Commission is supported by competent evidence, the findings are conclusive on appeal, even though some incompetent evidence was also admitted upon the hearing. Carlton v. Bernhardt-Seagle Co., 210 N. C. 655, 188 S. E. 77. See also, Tomlinson v. Norwood, 208 N. C. 716, 182 S. E. 659; Swink v. Carolina Asbestos Co., 210 N. C. 224, 186 S. E. 278; see Porter v. Noland Co., 208 N. C. 306, 186 S. E. 278; see also, Baxley v. Arthur Co., 216 N. C. 724, 2 S. E. (2d) 853; Baxter v. Arthur Co., 216 N. C. 276, 4 S. E. (2d) 631; Tindall v. American Furniture Co., 216 N. C. 306, 4 S. E. (2d) 834; Stallcup v. Carolina Wood Turn- ing Co., 217 N. C. 302, 7 S. E. (2d) 550; MacRae v. United Furniture Co., 217 N. C. 769, 9 S. E. (2d) 873. The findings of fact by the Industrial Commission are supported by competent evidence of sufficient probative force. Chambers v. Union Oil Co., 199 N. C. 25, 153 S. E. 834.

Findings supported by competent evidence are conclusive on appeal. Findings and conclusions of the Commission not subject to review. Where the jurisdiction of the Industrial Commission to hear and determine controversies arising under the Act is challenged by an employer, on the ground that he is not subject to the provisions of the Act, the findings of fact made by the Commission, on which its jurisdiction is dependent, are not conclusive on the Superior Court, and that said court has both the power and the duty, on the appeal of either party to the proceeding, to consider all of the evidence in the record, and find therefrom the jurisdictional facts, without regard to the finding of such facts by the Commission. Aycock v. Cooper, 202 N. C. 500, 163 S. E. 590.
tent evidence are not conclusive and must be set aside. Logan v. Johnson, 218 N. C. 200, 19 S. E. (2d) 653.

The findings of the industrial commission that deceased was an employee of defendant at the time of his fatal injury, notwithstanding that the court might have reached a different conclusion if it had been the fact finding body. Cloninger v. Ambrosia Cake Co., 218 N. C. 455, 10 S. E. (2d) 653.

When the record contains evidence to support either a finding that the accident did or did not arise out of and in the course of employment, the findings of the industrial commission are not controlling with respect to appeals from the Industrial Commission to the Superior Court, where the injury occurred a certified copy of a memorandum of agreement approved by the Commission, or of an award of the Commission unappealed from or of an award of the Superior Court, when there has been an appeal from the award of the industrial commission when no appeal was taken will not lie until judgment on the award has been rendered by the superior court in accordance therewith and notify the parties. Champion v. Vance County Board of Health, 221 N. C. 96, 19 S. E. (2d) 239.

§ 97-87. Agreement approved by Commission or awards may be filed as judgments; discharge or restoration of lien. Any party in interest may file in the Superior Court of the county in which the injury occurred a certified copy of a memorandum of agreement approved by the Commission, or of an award of the Commission unappealed from or of an award of the Superior Court, when there has been an appeal from the award of the industrial commission when no appeal was taken will not lie until judgment on the award has been rendered by the superior court in accordance therewith and notify the parties. Such judgment shall have the same effect, and all proceedings in relation thereto shall be the same, as though said judgment had been rendered in a suit duly heard and determined by said court: Provided, if the judgment debtor shall file a certificate duly issued by the Industrial Commission affirmed upon appeal; whereupon said court shall render judgment in accordance therewith, and notify the parties. Such judgment shall have the same effect, and all proceedings in relation thereto shall be the same, as though said judgment had been rendered in a suit duly heard and determined by said court: Provided, if the judgment debtor shall file a certificate duly issued by the Industrial Commission, showing compliance with § 97-93, with the Clerk of the Superior Court in the county or counties where such judgment is docketed, then such clerk shall make upon the judgment roll an entry showing the filing of such certificate, which shall operate as a discharge of the lien of the said judgment, and no execution shall be issued thereon; provided, further, that if at any time there is default in the payment of any installment due under the award set forth in said judgment the court may, upon application for cause after ten days' notice to judgment debtor, order the lien of such judgment restored, and execution may be immediately issued thereon for past due installments and for future installments as they may become due. (1929, c. 120, s. 61.)

Where No Appeal Taken.—The procedure for the enforcement of an award of the industrial commission when no appeal is taken therefrom is by filing a certified copy of the award in the superior court, wherein said court shall render judgment in accordance therewith and notify the parties. Champion v. Vance County Board of Health, 221 N. C. 96, 19 S. E. (2d) 239.

Mandamus to Compel County Board of Health to Pay Award.—Mandamus to compel a municipal corporation, governmental agency or public officer to pay a claim is equivalent to execution, and therefore a suit to compel a county board of health to pay compensation by which a claim is paid by the industrial commission from which no appeal was taken will not lie until judgment on the award has been rendered by the superior court in accordance with the procedure outlined by this section. Champion v. Vance County Board of Health, 221 N. C. 96, 19 S. E. (2d) 239.

§ 97-88. Expenses of appeals brought by insurers.—If the Industrial Commission at a hearing on review or any court before which any proceedings are brought on appeal under this article, shall find that such hearing or proceedings were brought by the insurer, and the Commission or court by its decision orders the insurer to make, or to continue, payments of compensation to the injured employee, the Commission or court may further order that the cost to the in-
jured employee of such hearing or proceedings, including therein reasonable attorney's fee to be determined by the Commission shall be paid by the insurer as a part of the bill of costs. (1929, c. 120, s. 62; 1931, c. 274, s. 11.)

Editor's Note.—This section was radically changed by the Act of 1931. It is the contention of the defendant employee, whose admission found to have been prosecuted or defended without reasonable grounds to be thrown on the party so acting unreasonably. 9 N. C. Law Rev. 407. (Falsification as valuing firm.”)

Discretion of Court.—The power given the court under this Act of 1931 to order that the cost to the injured employee in such proceedings, including a reasonable attorney’s fee to be determined by the Commission, shall be paid by the insurer as part of the bill of costs is within the discretion of the court, and an order appearing in the judgment will not be reviewed by this Court. Perdue v. State Board of Equalization, 205 N. C. 730, 735, 172 S. E. 396.

The allowance of attorneys’ fee to claimant’s attorneys in a proceeding under the Compensation Act, held, authorized by this section, and defendants’ assignment of error thereto is untenable. Brooks v. Carolina Rim, etc., Co., 210 N. C. 341, 174 S. E. 101.

§ 97-89. Commission may appoint qualified physician to make necessary examinations; expenses; fees.—The Commission or any member thereof may, upon the application of either party, or upon its own motion, appoint a disinterested and duly qualified physician or surgeon to make any necessary medical examination of the employee, and to testify in respect thereto. Said physician or surgeon shall be allowed traveling expenses and a reasonable fee to be fixed by the Commission, not exceeding ten dollars for each examination and report, but the Commission may allow additional reasonable amounts in extraordinary cases. The fees and expenses of such physician or surgeon shall be paid by the employer (1929, c. 120, s. 63; 1931, c. 274, s. 12.)

Editor’s Note.—The Act of 1931 substituted the word “employer” for the word “state” formerly ending this section.

§ 97-90. Legal and medical fees to be approved by Commission; misdemeanor to receive fees unapproved by Commission, or to solicit employment in adjusting claims.—(a) Fees for attorneys and physicians and charges of hospitals for services under this article shall be subject to the approval of the Commission; but no physician shall be entitled to collect fees from an employer or insurance carrier until he has made the reports required by the Industrial Commission in connection with the case.

(b) Any person (1) who receives any fee, other consideration, or any gratuity on account of services so rendered, unless such consideration or gratuity is approved by the Commission or such court, or (2) who makes it a business to solicit employment for a lawyer or for himself in respect of any claim or award for compensation, shall be guilty of a misdemeanor, and upon conviction thereof shall, for each offense, be punished by a fine of not more than $500 or by imprisonment not to exceed one year, or by both such fine and imprisonment. (1929, c. 120, s. 64.)

§ 97-91. Commission to determine all questions.—All questions arising under this article if not settled by agreements of the parties interested therein, with the approval of the Commission, shall be determined by the Commission, except as otherwise herein provided. (1929, c. 120, s. 65.)

§ 97-92. Employer’s record and report of accidents; records of Commission not open to public; supplementary report upon termination of disability; penalty for refusal to make report; when insurance carrier liable.—(a) Every employer shall hereafter keep a record of all injuries, fatal or otherwise, received by his employees in the course of their employment on blanks approved by the Commission. Within ten days after the occurrence and knowledge thereof, as provided in § 97-92, of an injury to an employee, causing his death, the death having occurred within three days, a report thereof shall be made in writing and mailed to the Industrial Commission on blanks to be procured from the Commission for this purpose.

(b) The records of the Commission, in so far as they refer to accidents, injuries, and settlements, shall not be open to the public, but only to the parties satisfying the Commission of their interest in such records and the right to inspect them.

(c) Upon the termination of the disability of the injured employee, or if the disability extends beyond a period of sixty days, then, also, at the expiration of such period, the employer shall make a supplementary report to the Commission on blanks to be procured from the Commission for the purpose.

(d) The said report shall contain the name, nature, and location of the business of the employer, and name, age, sex, and wages and occupation of the injured employee; and shall state the date and hour of the accident causing injury, the nature and cause of the injury, and such other information as may be required by the Commission.

(e) Any employer who refuses or neglects to make the report required by this section shall be liable for a penalty of not less than five dollars and not more than twenty-five dollars for each refusal or neglect. The fine herein provided may be assessed by the Commission in an open hearing, with the right of review and appeal as in other cases. In the event the employer has transmitted the report to the insurance carrier for transmission by such insurance carrier to the Industrial Commission, the insurance carrier willfully neglecting or failing to transmit the report shall be liable for the said penalty. (1929, c. 120, s. 66.)

Report as Evidence.—The report signed by the manager of such incorporated employer and filed with the industrial commission as required by this section, is competent upon the hearing and statements contained therein not within the personal knowledge of the manager are competent as an admission against interest. Carlton v. Bernhardt-Seagle Co., 210 N. C. 655, 188 S. E. 77, wherein the instant section was inadvertently referred to as § 8181 (vvv).

Report as Claim.—Where the employer has filed a report with the commission within the prescribed time upon verbal information elicited from the representative of the employee by its claim agent, the representative being unable to read or write, and, the employer admitting liability, the report has been filed with the industrial commission as a claim within one year from date of the accident and contains all facts necessary to make an award. Hanks v. Southern Public Utilities Co., 210 N. C. 312, 186 S. E. 252.

§ 97-93. Employers required to carry insurance or prove financial ability to pay for benefits.—Every
employer who accepts the provisions of this article relative to the payment of compensation shall insure and keep insured his liability thereunder in any authorized corporation, association, organization, or in any mutual insurance association formed by a group of employers so authorized, or shall furnish to the Industrial Commission satisfactory proof of his financial ability to pay direct the compensation in the amount and manner and when due, as provided for in this article. In the latter case the Commission may require the deposit of an acceptable security, indemnity or bond to secure the payment of the compensation liabilities as they are incurred. (1929, c. 120, s. 67; 1943, c. 543.)

Editor's Note.—The 1943 amendment changed the word "liability" to the word "liability." For comment on the provisions of this and other sections in relation to the law of contracts, see 13 N. C. Law Rev. 163.

Employer Primarily Liable.—An award was entered in favor of the dependents of a deceased employee for payment of compensation in weekly installments for the death of the employee. After the insurance carrier had paid several installments, it defaulted in the payment of the balance because of insolvency. Under the provisions of the Compensation Act the employer is primarily liable to the employee, which obligation is unimpaired by its contract with an insurer for reinsurance protection, or by the insurer's subroga-
tion to the rights of the employer upon paying or assum-
ing the payment of an award, and the employer is not relieved of its liability to the dependents of the deceased em-
ployee for the balance of the weekly payments because of the insolvency of the insurer. Roberts v. City Ice, etc., Co., 210 N. C. 17, 185 S. E. 438.

The employer, held liable for the balance of an award after the insolvency of the insurer, is not entitled to a credit for the amount paid the dependents out of the judgment against the third person tort-feasor or for the amount of the attorney's fees in that action, the amount paid the dependents out of the judgment being an amount in addition to the award, and the award not being subject to reduction by such amount. Id.


§ 97-94. Employers required to give proof within 30 days that they have complied with preceding section; fine for not keeping liability insured; review; liability for compensation.—(a) Every em-
ployer accepting the compensation provisions of this article shall, within thirty days, after this article takes effect, file with the Commission, in form prescribed by it, and thereafter, annually or as often as may be necessary, evidence of his compliance with the provisions of § 97-93 and all others relating thereto.

(b) Any employer required to secure the pay-
ment of compensation under this article who re-
fuses or neglects to secure such compensation shall be punished by a fine of ten cents for each day of such refusal or neg-
lect, and until the same ceases; and he shall be liable during continuance of such refusal or neg-
lect to an employee either for compensation un-
der this article or at law in the same manner as provided in § 97-14.

The fine herein provided may be assessed by the Commission in an open hearing, with the right of review and appeal as in other cases. (1929, c. 120, s. 68.)

Quoted in Roberts v. City Ice, etc., Co., 210 N. C. 17, 185 S. E. 438.

§ 97-95. Actions against employers failing to effect insurance or qualify as self-insurer.—As to every employer subject to the provisions of this article who shall fail or neglect to keep in effect a policy of insurance against compensation lia-

bility arising hereunder with some insurance car-
rrier, as provided in § 97-93, or who shall fail to qualify as a self-insurer as provided in the article, in addition to other penalties provided by this article, such employer shall be liable in a civil action which may be instituted by the claimant for all such compensation as may be awarded by the industrial commission in a proceeding proper-

ly instituted before said commission, and such action may be brought by the claimant in the county of his residence or in any county in which the defendant has any property in this state; and in said civil action, ancillary remedies provided by law in civil actions of attachment, receivership, and other appropriate ancillary remedies shall be available to the plaintiff therein. Said action may be instituted before the award shall be made by the industrial commission in such case for the purpose of preventing the defendant from dis-
posing of or removing from the state of North Carolina for the purpose of defeating the payment of compensation or property which the defend-
ant may own in this state, and said action, after being instituted, the court may, upon proper amendment to the pleadings therein, permit the recovery of a judgment against the defendant for the amount of compensation duly awarded by the North Carolina industrial commission, and subject any property seized in said action for payment of the judgment so awarded. The institution of said action shall in no wise interfere with the jurisdic-
tion of said industrial commission in hearing and determining the claim for compensation in full accord with the provisions of this article. That nothing in this section shall be construed to limit or abridge the rights of an employee as provided in subsection (b) of § 97-94. (1941, c. 352.)

This section affects procedure only and does not disturb any vested rights. Byrd v. Johnson, 220 N. C. 184, 16 S. E. (2d) 843.

The provisions of this section, in force from its ratifica-
tion on 15 March, 1941, are available to claimants who in-
stituted a civil action alleging that the industrial commis-
sion had awarded them compensation in a stipulated sum, but defendant employer had failed and neglected to keep in effect a policy of compensation insurance and had failed to qualify as a self-insurer, that defendant was disposing and removing all his property from the state, and prayed that a writ of attachment issue against defendant's property, and defendant's exception to the refusal of the court to va-
cate the writ of attachment therefore issued in the cause was without error. It appeared that the award of the in-
dustrial commission was entered 24 March, 1941. Byrd v.
Johnson, 220 N. C. 184, 16 S. E. (2d) 843.

§ 97-96. Certificate of compliance with law; revocation and new certificate. — Whenever an employer has complied with the provisions of § 97-93 relating to self-insurance, the Indus-
trial Commission shall issue to such employer a certificate, which shall remain in force for a period fixed by the Commission, but the Com-
mission may, upon at least sixty days' notice and a hearing to the employer, revoke the certificate upon satisfactory evidence for such revocation having been presented. At any time after such revocation the Commission may grant a new certificate to the employer upon his petition. (1929, c. 120, s. 69.)

§ 97-97. Insurance policies must contain clause
that notice to employer is notice to insurer; etc.—All policies insuring the payment of compensation under this article must contain a clause to the effect that, as between the employer and the insurer, the notice or its form shall constitute notice of the occurrence of the injury on the part of the insured employer shall be deemed notice or knowledge as the case may be, on the part of the insurer; that jurisdiction of the insured for the purposes of this article shall be jurisdiction of the insurer, that the insurer shall in all things be bound by and subject to the awards, judgments, or decrees rendered against such insured employer, and that insolvency or bankruptcy of the employer and/or discharge therein shall not release the insurer from the payment of compensation for disability or death sustained by an employee during the life of such policy or contract. (1929, c. 120, s. 70.)

§ 97-98. Policy must contain agreement promptly to pay benefits; continuance of obligation of insurer in event of default.—No policy of insurance against liability arising under this article shall be issued unless it contains the agreement of the insurer that it will promptly pay to the person entitled to compensation enforceable in his name. (1929, c. 120, s. 71.)

§ 97-99. Law written into each insurance policy; form of policy to be approved by Insurance Commissioner; single catastrophe hazards.—(a) Every policy for the insurance against liability herein provided, or against liability therefor, shall be deemed to be made subject to the provisions of this article. No corporation, association, or organization shall enter into any such agreement, or set up any such clause in a policy of insurance unless its form shall have been approved by the Commissioner of Insurance.

(b) This article shall not apply to policies of insurance against loss from explosion of boilers or fly-wheels or other similar single catastrophe hazards: Provided, that nothing herein contained shall be construed to relieve the employer from liability for personal injuries to his employees, or death caused thereby, under the provisions of this article, shall be construed to be a direct promise by the insurer to the person entitled to compensation enforceable in his name. (1929, c. 120, s. 71.)

§ 97-100. Rates for insurance; carrier to make reports for determination of solvency; tax upon premium; returned or canceled premiums; reports of premiums collected; wrongful or fraudulent representation of carrier punishable as misdemeanor; notices to carrier; employer who carries own risk shall make report on payroll.—(a) The rates charged by all carriers of insurance, including the parties to any mutual insurance association writing insurance against the liability for compensation under this article, shall be fair, reasonable, and adequate, with due allowance for risk, merit rating; and all risks of the same kind and degree of hazard shall be written at the same rate by the same carrier. No policy of insurance against liability for compensation under this article shall be valid until the rate thereof has been approved by the Commissioner of Insurance; nor shall any such carrier of insurance write any such policy or contract until its basic form has been approved and the premium rate for such form has been filed with, approved, and not subsequently disapproved by the Commissioner of Insurance.

(b) Each such insurance carrier shall report to the Commissioner of Insurance, in accordance with such reasonable rules as the Commissioner of Insurance may at any time prescribe, for the purpose of determining the solvency of the carrier and the adequacy of its rates; for such purpose the Commissioner of Insurance may inspect the books and records of such insurance carrier, and examine its agents, officers, and directors under oath.

c. Every person, partnership, association, corporation, whether organized under the laws of this or any other state or country, every mutual company or association and every other insurance carrier insuring employers in this State against liability for personal injuries to their employees, or death caused thereby, under the provisions of this article, shall be issued unless it contains the agreement of the insurer that it will promptly pay to the person entitled to compensation enforceable in his name. (1929, c. 120, s. 71.)

(d) Every such insurance carrier shall, for the six months ending December thirty-first, nineteen hundred and twenty-nine, and semi-annually thereafter, make a return, verified by the affidavit of its president and secretary, or other chief officers or agents, to the Commissioner of Insurance, stating the amount of all such premiums and credits during the period covered by such return and the amount of all other taxes on such premiums, which tax shall be in lieu of all other taxes on such premiums, which tax shall be assessed and collected as hereinafter provided; provided, however, that such insurance carriers shall be credited with all canceled or returned premiums actually refunded during the year on such insurance.

(e) If any such insurance carrier shall fail or refuse to make the return required by this article, the said Commissioner of Insurance shall assess the tax against such insurance carrier at the rate herein provided for, on such amount of premium as he may deem just, and the proceedings thereon shall be the same as if the return had been made.

(f) If any such insurance carrier shall withdraw from business in this State before the tax shall fall due, as herein provided, or shall fail or neglect to pay such tax, the Commissioner of Insurance shall at once proceed to collect the same; and he is hereby empowered and authorized to employ such legal process as may be necessary for that purpose, and when so collected he shall pay the same into the State
Commission v. O'Berry, 197 N. C. 595, 150 S. E. 44.

The powers and duties of the Industrial Commission as authorized and required to allocate to the Industrial Commission as is necessary to carry out its function efficiently, and the powers so much of the special fund created by said subsection (j) of § 97-100. (1931, c. 274, s. 14.)

Art. 2. Compensation Rating and Inspection Bureau.

§ 97-102. Compensation Rating and Inspection Bureau created; objects, functions, etc.—There is hereby created a Bureau to be known as the Compensation Rating and Inspection Bureau of North Carolina, with the following objects, functions and powers:

(a) To maintain rules and regulations and fix premium rates for Workmen's Compensation Insurance and equitably adjust the same as far as practicable, in accordance with the hazards of individual risks by inspection by the Bureau.

(b) To furnish upon request of any employer in the State of North Carolina or to any member of the Compensation Rating and Inspection Bureau of North Carolina, upon whose risk a compensation rating has been promulgated, information as to the rating, including the method of its compilation, and to encourage employers to reduce the number and severity of accidents by offering reduced premium rates for improved working conditions under such uniform system of merit or schedule rating as may be approved by the Insurance Commissioner of the State of North Carolina.

(c) The Bureau shall make a rating survey of each risk inspected which survey shall clearly show the location of all ratable items; Provided, however, that the Bureau shall not describe the items or make any recommendations for accident prevention, such service being reserved as a proper and essential field for the competitive enterprise of its individual members. (1931, c. 279, s. 1.)

Cross Reference.—As to automobile rate administrative office established in the bureau created by this section, see §§ 58-246 et seq.

§ 97-103. Membership in Bureau of carriers of insurance; acceptance of rejected risks; rules and regulations for maintenance; Insurance Commissioner or deputy ex-officio Chairman. — Before the Insurance Commissioner shall grant permission to any mutual association, reciprocal or stock company, or any other insurance organization to write compensation or employers' liability insurance in this State, it shall be a requisite that they shall subscribe to and become members of the Compensation Rating and Inspection Bureau of North Carolina.

It shall be the duty of all companies underwriting workmen's compensation insurance in this State and being members of the compensation rating and inspection bureau of North Carolina, as defined in this section, to insure and accept any workmen's compensation insurance risk which shall have been tendered to and rejected by any three members of said bureau in the manner hereinafter provided. When any such rejected risk is called to the attention of the compensation rating and inspection bureau of North Carolina and it appearing that said risk is in good faith entitled to such coverage, the bureau shall fix the initial premium therefor, (subject to the
§ 97-104. Governing committee; production of books and records for compilation of appropriate statistics; rates subject to approval of Insurance Commissioner.—In order to carry into effect the objects of this article the Bureau members shall immediately elect its governing committee who shall employ and fix the salaries of such personnel and assistance as is necessary, subject to the approval of the Insurance Commissioner, and the Insurance Commissioner is hereby authorized to compel the production of books, data, papers, and records relating to or bearing upon such data as is necessary to compile statistics for the purpose of determining the pure cost and expense loading of Workmen's Compensation Insurance in North Carolina and this information shall be available and for the use of the Compensation Rating and Inspection Bureau, for the compilation and promulgation of rates on Workmen's Compensation Insurance. All such rates compiled and promulgated by such Bureau shall be submitted to the Insurance Commissioner for approval as provided in § 97-100. (1931, c. 279, s. 3.)

Art. 3. Security Funds.

§ 97-105. Title of article.—This article shall be known as the Workmen's Compensation Security Fund Act. (1935, c. 228, s. 1.)

§ 97-106. Definitions.—As hereafter used in this article, unless the context or subject matter otherwise requires:

"Stock fund" means the stock workmen's compensation security fund created by this article.

"Mutual fund" means the mutual workmen's compensation security fund created by this article.

"Funds" means the stock fund and the mutual fund.

"Fund" means either the stock fund or the mutual fund as the context may require.

"Fund year" means the calendar year.

"Stock carrier" means any stock corporation authorized to transact the business of workmen's compensation insurance in this State, except an insolvent stock carrier.

"Mutual carrier" means any mutual corporation or association and any reciprocal or inter-insurance exchange authorized to transact the business of workmen's compensation insurance in this State, except an insolvent mutual carrier.

"Carrier" means either a stock carrier or a mutual carrier, as the context may require.

"Insolvent stock carrier" or "insolvent mutual carrier" means a stock carrier or a mutual carrier, as the case may be, which has been determined to be insolvent, or for which or for the assets of which a receiver has been appointed by a court or public officer of competent jurisdiction and authority.

"Commissioner" means the Insurance Commissioner of this State.

"Workmen's compensation act" means the workmen's compensation act of the State of North Carolina, being §§ 97-1 to 97-101 as amended and supplemented. (1935, c. 228, s. 2; 1941, c. 298, s. 1.)

Editor's Note.—The 1941 amendment inserted the words "and any reciprocal or inter-insurance exchange" in the paragraph defining "mutual carrier."

§ 97-107. Stock workmen's compensation security fund created.—There is hereby created a fund to be known as "The Stock Workmen's
Compensation Security Fund," for the purpose of assuring to persons entitled thereto the compensation provided by the workmen's compensation act for employments insured in insolvent stock carriers. Such fund shall be applicable to the payment of valid claims for compensation or death benefits heretofore or hereafter made pursuant to the workmen's compensation act, and remaining unpaid in whole or in part, by reason of the default, after the effective date of this article, of an insolvent stock carrier. Expenses of administration also shall be paid from the fund as herein provided. Such fund shall consist of all contributions received and paid into the fund by stock carriers, as herein defined, all property and securities acquired by and through the use of moneys belonging to the fund, and of interest earned upon moneys deposited or invested as herein provided. The fund shall be administered by the commissioner of this State in accordance with the provisions of this article. (1935, c. 228, s. 3.)

§ 97-108. Verified report of premiums to be filed by stock carrier.—Every stock carrier shall, on or before the first day of September, nineteen hundred and thirty-five, file with the treasurer of the State and with the commissioner identical returns, under oath, on a form to be prescribed and furnished by the commissioner, stating the amount of net written premiums for the six months' period ending June thirtieth, nineteen hundred thirty-five on policies issued, renewed or extended by such carrier, to insure payment of compensation pursuant to the workmen's compensation act. For the purposes of this article "net written premiums" shall mean gross written premiums less return premiums on policies returned not taken, and on policies canceled. Thereafter, on or before the first day of March and September of each year, each such carrier shall file similar identical returns, stating the amount of such net written premiums for the six months' period ending, respectively, on the preceding December thirty-first and June thirtieth, on policies issued, renewed or extended by such carrier. (1935, c. 228, s. 4.)

§ 97-109. Contributions by stock carriers of 1% of net written premiums.—For the privilege of carrying on the business of workmen's compensation insurance in this State, every stock carrier shall pay into the stock fund on the first day of September, nineteen hundred thirty-five, a sum equal to one per centum (1%) of its net written premiums as shown by the return hereinafter prescribed for the period ending June thirtieth, nineteen hundred thirty-five and therefor each such stock carrier, upon filing each semi-annual return, shall pay a sum equal to one per centum (1%) of its net written premiums for the period covered by such return. (1935, c. 228, s. 5.)

§ 97-110. Contributions to stop when stock fund equals 5% of loss reserves; resumption of contributions. — When the aggregate amount of all such payments into the stock fund, together with accumulated interest thereon, less all its expenditures and known liabilities, becomes equal to five per centum (5%) of the loss reserves of all stock carriers for the payment of benefits under the workmen's compensation act as of December thirty-first, next preceding, no further contributions to said fund shall be required to be made; provided, however, that whenever, thereafter, the amount of said fund shall be reduced below five per centum (5%) of such loss reserves as of said date by reason of payments from and known liabilities of said stock fund, then such contribution to said fund shall be resumed forthwith, and shall continue until said fund, over and above its known liabilities, shall be equal to five per centum (5%) of such reserves. (1935, c. 228, s. 6.)

§ 97-111. Rules and regulations for administration of stock fund; examination of books and records; penalty for failure to file report or pay assessment; revocation of license.—The commissioner may adopt, amend and enforce rules and regulations necessary for the proper administration of said stock fund. In the event any stock carrier shall fail to file any return or make any payment required by this article, or in case the commissioner shall have cause to believe that any return or other statement filed is false or inaccurate in any particular, or that any payment made is incorrect, he shall have full authority to examine all the books and records of the carrier for the purpose of ascertaining the facts and shall determine the correct amount to be paid and may proceed in any court of competent jurisdiction to recover for the benefit of the fund any sums shown to be due upon such examination and determination. Any stock carrier which fails to make any statement as required by this article, or to pay any contribution to the stock fund when due, shall thereby forfeit to said fund a penalty of five per centum (5%) of the amount of unpaid contribution determined to be due as provided by this article plus one per centum (1%) of such amount for each month of delay, or fraction thereof, after the expiration of the first month of such delay, but the commissioner may upon good cause shown extend the time for filing of such return or payment. The commissioner shall revoke the certificate of authority to do business in this State of any carrier which shall fail to comply with the provisions of this article or to pay any penalty imposed in accordance with this article. (1935, c. 228, s. 7.)

§ 97-112. Separation of stock fund; disbursements; investment; sale of securities.—The stock fund created by this article shall be separate and apart from any other fund so created and from all other state monies; the state treasurer shall be the custodian of said fund; and all disbursements from said fund shall be made by the state treasurer upon vouchers signed by the commissioner as hereinafter provided. The moneys of said fund may be invested by the state treasurer only in the bonds or securities which are the direct obligations of or which are guaranteed as to principal and interest by the United States or this State. The state treasurer may sell any of the securities in which said fund is invested, if advisable for its proper administration or in the best interests of such fund, and all earnings from the investments of such fund shall be credited to such fund. (1935, c. 228, s. 8.)
§ 97-113. Payment of claim from stock fund when carrier insolvent; subrogation of employer paying claim; recovery against employer or receiver of insolvent carrier.—A. A valid claim for compensation or death benefits, or installments thereof, heretofore or hereafter made pursuant to the workmen's compensation act, which has remained or shall remain due and unpaid for sixty days, by reason of default by an insolvent stock carrier, shall be paid from the stock fund in the manner provided in this section. Any person in interest may file with the commissioner an application for payment of compensation or death benefits from the stock fund on a form prescribed and furnished by the commissioner. If there has been an award, final or otherwise, a certified copy thereof shall accompany the application. The commissioner shall thereupon certify to the state treasurer such award for payment according to the terms of the same, whereupon payment shall be made by the state treasurer.

B. Payment of compensation from the stock fund shall give the fund no right of recovery against the employer.

C. An employer may pay such award or part thereof in advance of payment from the stock fund and shall thereupon be subrogated to the rights of the employee or other party in interest against such fund to the extent of the amount so paid.

D. The state treasurer as custodian of the stock fund shall be entitled to recover the sum of all liabilities of such insolvent carrier assumed by such fund from such carrier, its receiver, liquidator, rehabilitator or trustee in bankruptcy and may prosecute an action or other proceedings therefor. All moneys recovered in any such action or proceedings shall forthwith be placed to the credit of the stock fund by the state treasurer to reimburse the stock fund to the extent of the moneys so recovered and paid. (1935, c. 228, s. 9.)

§ 97-114. Mutual workmen's compensation security fund created. — There is hereby created a fund to be known as "The Mutual Workmen's Compensation Security Fund," for the purpose of assuring to persons entitled thereto the compensation provided by the workmen's compensation act for employments insured in insolvent mutual carriers. Such fund shall be applicable to the payment of valid claims for compensation or death benefits heretofore or hereafter made pursuant to the workmen's compensation act, and remaining unpaid, in whole or in part, by reason of the default, after the effective date of this article, of an insolvent mutual carrier. Expenses of administration also shall be paid from the fund as herein provided. Such fund shall consist of all contributions received and paid into the fund by mutual carriers, as herein defined, of property and securities acquired by and through the use of moneys belonging to the fund and of interest earned upon moneys deposited or invested as herein provided. The fund shall be administered by the commissioner in accordance with the provisions of this article. (1935, c. 228, s. 10.)

§ 97-115. Verified report of premiums to be filed by mutual carrier; equalization of payments by reciprocal or inter-insurance exchanges.—Every mutual carrier shall, on or before the first day of September, nineteen hundred thirty-five, file with the treasurer of the State and with the commissioner identical returns, under oath, on a form to be prescribed and furnished by the commissioner of insurance, stating the amount of net written premiums for the six months' period ending June thirtieth, nineteen hundred thirty-five, on policies issued, renewed or extended by such carrier, to insure payment of compensation pursuant to the workmen's compensation act during said period.

For the purpose of this article "net written premiums" shall mean gross written premiums less return premiums on policies returned not taken and on policies cancelled. Thereafter, on or before the first day of March and September, of each year, each such carrier shall file similar identical returns, stating the amount of such net written premiums for the six months' periods ending respectively, on the preceding December thirty-first and June thirtieth, on such policies issued, renewed or extended by such carrier.

Any reciprocal or inter-insurance exchange writing workmen's compensation insurance in North Carolina on September first, one thousand nine hundred and thirty-five and continuing to underwrite this class of insurance shall, upon the fund reaching its maximum contribution and the discontinuance of any collection thereof, continue to pay into such mutual fund as provided for in this section for a period of six years after the other members of the mutual fund have discontinued said payments in order to equalize the contributions of all members of the mutual fund, and thereafter such reciprocal or inter-insurance exchanges shall be subject to the provisions of this section. (1935, c. 228, s. 11; 1941, c. 298, s. 2.)

Editor's Note.—The 1941 amendment added the last sentence to this section.

§ 97-116. Contributions by mutual carriers of 1% of net written premiums.—For the privilege of carrying on the business of workmen's compensation insurance in this State, every mutual carrier shall pay into the mutual fund of the total to be maintained by each such carrier, upon filing each semi-annual return, shall pay a sum equal to one per centum (1%) of its net written premiums, as shown by the return hereinbefore prescribed for the period ending June thirtieth, nineteen hundred thirty-five, and thereafter each such mutual carrier, upon filing each semi-annual return, shall pay a sum equal to one per centum (1%) of its net written premiums, as shown for the period covered by such return. (1935, c. 228, s. 12.)

§ 97-117. Distribution of excess when mutual fund equals to 5% of loss reserves; distribution of fund when liabilities liquidated. — Whenever the mutual fund, less all its known liabilities, shall exceed five percentum (5%) of the loss reserves of all mutual carriers for the payments of losses under the workmen's compensation act, as of December thirty-first next preceding, distribution of such excess shall be made as provided in this section for a period of six years, commencing with the first fund year, to the mutual carriers in the proportion in which they respectively made contributions for such fund year: Provided, however, no such distribution shall reduce the fund, less all its known liabilities, below an amount equal to five per centum (5%) of such loss reserves as
§ 97-118. Administration, custody, etc., of mutual fund.—The provisions of §§ 97-111, 97-112, and 97-113 shall apply to the administration, custody and investment of and payments from the mutual fund and to this end those sections shall be read with the necessary changes in detail to adopt their provisions to mutual funds. (1935, c. 228, s. 14.)

§ 97-119. Notice of insolvency; report of claims and unpaid awards.—Forthwith upon any carrier becoming an insolvent stock carrier, or an insolvent mutual carrier, as the case may be, the commissioner shall so notify the North Carolina industrial commission, and the North Carolina industrial commission shall immediately advise the commissioner (a) of all claims for compensation pending or thereafter made against an employer insured by such insolvent carrier, or against such insolvent carrier; (b) of all unpaid or continuing agreements, awards or decisions made upon claims prior to or after the date of such notice from the commissioner; and (c) of all appeals from or applications for modifications or rescission or review of such agreements, awards or decisions. (1935, c. 228, s. 15.)

§ 97-120. Right of commissioner to defend claims against insolvent carriers; arrangement with other carriers to pay claims.—The commissioner or his duly authorized representative may investigate and may defend before the North Carolina industrial commission or any court any or all claims for compensation against an employer insured by an insolvent carrier or against such insolvent carrier and may prosecute any pending appeal or may appeal from or make application for modification or rescission or review of an agreement, award or decision against such employer or insolvent carrier. Until all such claims for compensation are closed and all such awards thereon are paid, the commissioner, the administrator of the funds, shall be a party in interest in respect to all such claims, agreements and awards. For the purposes of this article the commissioner shall have exclusive power to select and employ such counsel, clerks and assistants as may be deemed necessary and to fix and determine their powers and duties, and he may also, in his discretion, arrange with any carrier or carriers to investigate and defend any or all such claims and to liquidate and pay such as are valid and the commissioner may from time to time reimburse, from the appropriate fund, such carrier or carriers for compensation payments so made, together with reasonable allowance for the services so rendered. (1935, c. 228, s. 16.)

§ 97-121. Expenses of administering funds.—The expense of administering the stock fund shall be paid out of the stock fund and the expense of administering the mutual fund shall be paid out of the mutual fund. The commissioner shall serve as administrator of each fund without additional compensation, but may be allowed and paid from either fund expenses incurred in the performance of his duties in connection with that fund. The compensation of those persons employed by the commissioner shall be deemed administration expenses payable from the fund in the manner provided in § 97-112. The commissioner shall include in his regular report to the legislature a statement of the expense of administering each of such funds for the preceding year. (1935, c. 228, s. 17.)

§ 97-122. Contributions relieving carrier of posting bond or making special deposit.—Contributions made by any stock or mutual carrier to the funds created by this article shall relieve such carriers from filing any surety bond or making any deposit of securities required under the provisions of any law of this State for the purpose of securing the payment of workmen's compensation benefits only. (1935, c. 228, s. 18.)
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Chapter 98. Burnt and Lost Records.

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§ 98-1. Copy of destroyed record as evidence; may be recorded.—When the office of any registry is destroyed by fire or other accident, and the records and other papers thereof are burnt or destroyed, the copies of all such proceedings, instruments and papers as are of record or registry, certified by the proper officer, though without the seal of office, shall be received in evidence whenever the original or duly certified exemplifications would be. Such copies, when the court is satisfied of their genuineness, may be ordered to be recorded or registered. (Rev., s. 327; Code, s. 55; C. S. 365.)

Admissibility of Parol Evidence.—As this chapter constitutes an enabling Act where it is attempted to prove by oral evidence and by copy the contents of the original report, the oral evidence is not excluded by its provisions. Hughes v. Frichard, 151 N. C. 53, 63 S. E. 596. Varner v. Johnston, 112 N. C. 570, 576, 17 S. E. 483; Mobley v. Watts, 98 N. C. 284, 286; 3 S. E. 677.

But when a deed is lost or destroyed a copy must be produced if there be one but if none, parol evidence may be admitted to prove its contents. Cowles v. Hardin, 91 N. C. 231; Dumas v. Powell, 14 N. C. 103; Baker v. Webb, 2 N. C. 43.

Same.—Statements of One Not a Party.—A statement that he owned no interest in the property made by one not a party to the suit, and under whom the plaintiff does not claim, is not admissible under this section. Jones v. Ballou, 139 N. C. 526, 52 S. E. 254.

Same.—Not Admissible to Change Certified Copy.—This section does not permit parol evidence to be introduced to show that the lost or destroyed original had a different description and thus correct a recorded certified copy of a deed. Hopper v. Justice, 111 N. C. 420, 10 S. E. 126.

§ 98-2. Originals may be again recorded.—All original papers, once admitted to record or registry, whereof the record or registry is destroyed, may, on motion, be again recorded or registered, on such proof as the court shall require. (Rev., s. 328; Code, s. 56; C. S. 366.)

Original Recorded upon Sufficient Evidence to Clerk.—Where the registry of partition is destroyed and a paper purporting to be the original is presented to the clerk, it is his duty, after satisfying himself upon evidence that the paper is the original one, to record it. Hill v. Lane, 149 N. C. 267, 52 S. E. 1067.

Effect of Failure to Re-register.—In Waters v. Crabtree, 105 N. C. 394, 402, 11 S. E. 240 the court said, in referring to this section: "This statutory provision, at least, admonished the public reason to expect that it would be faithfully observed by persons interested. However where the plaintiff has been negligent in again registering or recording a deed, such re-registration will not defeat the rights of bona fide purchasers.”

§ 98-3. Establishing boundaries and interest, where conveyance and copy lost.—When any conveyance of real estate, or of any right or interest therein, is lost, the registry thereof being also destroyed, any person claiming under the same may cause the boundaries thereof to be established in the manner provided in the chapter entitled Boundaries, or he may proceed in the following manner to establish both the boundaries and the nature of his estate:

He shall file his petition before the clerk of the superior court, setting forth the whole substance of the conveyance as truly and specifically as he can, the location and boundaries of his land, whose land it adjoins, the estate claimed therein, and a prayer to have his own boundaries established and the nature of his estate declared.

All persons claiming any estate in the premises, and those whose lands adjoin, shall be notified of the proceedings. Unless they or some of them, by answer on oath, deny the truth of all or some of the matters alleged, the clerk shall order a surveyor to run and designate the boundaries of the petitioner's land, and return his survey, with a plot thereof, to the court. This, when confirmed, shall, with the declaration of the court as to the nature of the estate of the petitioner, be registered and have, as to the persons notified, the effect of a deed for the same, executed by the person possessed of the same next before the petitioner. But in all cases, however, wherein the process of surveying is disputed, and the surveyor is forbidden to proceed by any person interested, the same proceedings shall be had as under the chapter entitled Boundaries.

If any of the persons notified deny by answer the truth of the conveyance, the clerk shall transfer the issues of fact to the superior court at term, to be tried as other issues of fact are required by law to be tried; and on the verdict and the pleadings the judge shall adjudge the rights of the parties, and declare the contents of the deed, if any deed is found by the jury, and allow the registration of such judgment and declaration, which
shall have the force and effect of a deed. (Rev., s. 328; Code, s. 56; C. S. 367.)

Cross Reference.—As to boundaries, see chapter 38.

Remedy Additional and Not Exclusive.—This section is an enabling statute providing, not an exclusive remedy, but merely an additional one. Jones v. Ballou, 139 N. C. 526, 52 S. E. 254; Mobley v. Watts, 98 N. C. 284, 3 S. E. 677.

It does not repeal but adds the common law rules for establishing deeds, and a party may choose either mode. Cowles v. Hardin, 91 N. C. 237.

Evidence Must Show Existence, Nature, and Loss.—Before the deed can be made, the plaintiff must clearly prove that a deed did exist, its legal operation, and the loss thereof. Plummer v. Baskerville, 36 N. C. 252; Loftin v. Loftin, 96 N. C. 94, 1 S. E. 637.

Judgment has Only Force of Original.—A judgment under this section has only such force as the original conveyance would have as evidence had it not been destroyed. McNeely v. Lutom, 142 N. C. 327, 63 S. E. 279.

Private Acts.—In a special proceeding under a private act, similar to this section, to restore certain records lost by fire or other casualty, it is necessary to conform exactly to all the terms prescribed by the statute. Cowles v. Hardin, 79 N. C. 577.

§ 98-4. Copy of lost will may be probated.—In counties where the original wills on file in the office of the clerk of superior court, and will-books containing copies, are lost or destroyed, if the executor or any other person has preserved a copy of a will (the original being so lost or destroyed) with a certificate appended, signed by a clerk of the court in whose office the will was, or is required to be filed, stating that said copy is a correct one, this copy may be admitted to probate, under the same rules and in the same manner as now prescribed by law for proving wills. The proceedings in such cases shall be the same as though such copy was the original offered for the first time for probate, except that the clerk who signed such certificate shall, on oath, acknowledge his signature, or in case it appears that he has died or left the state, then his signature shall be proved by a competent witness; and the witness or witnesses to the original, who may be examined, shall be required to swear that he or they signed in the presence of the testator and by his direction a paper-writing purporting to be his last will and testament. (Rev., s. 329; Code, s. 57; C. S. 368.)

Cross Reference.—As to probate of wills generally, see §§ 312, 313.

Probated before Clerk.—The probate of a lost will must be made before the clerk of the Superior Court, he alone having jurisdiction. McCormick v. Jernigan, 110 N. C. 406, 14 S. E. 971.

Statute of Limitation Does Not Apply.—The statute of limitation does not apply to the simple taking probate of a will, hence it has no application to proceedings under this section. McCormick v. Jernigan, 110 N. C. 406, 14 S. E. 971.

§ 98-5. Copy of lost will as evidence; letters to issue.—In any action or proceeding at law, where it becomes necessary to introduce such will to establish title, or for any other purpose, a copy of the will and of the record of the probate, with a certificate signed by the clerk of the superior court for the county where the will may be recorded, stating that said record and copy are full evidence, stating that said record and copy are full evidence; and when a copy of a will is admitted to probate, the clerk shall thereupon issue letters testamentary. (Rev., s. 330; Code, s. 58; C. S. 369.)

§ 98-6. Establishing contents of will, where original and copy destroyed.—Any person desirous of establishing the contents of a will destroyed as aforesaid, there being no copy thereof, may file his petition in the office of the clerk of the superior court, setting forth the entire contents thereof, according to the best of his knowledge, information and belief. All persons having any interest in the same shall be made parties, and if the truth of such petition is denied, the issues of fact shall be transferred to the superior court at term for trial by a jury, whether the will was recorded, and if so recorded, the contents thereof, and the declarations of the judge shall be recorded as the will of the testator. Any devisee or legatee is a competent witness as to the contents of every part of said will, except such as may concern his own interest in the same. (Rev., s. 331; Code, s. 59; C. S. 370.)

Parol Evidence.—Parol evidence may be introduced to show the contents of a will which has been lost or destroyed. Cox v. Lumber Co., 124 N. C. 78, 32 S. E. 381; Varner v. Johnston, 112 N. C. 570, 17 S. E. 483.

And such evidence is also admissible to show existence of such a will, its probate and registration. Cox v. Lumber Co., 124 N. C. 78, 32 S. E. 381.

§ 98-7. Perpetuating destroyed judgments and proceedings.—Every person desirous of perpetuating the contents of destroyed judgments, orders or proceedings of court, or any paper admitted to record or registration, or directed to be filed for safe keeping, other than wills or conveyances of real estate, or some right or interest therein, or any deed or other instrument of writing, required to be recorded or registered, but not having been recorded or registered, it being competent to register or record said deed or other instrument at the time of its loss or destruction, may file his petition in the court having jurisdiction of like matters with the original proceeding, setting forth the substance of the whole record, deed, proceeding, or paper, which he desires to perpetuate. If, on the hearing, the court shall declare the existence of such record, deed, or proceeding, or paper at the time of the burning of the office wherein the same was located or kept, or other destruction thereof, and that the same was there destroyed, and shall declare the contents thereof, such declaration shall be recorded or registered, or filed, according to the nature of the paper destroyed. (Rev., s. 332; Code, s. 60; C. S. 371.)

Restored Record Free from Collateral Attack.—Where the destroyed record has been restored, the record so restored cannot be collaterally attacked. Branch v. Griffin, 59 N. C. 173, 5 S. E. 393, 398.

§ 98-8. Color of title under destroyed instrument.—Every person who has been in the continuous, peaceable and quiet possession of land, tenements, or hereditaments, situated in the county, claiming, using and occupying them as his own, for the space of seven years, under known boundaries, the title thereto being out of the state, is deemed to have been lawfully possessed, under color of title, of such estate therein as has been claimed by him during his possession, although he may exhibit no conveyance therefor: Provided, that such possession commenced before the destruction of the registry office, or other destruction as aforesaid, and also that any such person, or any person claiming by, through or under him, makes affidavit and produces such proof as is satisfactory to the court that the possession was rightfully taken; and if taken under a written
conveyance, that the registry thereof was destroyed by fire or other means, or was destroyed before registry as aforesaid, and that neither the original nor any copy thereof is in existence: Provided further, that such presumption shall not arise against infants, persons of nonsane memory, and persons residing out of the state, who were such at the time of possession taken, and were not therefore barred, nor were so barred at the time of the burning of the office or other destruction.  (Rev., s. 333; Code, s. 61; C. S. 372.)

Cross Reference.—As to title by adverse possession generally, see §§ 1-35 et seq.

§ 98-9. Action on destroyed bond.—Actions on official or other bonds lodged in any office which are destroyed with the registry thereof may be prosecuted by petition against the principal and sureties thereto, and the proceedings shall be as in the former courts of equity.  (Rev., s. 334; Code, s. 62; C. S. 373.)


§ 98-10. Destroyed witness tickets; duplicates may be filed.—The court having jurisdiction of the action may allow other witness tickets to be filed in place of such as may be destroyed, upon the oath of the witness or other satisfactory proof.  (Rev., s. 333; Code, s. 63; C. S. 374.)

§ 98-11. Replacing lost official conveyances.—Where any conveyance executed by any person, sheriff, clerk and master, or commissioner of court has been lost, and registry thereof destroyed aforesaid, and there is no copy thereof, such persons, whether in or out of office, may execute another of like tenor and date, reciting therein that the same is a duplicate, and such deed shall be evidence of the facts therein recited, in all cases wherein the parties thereto are dead, or are incompetent witnesses to prove the same, to the extent as if it was the original conveyance.  (Rev., s. 336; Code, s. 64; C. S. 375.)

§ 98-12. Court records as proof of destroyed instruments set out therein.—The records of any court in or out of the state, and all transcripts of such records, and the exhibits filed therewith in any case, are admissible to prove the existence and contents of all deeds, wills, conveyances, depositions and other papers, copies whereof are therein set forth or exhibited, in all cases where the records and registry of such as were or ought to have been recorded and registered, or the originals of such as were not proper to be recorded or registered, have been destroyed as aforesaid, although such transcripts or exhibits have been informally certified; and when offered in evidence to have the same effect as though the transcript or record was the record of the court whose records are destroyed, and the deeds, wills and conveyances, depositions and other papers therein copied or therewith exhibited were original.  (Rev., s. 337; Code, s. 65; C. S. 376.)

Evidence of Court Records as Proof. — When papers have been lost and under competent evidence and instructions, the jury has found their contents to be as contended for by the plaintiff, the plaintiff prevails.  Fain v. Gaddis, 144 N. C. 765, 57 S. E. 1111.

§ 98-13. Copies contained in court records may be recorded.—The copies aforesaid of all such deeds, wills, conveyances and other instruments proper to be recorded or registered, as are mentioned in § 98-12, may be recorded or registered on application to the clerk of the superior court and due proof that the original thereof was genuine.  (Rev., s. 335; Code, s. 66; C. S. 377.)

§ 98-14. Rules for petitions and motions.—The following rules shall be observed in petitions and motions under this chapter:

1. The facts stated in every petition or motion shall be verified by affidavit of the petitioner that they are true according to the best of his knowledge, information, and belief.

Affidavit by Agent Not Sufficient. — In a proceeding under this section an affidavit by the agent of the petitioner that the facts set forth in the complaint "are true to the best of his knowledge, information and belief," is an insufficient verification. Cowles v. Hardin, 79 N. C. 577.

2. The instrument or paper sought to be established by any petition shall be fully set forth in its substance, and its precise language shall be stated when the same is remembered.

3. All persons interested in the prayers of the petition or decree shall be made parties.

4. Petitions to establish a record of any court shall be filed at term in the superior court of the county where the record is sought to be established. Other petitions may be filed in the office of the clerk.

5. The costs shall be paid as the court may decree.

6. Appeals shall be allowed as in all other cases, and where the error alleged shall be a finding by the superior court at term, of a matter of fact, the same may be removed on appeal to the supreme court, and the proper judgments directed to be entered below.

7. It shall be presumed that any order or record of the court of pleas and quarter sessions, which was made and has been lost or destroyed, was made by a legally constituted court, and the requisite number of justices, without naming said justices.  (Rev., s. 339; Code, s. 67; 1893, c. 295; C. S. 378.)

§ 98-15. Records allowed under this chapter to have effect of original records.—The records and registries allowed by the court in pursuance of this chapter shall have the same force and effect as original records and registries.  (Rev., s. 340; Code, s. 65; C. S. 379.)

No More Effect than Originals.—The copies have only the same force and effect as the lost or destroyed deeds would have had, if produced. MeNeely v. Laxton, 149 N. C. 327; 61 S. E. 240.

Bona Fide Purchaser—True Purpose of Original. — But it would seem that if the true purpose of the deed was to serve as a mortgage, and the plaintiff has been negligent in registering it, it will not have that effect against one who subsequently purchases without notice and for value. Waters v. Crabtree, 105 N. C. 402, 11 S. E. 240.

§ 98-16. Destroyed court records proved prima facie by recitals in conveyances executed before their destruction.—The recitals, reference to, or
§ 99-1. Libel against newspaper; defamation by or through radio or television station; notice before action.

§ 99-2. Effect of publication or broadcast in good faith and retraction.

§ 98-17. Conveyances reciting court records prima facie evidence thereof.—Such deed of conveyance, or other paper-writing, executed as aforesaid, and registered according to law, may be read in any suit now pending or which may hereafter be instituted in any court of this state, as prima facie evidence of the existence and validity of the decree, judgment, order, or other record upon which the same purports to be founded, without any other or further restoration or reinstatement of said decree, order, judgment, or record than is contained in this chapter. (Rev., s. 343; Code, s. 71; C. S. 383.)

Constitutionality. — The constitutionality and validity of this section cannot now be open to dispute, Barefoot v. Musselwhite, 153 N. C. 208, 211, 69 S. E. 71.

§ 98-18. Court records and conveyances to which chapter extends.—This chapter shall extend to records of any court which have been or may be destroyed by fire or otherwise, and to any deed of conveyance, paper-writing, or other bona fide evidence of title executed before the destruction of said records. (Rev., s. 343; Code, s. 71; C. S. 383.)

Local Modification.—Moore: C. S. 383; Cherokee, Graham, Haywood, and Madison: C. S. 384; 1935, c. 25.

§ 98-19. Replacement of stolen, lost or destroyed state or municipal bonds; indemnity bond. — The State Treasurer of the State of North Carolina, by and with the consent and approval of the governor and council of State, and the governing boards of the several counties, cities and political sub-divisions of the State, is hereby authorized and empowered to make settlement for or issue new bonds for bonds of the State or any of the political sub-divisions thereof, which have been stolen, lost or destroyed: Provided, that there is furnished an indemnity bond in double the amount of the said bonds, said indemnity bond to be approved by the State Treasurer or the governing boards of any political sub-division of the State issuing said replacement bonds: Provided further, that said indemnity bond shall clearly designate the said bonds which have been stolen, lost or destroyed: (1935, c. 292, s. 1.)

§ 98-20. Expenses borne by applicant. — All expenses in connection with printing and issuing any replacement bonds provided for in this article shall be borne by the person making application therefor. (1935, c. 292, s. 2.)
indicated, is a sufficient notice in writing as required by this section, the provisions of section 1-585 relating to notice in judicial proceedings after suit has been instituted, not being unconstitutional discrimination. Osborn v. Leach, 135 N. C. 626, 47 S. E. 811. A recovery of actual damages does not abridge the freedom of the press, as inhibited by our Constitution. Art. 1, sec. 20. Pentuff v. Park, 194 N. C. 146, 138 S. E. 616, 53 A. L. R. 625.

Letter as Sufficient Notice.—A letter written by plaintiff and delivered, postpaid, with a demand for a categorical retraction and apology, for a clearly specified article, in which the alleged false and defamatory statements are plainly indicated, is a sufficient notice in writing as required by section 1-585. Williams v. Smith, 134 N. C. 249, 46 S. E. 502.

Same.—Same.—Amendment.—Where a demurrer was sustained to a complaint for libel against a newspaper because it failed to appear that notice of the action had been given, the trial court may permit an amendment showing cause why such notice was not given. Osborn v. Leach, 135 N. C. 626, 47 S. E. 811.

Same.—Same.—Amendment.—In an action against a newspaper for libel, the failure of the complaint to allege the giving of five days' notice renders it demurrable. Osborne v. Leach, 135 N. C. 628, 47 S. E. 811.

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Letter as Sufficient Notice.—A letter written by plaintiff and delivered, postpaid, with a demand for a categorical retraction and apology, for a clearly specified article, in which the alleged false and defamatory statements are plainly indicated, is a sufficient notice in writing as required by section 1-585. Williams v. Smith, 134 N. C. 249, 46 S. E. 502.

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When Malice May Not Be Inferred by Jury.—Malice may not be inferred by the jury from a false publication when defendant's uncontradicted evidence rebuts the presumption by showing that the publication was made in good faith through error, and that a correction and retraction was published upon defendant's ascertaining the facts. Lay v. Gazette Pub. Co., 209 N. C. 134, 183 S. E. 416.

Defendant's Pleading.—In an action for libel against a newspaper, the paper having pleaded a retraction of the publication, it is necessary for the defendant to show that the publication was made in good faith, and with reasonable ground to believe it to be true, in order to relieve the paper from punitive damages. Osborn v. Leach, 135 N. C. 628, 47 S. E. 811.

§ 99-3. Anonymous communications.—The two preceding sections shall not apply to anonymous communications and publications. (Rev., s. 2014; 1901, c. 557, s. 3; C. S. 2434.)

An article signed "Smith" is not an anonymous publication under this section. Williams v. Smith, 134 N. C. 249, 46 S. E. 502.

§ 99-4. Charging innocent woman with incontinency.—Whereas doubts have arisen whether actions of slander can be maintained against persons who may attempt, in a wanton and malicious manner, to destroy the reputation of innocent and unprotected women, whose very existence in society depends upon the unsullied purity of their character, therefore any words written or spoken as affecting her reputation when the slanderous words are explicit and positive. Bowden v. Bailes, 101 N. C. 612, 616, 8 S. E. 342.

Meaning of "Innocent Woman."—There is a manifest reason why the words "an innocent woman," in sec. 14-46 and "innocent and unprotected woman" in this section, should be construed to mean innocent of illicit sexual intercourse, as affecting her reputation when the slanderous words are spoken, for the purpose of those sections is to charge women who, however imprudent they may have been in other respects, have not so far "st早晚ed to folly" as to surrender their chastity and become incontinent, or who have regained their characters. State v. Ferguson, 107 N. C. 841, 849, 12 S. E. 574; State v. Johnson, 182 N. C. 883, 886, 109 S. E. 786.

Must Charge Adultery or Fornication.—Words which impugne to a female a wanton and lascivious disposition only are not actionable. Lucas v. Nichols, 52 N. C. 32.

The words, which amount to a charge of incontinency, must import not merely a lascivious disposition, but the criminal act of adultery or fornication. McBrayer v. Hili, 26 N. C. 136.

Same.—May Be Question for Jury.—When the words are ambiguous and admit of a slanderous interpretation, it becomes a question for the jury to determine whether they amounted to the slanderous charge in the reasonable apprehension of the hearers. State v. Howard, 169 N. C. 312, 84 S. E. 807.

Where a telegraph company sends a message containing words that amount to a charge of incontinency against a woman, demurrer to the evidence, as in case of nonsuit, is properly denied. Parker v. Edwards, 222 N. C. 75, 21 S. E. (2d) 876.

Complaint.—It is not necessary that the complaint should allege that the words were "wantonly and maliciously" uttered. Bowden v. Bailes, 101 N. C. 612, 8 S. E. 342.

Action by Husband.—An action by a husband for slander of his wife, the wife not being a party and the complaint not alleging no special damage to the husband, shall be dismissed on motion of the defendant, or ex mero motu, for failure of the complaint to state a cause of action. Harper v. Pinkston, 112 N. C. 293, 17 S. E. 161.

Evidence.—Testimony by the witnesses of statements made by defendant charging in effect that plaintiff had been guilty of illicit sexual intercourse, is competent although in the exact words alleged in the bill of particulars, it being sufficient if the testimony is confined in substance to the bill of particulars. Bryant v. Reedy, 214 N. C. 748, 200 S. E. 896.

Damages.—In an action by a woman for slander, for words alleged to have been spoken, amounting to a charge of incontinency, the plaintiff may, in the absence of proof of actual physical damages, recover compensatory damages; and upon proof that the words were spoken with malice, or that the conduct of the defendant was marked by gross and willful wrong, or was oppressive, vindictive damages may be awarded. Bowden v. Bailes, 101 N. C. 612, 8 S. E. 342.

Words charging an innocent woman with conduct amounting to incontinency are actionable per se, under this section, and will import not merely a lascivious disposition, but the criminal act of adultery and fornication, or that the conduct of the defendant was marked by gross and willful wrong, or was oppressive, vindictive damages may be awarded. Bowden v. Bailes, 101 N. C. 612, 8 S. E. 342.

As under this section the charge of incontinency made against an innocent woman, in whatever words written or spoken, conveyed to the hearer, is per se actionable, their utterance must be followed by the same consequence as to damages as the publishing of other defamatory imputations. Bowden v. Bailes, 101 N. C. 612, 616, 8 S. E. 342.

Examples.—Sec. 14-48 is the criminal statute making it a misdemeanor to slander an innocent woman. The word is similar to this section and the following expressions which were held to amount to a charge of incontinency, though decided in criminal cases, apply equally here. Sowers v. Sowers, 87 N. C. 303.

Calling an innocent woman a "d—d whore," in a loud and angry manner in the hearing alone of the wife of the speaker, is a charge of incontinency within the meaning of the statute. State v. Shoemaker, 101 N. C. 690, 8 S. E. 332.

To say of a woman, that "she was kept by a man" is actionable as a slander under our act of assembly. McBrayer v. Hili, 26 N. C. 136.

Same.—Not Sufficient.—The words that a woman "looked like a woman who had miscarried," do not, per se imply a charge of incontinency. State v. Benton, 117 N. C. 788, 790, 21 S. E. 452.

Calling a woman a "damned bitch" held not a charge of incontinency. State v. Harwell, 129 N. C. 595, 553, 40 S. E. 48.

Chapter 100. Monuments, Memorials and Parks.


Sec. 100-1. Memorials commission created; members; officers; quorum, etc.—A memorials commission is hereby created, to consist of the following officials, ex-officio: The governor of North Carolina, the secretary of the North Carolina historical commission, the head of the art department of the University of North Carolina at Chapel Hill, the head of the history department of the University of North Carolina at Chapel Hill, and the head of the department of architecture of the North Carolina State College of Agriculture and Engineering. The memorials commission shall have the power to adopt its own rules and to elect such officers from its own members as may be deemed proper. Three commissioners shall constitute a quorum. The members shall serve without compensation. (1941, c. 341, s. 1.)

Sec. 100-2. Approval of memorials before acceptance by state; regulation of existing memorials, etc.; “work of art” defined; highway markers.—No memorial or work of art shall hereafter become the property of the state by purchase, gift or otherwise, unless such memorial or work of art or a design of the same, together with the proposed location of the same, shall first have been submitted to and approved by said memorials commission; nor shall any memorial or work of art, until so submitted and approved, be contracted for, placed in or upon or allowed to extend over any property belonging to the state. No existing memorial or work of art owned by the state shall be removed, relocated, or altered in any way without approval of the memorials commission. The term “work of art” as used in this section shall include any painting, portrait, sculpture, monument, tablet, fountain, or other article or structure of a permanent character intended for decoration or commemoration. This section, however, shall not apply to markers set up by the state highway and public works commission in cooperation with the department of conservation and development and the state historical commission as provided by chapter one hundred and ninety-seven of the Public Laws of one thousand nine hundred and thirty-five. (1941, c. 341, s. 2.)

Sec. 100-3. Approval of design, etc., of certain bridges and other structures.—No bridge, arch, gate, fence or other structure intended primarily for ornamental or memorial purposes and which is paid for either wholly or in part by appropriation from the state treasury, or which is to be placed on or allowed to extend over any property belonging to the state, shall be begun unless the design and proposed location thereof shall have been submitted to said memorials commission and approved by it. Furthermore, no existing structures of the kind named and described in the preceding part of this section owned by the state, shall be removed or remodeled without submission of the plans therefor to the commission and approval of said plans by the commission. This section shall not be construed as amending or repealing chapter one hundred and ninety-seven of the Public Laws of one thousand nine hundred and thirty-five. (1941, c. 341, s. 3.)

Sec. 100-4. Governor to accept works of art approved by commission.—The governor of North Carolina is hereby authorized to accept, in the name of the state of North Carolina, gifts to the state of works of art as defined in § 100-2. But no work of art shall be so accepted unless and until the same shall have been first submitted to said memorials commission and by it judged worthy of acceptance. (1941, c. 341, s. 4.)

Sec. 100-5. Duties as to buildings erected or remodeled by state.—Upon request of the governor and the board of public buildings and grounds, said memorials commission shall act in an advisory capacity relative to the artistic character of any building constructed, erected, or remodeled by the state. The term “building” as used in this section shall include structures intended for human occupation, and also bridges, arches, gates, walls, or other permanent structures of any character not intended primarily for purposes of decoration or commemoration. (1941, c. 341, s. 5.)

Sec. 100-6. Disqualification to vote on work of art, etc.; vacancy.—Any member of said memorials commission who shall be employed by the
§ 100-7. Construction.—The provisions of this article shall not be construed to include exhibits of an educational nature arranged by museums or art galleries administered by the state or any of its agencies or institutions, or to prevent the placing of portraits of officials, officers, or employees of the state in the offices or buildings of the departments, agencies, or institutions with which such officials, officers, or employees are or have been connected. But upon request of such museums or agencies, said memorials commission shall act in an advisory capacity as to the artistic qualities and appropriations of memorial exhibits or works of art submitted to it. (1941, c. 341, s. 7.)

§ 100-8. Memorials to persons within twenty-five years of death; acceptance of commemorative funds for useful work.—No monument, statue, tablet, painting, or other article or structure of a permanent nature intended primarily to commemorate any person or persons shall be purchased or persons by providing funds for educational, health, charitable, or other useful work. The agency or institution to which such funds are offered for memorial enterprises shall exercise its discretion as to the acceptance and expenditure of such funds. (1941, c. 341, s. 8.)

Art. 2. Memorials Financed by Counties and Cities.

§ 100-9. County commissioners may protect monuments.—When any monument has been or shall hereafter be erected to the memory of our Confederate dead or to perpetuate the memory and virtues of our distinguished dead, if such monument is erected by the voluntary subscription of the people and is placed on the courthouse square, the board of county commissioners of such county are permitted to expend from the public funds of the county an amount sufficient to erect a substantial iron fence around such monument in order that the same may be protected. (Rev. s. 3928; 1905, c. 457; C. S. 6934.)

Cross Reference.—As to criminal liability for defacing or removing monuments, see § 14-148.

§ 100-10. Counties, cities, and towns may contribute toward erection of memorials.—Any county, city, or town by resolution first adopted by its governing body may become a member of any memorial association or organization for perpetuating the memory of the soldiers and sailors of North Carolina who served the United States in the great world war, or who fought in the war between the states, and may subscribe and pay toward the cost of the erection of any memorial to the memory of such soldiers and sailors such sums of money as its governing body may determine, and may be represented in such association or organization by such persons as its governing body may select. Any contribution so made shall be paid out of the general fund of such county, city, or town making same, on such terms as may be agreed upon by its governing body, and the officers having the control and management of the association or organization to which subscription and contributions are made. (1919, c. 21, ss. 1, 2, 3; 1924, c. 200; C. S. 6938.)

Editor's Note.—By amendment Public Laws 1923, ch. 200, there was added to this section the provision for perpetuating the memory of the soldiers and sailors of the Civil War.


§ 100-11. Duties.—The Board of Conservation and Development shall have complete control, care, protection and charge of that part of Mitchell's park acquired by the state. (1919, c. 316, s. 3; 1915, c. 76; 1921, c. 232, s. 1; 1925, c. 123, s. 23; C. S. 6940.)

Editor's Note.—Public Laws 1921, c. 222, made the North Carolina geological and economic survey and the geological board the successor of the Mount Mitchell Park Commission and the Mitchell Peak Park Commission. The survey and board were in turn replaced by the board of conservation and development by authority of Public Laws 1923, c. 122.

§ 100-12. Roads, trails, and fences authorized; protection of property.—The Board of Conservation and Development is authorized and empowered to enter upon the land hereinbefore referred to, and to build a fence or fences around the same, also roads, paths, and trails and protect the property against trespass and fire and injury of any and all kinds whatsoever; cut wood and timber upon the same, but only for the purpose of protecting the other timber thereon and improving the property generally. (1919, c. 316, s. 5; 1921, c. 222, s. 1; 1925, c. 122, s. 23; C. S. 6942.)

§ 100-13. Fees for use of improvements; fees for other privileges; leases; rules and regulations.—The Board of Conservation and Development is further authorized and empowered to charge and collect fees for the use of such improvements as have already been constructed or may hereafter be constructed, on the park, and for other privileges connected with the full use of the park by the public; to lease sites for camps, houses, hotels, and places of amusement and business; and to make and enforce such necessary rules and regulations as may best tend to protect, preserve, and increase the value and attractiveness of the park. (1921, c. 222, s. 2; 1925, c. 122, s. 23; C. S. 6942(a).)

§ 100-14. Use of fees and other collections.—All fees and other money collected and received by the Board of Conservation and Development in connection with its proper administration of Mount Mitchell state park shall be used by said board for the administration, protection, improvement, and maintenance of said park. (1921, c. 222, s. 3; 1923, c. 122, s. 23; C. S. 6942(b).)

§ 100-15. Annual reports.—The Board of Conservation and Development shall make an annual report to the governor of all money received and
§ 101-1. Legislature may regulate change by general but not private law.

§ 101-2. Procedure for changing name; petition; notice.


§ 101-4. Proof of good character to accompany petition.

§ 101-5. Clerk to order change; certificate and record.

§ 101-6. Effect of change; only one change.
Chapter 102. Official Survey Base.

§ 102-1. Name and description. — The official survey base for the state of North Carolina shall be a system of plane coordinates to be known as the "North Carolina Coordinate System," said system being defined as a Lambert conformal projection of Clarke's spheroid of one thousand eight hundred sixty-six, having a central meridian of 79°—00' west from Greenwich and standard parallels of latitude of 34°—20' and 36°—10' north of the equator, along which parallels the scale shall be exact. All coordinates of the system are expressed in feet, the x coordinate being measured easterly along the grid and the y coordinate being measured northerly along the grid. The origin of the coordinates is hereby established on the meridian 79°—00' west from Greenwich at the intersection of the parallels 33°—45' north latitude, such origin being given the coordinates x = 2,000,000 feet, y = 0 feet. The precise position of said system shall be as marked on the ground by triangulation or traverse stations or monuments established in conformity with the standards adopted by the United States coast and geodetic survey for first- and second-order work; whose geodetic positions have been rigidly adjusted on the North American datum, whose plane coordinates have been computed on the system defined. (1939, c. 163, s. 1.)

§ 102-2. Physical control. — Any triangulation or traverse station or monument established as described in § 102-1 may be used in establishing a connection between any survey and the above-mentioned system of rectangular coordinates. (1939, c. 163, s. 2.)

§ 102-3. Use of name. — The use of the term "North Carolina Coordinate System" on any map, report, or survey, or other document, shall be limited to coordinates based on the North Carolina coordinate system as defined in this chapter. (1939, c. 163, s. 3.)

§ 102-4. Damaging, defacing, or destroying monuments. — If any person shall willfully damage, deface, destroy, or otherwise injure a station, monument or permanent mark of the North Carolina coordinate system, or shall oppose any obstacles to the proper, reasonable, and legal use of any such station or monument, such person shall be guilty of a misdemeanor, and shall be liable to fine or imprisonment at the discretion of the court. (1939, c. 163, s. 4.)

§ 102-5. Limitations of use. — No coordinates based on the North Carolina coordinate system purporting to define the position of a point on a land boundary shall be presented to be recorded in public land records or deed records unless such point in the survey is within one-half mile of a station or monument of the North Carolina coordinate system: Provided, that the administrative agency for said system may, by rules and regulations, increase or decrease such limiting distance for the whole state, or any area or areas thereof. (1939, c. 163, s. 5.)

§ 102-6. Legality of use in descriptions. — For the purpose of describing the location of any survey station or land boundary corner in the state of North Carolina, it shall be considered a complete, legal, and satisfactory description to define the location of such point or points by means of coordinates of the North Carolina coordinate system as described herein, and within the limitations of § 102-5. (1939, c. 163, s. 6.)

§ 102-7. Use not compulsory. — Nothing contained in this chapter shall be interpreted as requiring any purchaser or mortgagee to rely wholly on a description based upon the North Carolina coordinate system. (1939, c. 163, s. 7.)

§ 102-8. Administrative agency. — The administrative agency of the North Carolina coordinate system shall be the North Carolina department of conservation and development, through its appropriate division, hereinafter called the "Agency." (1939, c. 163, s. 8.)

§ 102-9. Duties and powers of the agency. — It shall be the duty of the agency to make or cause to be made from time to time such surveys and computations as are necessary to further or complete the North Carolina coordinate system. The agency shall endeavor to carry to completion as soon as practicable the field monumentation and office computations of the coordinate system. For the purpose of this work the agency shall have the power to accept grants for the specific purpose of carrying on the work; to coordinate, organize, and direct any federal or other assistance which may be offered to further the work; to cooperate with any individual, firm, company, public or private agency, state or federal agencies, in the prosecution of the work; to enter into contracts or cooperative agreements with other state or federal agencies in promoting the work of the coordinating system. The agency shall further have the power to adopt necessary rules, regulations, and specifications relating to the establishment and use of the coordinate system as defined in this chapter, consistent with the standards and practice of the United States coast and geodetic survey. (1939, c. 163, s. 9.)

§ 102-10. Prior work. — The system of stations, monuments, traverses, computations, and other work which has been done or is under way in North Carolina by the so-called North Carolina geodetic survey, under the supervision of the United States coast and geodetic survey, is, where consistent with the provisions of this chapter, hereby...
made a part of the North Carolina coordinate system. The surveys, notes, computations, monuments, stations, and all other work relating to the coordinate system, which has been done by said North Carolina geodetic survey, under the supervision and in cooperation with the United States coast and geodetic survey and federal relief agencies, hereby are placed under the direction of, and shall become the property of, the administrative agency, subject to the agreement of the federal Works Progress Administration. (1939, c. 163, s. 10).

§ 103-1. Work in ordinary calling on Sunday forbidden.—On the Lord's day, commonly called Sunday, no tradesman, artificer, planter, laborer, or other person shall, upon land or water, do or exercise any labor, business or work, of his ordinary calling, works of necessity and charity alone excepted, nor employ himself in hunting, fishing or fouling, nor use any game, sport or play, upon pain that every person so offending, being of the age of fourteen years and upwards, shall forfeit and pay one dollar. (Rev., s. 2836; Code, s. 3789; R. C. c. 115; 1714, c. 30, s. 2; C. S. 3935.)


Cross References.—As to Sunday fishing, see § 113-247. As to catching oysters on Sunday, see § 113-216. As to unloading oysters on Sunday, see § 113-211.

Editor's Note.—The theory is often advanced that Christianity is a part of the law of the land, and, hence, independent of any statute, contracts made on Sunday are illegal, and that the statute forbidding labor on Sunday was enacted solely for religious reasons. However, to show the fallacy in this argument it need only be stated. Under our constitution, both State and Federal, no act can be required or forbidden by statute because such act may be in accordance with or opposed to the religious views of anyone. If, therefore, the cessation of labor or the prohibition or performance of any act were provided by statute for religious reasons, the statute could not be maintained.

Some economic or political ground must be found upon which to sustain the Sunday laws, because religious grounds will avail us nothing. Apparently the only ground upon which the “Sunday laws” can be sustained is that, in pursuance of the police power, the State can and ought to require a cessation of labor upon specified days, to protect the masses from being worn out by incessant and unremitting toil. If such days as the Legislature may care to designate to observe a cessation of toil for religious reasons, it is not an objection but a convenience. For a complete review of the Sunday laws, see Rodman v. Robinson, 134 N. C. 503, 507, 47 S. E. 19.

Acts Which May Be Lawfully Done on Sunday.—It is said in State v. Ricketts, 74 N. C. 187, 192, “In this State every act may lawfully be done on Sunday which may lawfully be done on any other day, unless there is some statute forbidding it to be done on that day.” Rodman v. Robinson, 134 N. C. 503, 507, 47 S. E. 19.

Keeping “Open Shop” on Sunday.—This section does not make keeping open shop and selling goods on Sunday an indictable offense, and an ordinance of a town, passed in pursuance of this section, for the better government of the town, prohibiting keeping open stores and other places of business on Sunday for the purpose of buying and selling, excepting ice, drugs and medicines, and permitting drug stores to sell soft drinks, etc., within certain hours, is not objectionable on the ground that the offense is covered by this section for the ordinance is passed under the police powers of the town, its violation is indictable, and in furtherance of local government, which the statute contemplates. State v. Medlin, 170 N. C. 682, 86 S. E. 597.

It is against the public policy of this State that one should pursue his ordinary business calling on Sunday, and such may not only be regulated by town ordinances, but altogether prohibited on that day; and an ordinance of this kind is not rendered invalid, as unduly discriminative, by reason of an exception in favor of drug stores or on account of this section. State v. Burbage, 172 N. C. 876, 89 S. E. 795.

Same—Powers of Towns—Commissioners of a town may, by valid ordinance, prohibit the opening of places of business in the town on Sunday, excepting drug stores. State v. Medlin, 170 N. C. 682, 86 S. E. 597.

Power to Prohibit Labor—Public and Private.—The Legislature has power to prohibit labor of this kind on Sunday, on the ground of public decency. But when it goes further and prohibits labor which is done in private, the power is exceeded and the statute is void. Rodman v. Robinson, 134 N. C. 503, 507, 47 S. E. 19.

Sunday Contracts.—“In Melvin v. Easley, 52 N. C. 356, it was conceded by the whole court . . . that a contract made on Sunday was illegal, and could not support an action.” Covington v. Threadgill, 88 N. C. 166, 189.

“In the language of Caldwell, J., in Swann v. Swann, 21 Fed., at p. 105, It would be downright hypocrisy for a court to affect to believe that the moral sense of the community would be shocked by compelling a man to pay a note given for an honest debt because it was executed on the Lord’s Day.” And the same is true of the enforcement of any contract made on Sunday which may lawfully be done on Sunday. Riddle v. Whisnant, 220 N. C. 131, 134, 16 S. E. (2d) 698.

Cited in Riddle v. Whisnant, 220 N. C. 131, 134, 16 S. E. (2d) 698.
§ 103-2. Hunting or going armed on Sunday.—If any person shall, except in defense of his own property, hunt on Sunday with a dog, or shall be found off his premises on Sunday, having with him a shotgun, rifle or pistol, he shall be guilty of a misdemeanor, and pay a fine not exceeding fifty dollars, or be imprisoned not exceeding thirty days. (Rev. s. 3842; Code, s. 3783; 1865-6, c. 18, ss. 1, 2; C. S. 3936.)

Local Modification.—Perquinans: 1935, c. 145.

Creates Two Offenses.—The section creates two offenses: 1st, Disputing the Sabbath with a dog, 2d, Being found off one's premises having a shotgun, rifle or pistol. State v. Howard, 67 N. C. 24.

§ 103-3. What process executed on Sunday.—It shall not be lawful for any sheriff, constable, or other officer to execute any summons, capias, or other process on Sunday, unless the same be issued for treason, felony or misdemeanor. (Rev. s. 2837; Code, s. 928; R. C., c. 31, s. 54; 1777, c. 118, s. 6; C. S. 3958.)

Cross Reference.—As to prohibition against arrest in civil cases on Sunday, see § 1-410.

Execution of Writ or Other Process.—It is unlawful for any officer to execute any writ or other process on Sunday. Dervies & Co. v. Summit, 86 N. C. 126.

Summons in a civil action served on Sunday is invalid and does not bind defendant, and the status of the process is the same as if service had not been made. Mintz v. Frink, 217 N. C. 101, 6 S. E. (2d) 804.


§ 103-4. Dates of public holidays.—The first day of January, the ninetieth day of January, the twenty-second day of February, Easter Monday, the twelfth day of April, the tenth day of May, the twentieth day of May, the thirtieth day of May, the fourth day of July, the first Monday in September, the eleventh day of November, Tuesday after the first Monday in November when a general election is held, the day appointed by the governor as a Thanksgiving Day, and the twenty-fifth day of December of each and every year, are declared to be public holidays; and whenever any such holiday shall fall on Sunday, the next succeeding secular or business day shall be a public holiday. Provided, the last Monday in January, and the thirtieth day of May shall be holidays for all banks and National Banks only. (Rev. s. 2838; Code, s. 3784; 1891, c. 58; 1899, c. 410; 1901, c. 25; 1881, c. 294; 1907, c. 996; 1909, c. 888; 1919, c. 287; 1935, c. 212; C. S. 3959.)

Editor's Note.—Public Laws 1935, chapter 212, inserted "Easter Monday" and the "thirtieth day of May" in this section.

Effect of Legal Holiday Generally.—The statute declaring certain days public holidays, does not prohibit the pursuit of the usual avocations of citizens, nor public officers, or the courts from exercising their respective functions on those days. Provided, that the attendance of jurors, witnesses and suitors will not be enforced, and the courts will not sue out or enforce process on such days, yet the courts may lawfully proceed with the business before them. State v. Moore, 104 N. C. 740, 19 S. E. 183.

The section simply declares that certain days therein specified, in each year, shall be public holidays, and the following section prescribes when papers coming due on such days, or on Sunday, shall be payable. It does not purport, that persons or courts may not proceed with the business that ordinarily comes before them, especially when there is no objection. Id.

§ 108-5. Dates of public holidays. — The first Monday in January, is a public holiday; the last Monday in December, shall be a public holiday; the twenty-fifth day of December of each year, are declared to be public holidays; and the first Monday in November when a general election is held, shall be a public holiday. (Rev. s. 2839; Code, ss. 3784, 3785, 3786; 1899, c. 733, s. 194; C. S. 3960.)

Cross References.—As to computing time when last day falls on Sunday, see § 1-593. As to time negotiable instrument becoming due on Sunday is payable, see § 25-91.

A verdict entered on Sunday of a week set for the duration of a court, in the absence of an earlier adjournment, is legally entered. Taylor v. Ervin, 119 N. C. 274, 26 S. E. 839.

A notice to take a deposition on Sunday is not good, and a deposition taken on such notice must be rejected. Sloan v. Williford, 25 N. C. 307.
Chapter 104. United States Lands

Art. 1. Authority for Acquisition.

§ 104-1. Acquisition of lands for specified purposes authorized; concurrent jurisdiction reserved.

§ 104-2. Unused lands to revert to state.

§ 104-3. Exemptions of such lands from taxation.

§ 104-4. Conveyances of such lands to be recorded.

§ 104-5. Forest reserve in North Carolina authorized; powers conferred.

§ 104-6. Acquisition of lands for river and harbor improvements; reservation of right to serve process.

§ 104-7. Acquisition of lands for public buildings; cession of jurisdiction; exemption from taxation.


§ 104-9. Condition of consent granted in preceding section.

§ 104-10. Migratory bird sanctuaries or other wildlife refuges.

§ 104-11. Utilities Commission to secure rights-of-way, etc., for waterway improvements by use of federal funds.

from the date of the conveyance from the grantor. (Rev., s. 5426; Code, ss. 3080, 3083; 1899, c. 10; 1987, c. 136; 1870-1, c. 44, s. 5; C. S. 8054.)

§ 104-3. Exemption of such lands from taxation.—The lots, parcels, or tracts of land acquired under this chapter, together with the tenements and appurtenances for the purpose mentioned in this chapter, shall be exempt from taxation. (Rev., s. 5428; Code, s. 3082; 1870-1, c. 44, s. 3; C. S. 8055.)

§ 104-4. Conveyances of such lands to be recorded.—All deeds, conveyances, or other title papers for the same shall be recorded, as in other cases, in the office of the register of deeds of the county in which the lands so conveyed may lie, in the same manner and under the same regulations as other deeds and conveyances are now recorded, and in like manner be recorded a sufficient description by metes and bounds, courses and distances, of any tract or legal division of any public land belonging to the United States, which may be set apart by the general government for the purpose before mentioned, by an order, patent, or other official document or paper so describing such land. (Rev., s. 5429; Code, s. 3081; 1870-1, c. 44, s. 2; C. S. 8055.)

§ 104-5. Forest reserve in North Carolina authorized; powers conferred.—The United States is authorized to acquire by purchase, or by condemnation with adequate compensation, except as hereinafter provided, such lands in North
Carolina as in the opinion of the federal government may be needed for the establishment of a national forest reserve in that region. This consent is given upon condition that the state of North Carolina shall retain a concurrent jurisdiction with the United States in and over such lands so far that civil process in all cases, and such criminal process as may issue under the authority of the State of North Carolina shall retain concurrent jurisdiction with the United States in and over such lands so far that civil and criminal process of the courts of this state; but the jurisdiction so ceded shall continue no longer than the said United States shall own such lands. The jurisdiction ceded shall not vest until the United States shall have acquired title to said lands by purchase, condemnation, or otherwise.

So long as the said lands shall remain the property of the United States when acquired as aforesaid, and no longer, the same shall be and continue exempt and exonerated from all state, county, and municipal taxation, assessment, or other charges which may be levied or imposed under the authority of this state. (1907, c. 25; C. S. 8059.)

§ 104-8. Further authorization of acquisition of land.—The United States is hereby authorized to acquire lands by condemnation or otherwise in this State for the purpose of preserving the navigability of navigable streams and for holding and administering such lands for National Park purposes: Provided, that this section and § 104-9 shall in no wise affect the authority conferred upon the United States and reserved to the State in §§ 104-5 and 104-6. (1925, c. 153, s. 1.)

§ 104-9. Condition of consent granted in preceding section.—This consent is given upon condition that the State of North Carolina shall retain a concurrent jurisdiction with the United States in and over such lands so far that civil process in all cases, and such criminal process as may issue under the authority of the State of North Carolina against any person charged with the commission of any crime, without or within said jurisdiction, may be executed thereon in like manner as if this consent had not been given. (1925, c. 152, s. 2.)

§ 104-10. Migratory bird sanctuaries or other wild life refuges.—The United States is authorized to acquire by purchase, or by condemnation with adequate compensation, such lands in North Carolina as in the opinion of the Federal Government may be needed for the establishment of one or more migratory bird sanctuaries or other wild life refuges. This consent is given upon condition that the State of North Carolina shall retain a concurrent jurisdiction with the United States in and over such lands so far that civil process in all cases, and such criminal process as may issue under the authority of the State of North Carolina against any person charged with the commission of any crime without or within said jurisdiction, may be executed therein in like manner as if this consent had not been given. (1925, c. 152, s. 2.)
§ 104-11. Utilities Commission to secure rights-of-way, etc., for waterway improvements by use of federal funds.—Hereafter whenever any waterway or proceeds through condemnation or otherwise proposed waterway improvement in North Carolina by the use of federal funds is provided for upon condition that the state or locality shall furnish rights-of-way, permits for the dumping of dredged material, or furnish or do any other thing in connection with the proposed waterway improvement, the Utilities Commission is authorized and empowered to represent the State or locality in such matter of securing the rights-of-way, permits for the dumping of dredged material, or other things so required in connection with such waterway improvement; and in prosecuting such undertaking, the Utilities Commission may follow the same procedure provided in article two for the acquisition of rights-of-way for the intercoastal waterway from the Cape Fear river to the South Carolina line: Provided, however, that said Utilities Commission is not hereby authorized to enter into obligation or contract for the payment of any money or proceeds through condemnation or otherwise without the express approval of the governor and council of state. (1935, c. 210; 1937, c. 434.)

Art. 2. Inland Waterway.

§ 104-12. Acquisition of land for inland waterway from Cape Fear River; grant of state lands.—For the purpose of aiding in the construction of the proposed inland waterway by the United States from the Cape Fear River at Southport to the North Carolina-South Carolina State line, the Secretary of State is hereby authorized to issue a certificate for the construction of such inland waterway from the Cape Fear River to the South Carolina line. Provided, however, that said certificate be issued to a private person, company or corporation, railroad company, street railway company, telephone or telegraph company, or other public service corporation or shall have been donated or condemned for any public use by any political sub-division of the State, or if it may be necessary, for the purpose of obtaining the proper title to any lands, the title to which has heretofore been vested in the State Board of Education, the Governor of the State shall execute a deed for the same to the Secretary of State for the purposes of this article, and in all instances, the general and special benefits to the owner thereof shall be assessed as offsets against the damages to such property or lands.

As such condemnation proceedings might result in delay in the acquiring of title to all parts of the right-of-way and in the construction of the said inland waterway by the United States, said Utilities Commission is authorized to enter into any condemnation proceedings and take possession of the same at the time hereinafter provided as needed for this use in behalf of the State or the United States Government for the purposes herein set out, prior to the bringing of the proceeding for condemnation and prior to the payment of the money for such land or property under any judgment in condemnation. In the event the owner or owners shall appeal from the report of the commissioners appointed in any condemnation proceeding hereunder, it shall not be necessary for said commission, acting in behalf of the United States, as President thereof, and the Superintendent of Public Instruction as Secretary, are hereby authorized and required to execute proper conveyance to the United States of America for said marshlands or sound lands, free of cost, but to the State of North Carolina, the said grant to issue upon a certificate furnished to said Board of Education by the Secretary of State, or by any authorized officer of the said Marshlands, or sound lands, the said grant to issue upon a certificate furnished to the Secretary of State, or by any authorized officer of the said land so formed shall become the property of the State, as President thereof, and the Superintendent of Public Instruction as Secretary, are hereby authorized and required to execute proper conveyance to the United States of America for said marshlands or sound lands, free of cost, but to the State of North Carolina, the said grant to issue upon a certificate furnished to said Board of Education by the Secretary of State, or by any authorized officer of the said land so formed shall become the property of the State.
§ 104-14. Use declared paramount public purpose.—In such condemnation proceedings the uses for which such land or property is condemned are hereby declared to be for a purpose paramount to all other public uses, and the fact that any portion of it has heretofore been condemned by a railroad company, a street railway company, or any other public service corporation, or by any political subdivision of the State of North Carolina, for public uses, or has been conveyed by any person or corporation for any such public uses, or vested in the State Board of Education, or by any other act dedicated to any public use, shall in no way affect the right of the State of North Carolina, or the United States Government, to proceed and condemn such land and property as hereinafter provided. (1931, c. 2, s. 3.)

§ 104-15. Method of payment of expenses and awards.—Whenever said Commission has agreed with the owner of any such land or property as to the purchase price thereof, or the damage for the construction of the inland waterway has finally been determined in any condemnation proceeding necessary to secure such land or property, the said Commission is hereby authorized and directed to pay all of said sums and other expenses incident thereto by proper warrant upon the sum which may be appropriated for said purpose, and all such sums shall constitute and remain a fixed and valid claim against the State of North Carolina until paid and satisfied in full. (1931, c. 2, s. 4.)

§ 104-16. State and United States may enter upon lands for survey, etc.—For the purpose of determining the lands necessary for the uses herein set out, the Utilities Commission or the United States Government, or the agents of either, shall have the right to enter upon any lands along the general line of the right-of-way in this article specified, and make such surveys, and do such other acts as in their judgment may be necessary for the purpose of definitely locating the specific lines of said right-of-way and the lands required for said purposes, and there shall be no claim against the State of North Carolina or the United States for such acts as may be done in making said surveys. (1931, c. 2, s. 5; 1937, c. 434.)

§ 104-17. Maintenance of bridges over waterway.—The State Highway and Public Works Commission or the road governing body of any political subdivision of the State of North Carolina is hereby authorized and directed to construct, maintain and operate in perpetuity, all bridges over the waterway without cost to the United States. (1931, c. 2, s. 7; 1933, c. 172, s. 17.)

§ 104-18. Concurrent jurisdiction over waterway.—The State of North Carolina retains concurrent jurisdiction with the United States over any lands acquired and held in pursuance of the provisions of this chapter, so far as that all civil and criminal process issued under authority of any law of this State may be executed in any part of the premises so acquired for such inland waterway, or for the buildings or constructions thereon erected for the purposes of such inland waterway. (1931, c. 2, s. 8.)

§ 104-19. Acquisition of land for inland waterway from Beaufort Inlet; grant of state lands.—For the purpose of aiding in the construction of the proposed inland waterway by the United States from Beaufort Inlet in the State of North Carolina to the Cape Fear River, the secretary of State is hereby authorized to issue to the United States of America a grant to the land located within said inland waterway, right-of-way, which is to be one thousand feet wide, in so far as such land is subject to grant by the State of North Carolina, the said grant to issue upon a certificate furnished to the Secretary of State by the Secretary of War, or by any authorized officer of the corps of engineers of the United States Army, or by any other authorized official, exercising control over the
construction of the said waterway. Whenever in the construction of such inland waterway within this State, lands theretofore submerged shall be raised above the water by the deposit of excavated material, the land so formed shall become the property of the United States if within the limits of said inland waterway, right-of-way, except one thousand feet, and the Secretary of State shall hereby be authorized to grant to the land so formed within the limits above specified, the grant to issue upon a certificate furnished to the Secretary of State by some authorized official of the United States, as above provided. If said lands so required for the inland waterway right-of-way shall be marshlands, the title to which has heretofore been vested in the State Board of Education, the Governor of the State, as President thereof, and the Superintendent of Public Instruction as Secretary, are hereby authorized and required to execute a proper conveyance to the United States of America for said marshlands, free of cost, both to the State and to the United States Government, upon a certificate furnished to said Board of Education by the Secretary of War, or by any authorized officer of the corps of engineers of the United States Army, or by any other authorized official exercising control over the construction of the said inland waterway. (1927, c. 44, s. 1.)

§ 104-20. Utilities Commission to secure right-of-way; condemnation by United States.—If the title to any part of the lands required by the United States Government for the construction of such inland waterway from Beaufort Inlet to the Cape Fear River shall be in any private person, company or corporation, railroad company, street railway company, telephone or telegraph company, or other public service corporation, or shall have been donated or condemned for any public use by any political subdivision of the State or if it may be necessary, for the purpose of obtaining the proper title to any lands, the title to which has heretofore been vested in the State Board of Education, then the Utilities Commission in the name of the State, hereby empowered, acting for and in behalf of the State of North Carolina, to secure a right-of-way one thousand feet, and the Secretary of State is hereby authorized to condemn and use such public uses, or vested in the State Board of Education, shall in no way affect the right of the Utilities Commission in the name of the State of North Carolina, the State of North Carolina, or the United States Government, to deposit the money assessed by said Commissioners with the clerk.

Whenever proceedings in condemnation are instituted in pursuance of the provisions of this section, the said Commission upon the filing of the petition or petitions in such proceedings, shall have the right to take immediate possession on behalf of the State of such lands or property to the extent of the interest to be acquired and the Governor and Secretary of State shall thereupon execute a deed to the United States and said lands or property may then be appropriated and used by the United States for the purposes aforesaid. Provided, that in every case the proceedings in condemnation shall be diligently prosecuted to final judgment in order that the just compensation to which the owners of the property are entitled may be ascertained and when so ascertained and determined such compensation shall be promptly paid as hereinafter in this act provided.

If the United States Government shall so determine, it is hereby authorized to condemn and use all lands and property which may be needed for the purposes herein set out and which is specifically described and set out in the preceding paragraphs, under the authority of said United States Government, and according to the provisions existing in the federal statutes for condemning lands and property for the use of the United States Government. In case the United States Government shall so condemn said land and property and the said Utilities Commission is hereby authorized to pay all expenses of the condemnation proceedings and any award that may be made thereunder, out of the money which may be appropriated for said purposes. (1927, c. 44, s. 2; 1937, c. 434.)

§ 104-21. Use declared paramount public purpose.—In such condemnation proceedings the uses for which such land or property is condemned are hereby declared to be for a purpose paramount to all other public uses, and the fact that any portion of it has heretofore been condemned by a railroad company, street railway company, telephone or telegraph company, or other public service corporation, or by any political subdivision of the State of North Carolina, for public uses, or has been conveyed by any person or corporation for any such public uses, or vested in the State Board of Education, shall in no way affect the right of the State of North Carolina, or the United States [971]
Government, to proceed and condemn such land and property as hereinbefore provided. (1927, c. 44, s. 3.)

§ 104-22. Method of payment of expenses and awards.—Whenever said commission has agreed with the owner of any such land or property as to the purchase price thereof, or the damage for the construction of the inland waterway has finally been determined in any condemnation proceeding necessary to secure such land or property, the said commission is hereby authorized and directed to pay all of said sums and other expenses incident thereto by proper warrant upon the sum which may be appropriated for said purpose, and all such sums shall constitute and remain a fixed and valid claim against the State of North Carolina until paid and satisfied in full. (1927, c. 44, s. 4.)

§ 104-23. Maintenance of bridges over waterway.—The State Highway and Public Works Commission or the road governing body of any political subdivision of the State of North Carolina is hereby authorized and directed to take over and maintain and operate in perpetuity, by contract with the United States Government, if necessary, or otherwise, any bridge or bridges which may be subject to their respective control and which the United States Government may construct across said inland waterway. (1927, c. 44, s. 6; 1929, c. 4, s. 7.)

§ 104-24. Concurrent jurisdiction over waterway.—The State of North Carolina retains concurrent jurisdiction with the United States over any lands acquired and held in pursuance of the provisions of this chapter, so far as that all civil and criminal process issued under authority of any law of this State may be executed in any part of the premises so acquired for such inland waterway, or for the buildings or constructions thereon erected for the purposes of such inland waterway. (1927, c. 44, s. 7.)

§ 104-25. Lands conveyed to United States for inland waterway.—For the purpose of aiding in the construction of a proposed inland waterway by the United States from the city of Norfolk, in the state of Virginia, to Beaufort inlet, in the state of North Carolina, the secretary of state is hereby authorized to issue to the United States of America a grant to the land located within a distance of one thousand feet on either side of the center of the said inland waterway, in so far as such land is subject to grant by the state of North Carolina, the said grant to issue upon a certificate furnished to the secretary of state by the secretary of war, or by any authorized officer of the corps of engineers of the United States army, or by any other authorized official, exercising control of the construction of the said waterway.

Wherever, in the construction of the said inland waterway, lands theretofore submerged shall be raised above the water by deposit of excavated material, the lands so formed shall become the property of the United States for a distance of one thousand feet on either side of the center of such canal or channel, and the secretary of state is hereby authorized to issue to the United States a grant to the land so formed within the distance above mentioned, the grant to issue upon a certificate furnished to the secretary of state by some authorized official of the United States as above provided. (1913, c. 197; 1937, c. 445; C. S. 7583.)

Editor's Note.—The 1937 amendment struck out the words "or in the improvement of any other waterway within this state" formerly appearing after the word "waterway" in the second line of the second paragraph.
Chapter 105. Taxation.

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SUBCHAPTER I. LEVY OF TAXES.

§ 105-1. Title and purpose of subchapter.—The title of this subchapter shall be "The Revenue Act." The purpose of this subchapter shall be to raise and provide revenue for the necessary uses and purposes of the government and state of North Carolina during the next biennium and each biennium thereafter, and the provisions of this subchapter shall be and remain in full force and effect until changed by law. (1939, c. 158, ss. A, B, C; 1941, c. 50, s. 1.)

Editor's Note.—The 1941 amendment added the provision relating to remaining in force until changed by law.


§ 105-2. General provisions.—A tax shall be and is hereby imposed upon the transfer of any property, real or personal, or of any interest therein or income therefrom, in trust or otherwise, to persons or corporations, in the following cases:

First. When the transfer is by will or by the intestate laws of this state from any person dying, seized or possessed of the property while a resident of the state.

Second. When the transfer is by will or intestate laws of this state, or of any property, real, personal, or mixed, tangible or intangible, over which the state of North Carolina has a taxing jurisdiction, including state and municipal bonds, and the decedent was a resident of the state at the time of death; when the transfer is of real property or intangible personal property within the state, or intangible personal property that has acquired a situs in this state, and the decedent was a non-resident of the state at the time of death.

Third. When the transfer of property made by a resident, or non-resident, is of real property within this state, or of goods, wares and merchandise within this state, or of any other property, real, personal, or mixed, tangible or intangible, over which the state of North Carolina has a taxing jurisdiction, including state and municipal bonds, by deed, grant, bargain, sale, or gift made in contemplation of the death of the grantor, vendor, or donor, or intended to take effect in possession or enjoyment at or after such death, including a transfer under which the transferor has retained for his life or any period not ending before his death (a) the possession or enjoyment of, or the income from, the property or (b) the right to designate the persons who shall possess or enjoy the property or the income therefrom. Every transfer by deed, grant, bargain, sale, or gift, made within three years prior to the death of the grantor, vendor, or donor, exceeding three per cent (3%) of his or her estate, or in the nature of a final disposition or distribution thereof, and without an adequate valuable consideration, shall, in the absence of proof to the contrary, be deemed to have been made in contemplation of death within the meaning of this section.

Fourth. When any person or corporation comes into possession or enjoyment, by a transfer from a resident, or from a non-resident decedent when such non-resident decedent's property consists of real property within this state or tangible personal property within the state, or intangible personal property that has acquired a situs in this state, of an estate in expectancy of any kind or character which is contingent or defeasible, transferred by any instrument taking effect after March 24, 1939, or of any property transferred pursuant to a power of appointment contained in any instrument.

Fifth. Whenever any person or corporation shall exercise a power of appointment derived from any disposition of property made either before or after the passage of this article, such appointment when made shall be deemed a transfer taxable under the provisions of this article, in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power, and had been bequeathed or devised by such donee by will, and the rate shall be determined by the relationship between the beneficiary under the power and the donor; and whenever any person or corporation having such power of appointment so derived shall, for any reason whatever, omit or fail to exercise the same, in whole or in part, or where for any reason the said power has not been exercised, a transfer taxable under the provisions of this article shall be deemed to take place, to the extent of such omission or failure, in the same manner as though the persons or corporations thereby becoming entitled to the possession or enjoyment of the property to which such power related had succeeded thereto by will of the donee of the power failing to exercise the same, taking effect at the time of such omission or failure.

Sixth. Whenever any real or personal property, or both, of whatever kind or nature, tangible or intangible, is disposed of by will or by deed to any person or persons for life, or the life of the survivor, or for a term of years, or to any corporation for a term of years, with the power of appointment in such person or persons, or in such corporation, or reserving to the grantor or devisee the power of revocation, the tax, upon the death of the person making such will or deed, shall, on the whole amount of property so disposed of, be due and payable as in other cases, and the said tax shall be computed according to the relationship of the first donee or devisee to the devisor.

Seventh. Where real property is held by husband and wife as tenants by the entirety, the surviving tenant shall be taxable on one-half of the value of such property.

Eighth. Where the proceeds of life insurance policies are payable as provided in § 105-13.

However, nothing in this article shall be construed as imposing a tax upon any transfer of intangibles not having a commercial or business situs in this State, by a person, or by reason of the death of a person, who was not a resident of this State at the time of his death, and, if held or transferred in trust, such intangibles shall not be deemed to have a commercial or business situs in this State merely because the trustee is a resident or, if a corporation, is doing business in this State, unless the same be employed in or held or used in connection with some business carried on in whole or in part in this State. (1939, c. 158, s. 1; 1941, c. 50, s. 2; 1943, c. 400, s. 1.)
Editor's Note.—The 1941 amendment made changes in subsections first and second and directed that the last paragraph be added at the end of the section.

For comment on the 1941 amendment, see 19 N. C. Law Rev. 180.

The 1943 amendment inserted the eighth paragraph.

The annotations under this and the following sections are constructions of the corresponding sections (sections 7772 et seq.) of the Consolidated Statutes and of subsequent revisions and acts.

For history of the inheritance tax statute, see State v. Scales, 172 N. C. 915, 90 S. E. 439. See note 12 N. C. Law Rev. 180, on "Fate of the Trust in a Corporation Succession to Property."

For article discussing this subchapter, see 15 N. C. Law Rev. 387.

Constitutionality.—The provisions of section 7772 of the prior law were held not in conflict with Art. I, § 17, of the Constitution of the United States, 3 N. C. Law Rev. 426, and the provisions of section 7772 of the prior law were held not in conflict with Art. I, § 17, of the State Constitution or of the Fourteenth Amendment to the Constitution of the United States in Rhode Island Hospital Trust Co. v. Doughton, 187 N. C. 263, 121 S. E. 741, discussed in 3 N. C. Law Rev. 107. The judgment of this court, however, was reversed, on a writ of error, by the Supreme Court of the United States,Trust Co. v. Doughton, 270 U. S. 69, 46 S. Ct. 256, 70 L. Ed. 475, 43 A. L. R. 1374. It was there held that the statute under consideration is invalid because it denies the right to take property by devise or descent is not one of succession to property, and not on the property itself. (2) The right to take property by devise or descent is not one of this kind on the devolution of estates is based and its constitutionality is upheld is clearly established and is founded upon the policy which could be transferred by his death its property has been subjected to taxation. One of the sons of the decedent was a resident in the state, and then it may be taxed in common with any other property of the like kind. 141 S. E. 682, cited and approved in Rhode Island Hospital Trust Co. v. Doughton, 187 N. C. 263, 268, 121 S. E. 741.

Situs for Taxation.—"The personal property of a decedent, whatever its character and wherever located, is subject to an inheritance tax in the State in which its owner was a resident at the time of his death. Brown v. In re R. E. Morrison Trust, 138 N. C. 259, 263, 50 S. E. 682, cited and approved in Rhode Island Hospital Trust Co. v. Doughton, 187 N. C. 263, 267, 121 S. E. 741. See Waddell v. Doughton, 194 N. C. 537, 140 S. E. 160.

Transfers Subject to Tax.—The theory on which taxation of this kind on the devolution of estates is based and its constitutionality is upheld is clearly established and is founded upon the policy which could be transferred by his death its property has been subjected to taxation. One of the sons of the decedent was a resident in the state, and then it may be taxed in common with any other property of the like kind. 141 S. E. 682, cited and approved in Rhode Island Hospital Trust Co. v. Doughton, 187 N. C. 263, 268, 121 S. E. 741.

Thus if the testator or intestate has his domicile abroad and his personal estate were also, no tax would be demanded of the legatee or next of kin, though they might be resident in the state. State v. Brim, 57 N. C. 300, 301. After the legacy or distributive share has been received, it then becomes a part of the property of one of the citizens of the state, and then it may be taxed in common with any other property of the like kind. 141 S. E. 682, cited and approved in Rhode Island Hospital Trust Co. v. Doughton, 187 N. C. 263, 268, 121 S. E. 741.

Transfers Subject to Tax.—The right to impose an inheritance tax in the State in which its owner was a resident at the time of his death, was exercised by any statute passed by the legislature, not conducted for profit, incorporated or created under the laws of any other state: (a) Property passing to religious, charitable, or educational corporations, foundations or trusts, not conducted for profit, incorporated or created or administered under the laws of any other state: (b) Property passing to religious, charitable, or educational corporations, foundations or trusts, not conducted for profit, incorporated or created or administered under the laws of any other state: (c) Property passing to religious, charitable, or educational corporations, foundations or trusts, not conducted for profit, incorporated or created or administered under the laws of any other state: (d) The amount of twenty thousand dollars ($20,000,000), only, of the total proceeds of life insurance policies, when such policy or policies are payable to a beneficiary or beneficiaries named in such policy or policies, and such beneficiary or beneficiaries are any such person or persons as are designated in § 105-4, subsection (a): Provided, that no more than twenty thousand dollars ($20,000,000) of any such policy or policies shall be exempt from taxation, whether in favor of one beneficiary or more, and the such provision shall be prorated between the beneficia-
ties in proportion to the amounts received under the policies, unless otherwise provided by the decedent; and also proceeds of all life insurance policies payable to beneficiaries named in subsections (a), (b), and (c) of this section. And also proceeds of all policies of insurance and the proceeds of all adjusted service certificates that have been or may be paid by the United States Government, or that have been or may be paid on account of policies required to be carried by the United States government or any agency thereof, to the estate, beneficiary, or beneficiaries of any person who has served in the armed forces of the United States or in the merchant marine during the first or second World War; and proceeds, not exceeding the sum of ten thousand dollars ($10,000.00), of all policies of insurance paid to the estate, beneficiary or beneficiaries of any person whose death was caused by enemy action during the second World War. This provision will be operative only when satisfactory proof that the death was caused by enemy action is filed by the executor, administrator, or beneficiary with the commissioner of revenue. (1939, c. 158, s. 2; 1943, c. 400, s. 1.)

Editor's Note.—The 1943 amendment added the last sentence and rewrote the next to the last sentence of subsection (d).

For comment on exemption of property passing to foreign eleemosynary organizations, see 17 N. C. Rev. Statutes (1928) 381.

Section 7773 was the corresponding provision of the Consolidated Statutes.

Exemptions of property from taxation are to be strictly construed. Benson v. Johnston County, 209 N. C. 751, 185 S. E. 6.

Property is liable for county taxes where it is not used by the city for a governmental purpose, and therefore does not come within the constitutional provision for the exemption of property from taxation (N. C. Const. Art. V, § 5), or within the scope of this section enacted pursuant thereto. Benson v. Johnston County, 209 N. C. 751, 185 S. E. 6.

Same—Property Held for Business Purposes.—Property was held subject to taxation by the county in which the property is situated, owned by a municipal corporation, where the property was held by the municipal corporation purely for business purposes and not for any governmental or necessary public purpose. Board of Financial Control v. Henderson County, 208 N. C. 569, 181 S. E. 636, 101 A. L. R. 783.


§ 105-4. Rate of tax—Class A.—(a) Where the person or persons entitled to any beneficial interest in such property shall be the lineal issue, or lineal ancestor, or husband or wife of the person who died possessed as aforesaid, or stepchild of the person who died possessed of such property aforesaid, or child adopted by the decedent in conformity with the laws of the state of any of the United States, or of any foreign kingdom or nation, at the following rates of tax (for each one hundred dollars ($100.00) or fraction thereof) of the value of such interest:

First $10,000 above exemption ... 1 per cent
Over $10,000 and to $25,000 ... 2 per cent
Over $25,000 and to $50,000 ... 3 per cent
Over $50,000 and to $100,000 ... 4 per cent
Over $100,000 and to $200,000 ... 5 per cent
Over $200,000 and to $500,000 ... 6 per cent
Over $500,000 and to $1,000,000 ... 7 per cent
Over $1,000,000 and to $1,500,000 ... 8 per cent
Over $1,500,000 and to $2,000,000 ... 9 per cent
Over $2,000,000 and to $2,500,000 ... 10 per cent
Over $2,500,000 and to $3,000,000 ... 11 per cent
Over $3,000,000 ... 12 per cent

(b) The persons mentioned in this class shall be entitled to the following exemptions: Widows, ten thousand dollars ($10,000.00); each child under twenty-one years of age, five thousand dollars ($5,000.00); all other beneficiaries mentioned in this section, two thousand dollars ($2,000.00) each: Provided, a grandchild or grandchildren shall be allowed the single exemption or pro rata part of the exemption of the parent, when the parent of any one grandchild or group of grandchildren is deceased or when the parent is living and does not share in the estate: Provided, that any part of the exemption not applied to the share of the parent may be applied to the share of a grandchild or group of grandchildren of such parent. The same rule shall apply to the taking under a will, and also in case of a specific legacy or devise: Provided, that when any person shall die leaving a widow and child or children under twenty-one years of age, and leaving all or substantially all of his property by will to his wife, the wife shall be allowed an additional exemption of five thousand dollars ($5,000.00) for each child under twenty-one years of age. (1939, c. 158, s. 5.)

Cross Reference.—As to kinds of property contemplated by this section, see § 105-2.

Real Property, as well as personal, is included in this section. Norris v. Durley, 168 N. C. 321, 84 S. E. 687.

Who Entitled to Exemption.—The court in State v. Scales, 172 N. C. 915, 90 S. E. 499, in construing the words "all other beneficiaries in this section," contained in subdivision one of the corresponding section of the prior law, held that the word "section" was intended and meant for the subdivision in which it was placed and does not apply to the whole section to exempt strangers of the blood of the testator along with the beneficiaries of the first class. It is to be noted, however, that the word "section" is no longer included in this clause, the word "subchapter" having been substituted therefor.

Interest under Discretionary Control of Another Taxable. —The interest acquired by the child of testator is taxable and does not escape by reason of the fact that the testator placed it under the discretionary control and disposition of its brother. In re Inheritance Tax, 172 N. C. 170, 90 S. E. 301.

§ 105-5. Rate of tax—Class B.—Where the person or persons entitled to any beneficial interest in such property shall be the brother or sister or descendant of the brother or sister, or shall be the uncle or aunt by blood of the person who died possessed as aforesaid, at the following rates of tax (for each one hundred dollars ($100.00) or fraction thereof) of the value of such interest:

First $5,000 ... 4 per cent
Over $5,000 and to $10,000 ... 5 per cent
Over $10,000 and to $25,000 ... 6 per cent
Over $25,000 and to $50,000 ... 7 per cent
Over $50,000 and to $100,000 ... 8 per cent
Over $100,000 and to $250,000 ... 10 per cent
Over $250,000 and to $500,000 ... 11 per cent
Over $500,000 and to $1,000,000 ... 12 per cent
Over $1,000,000 and to $1,500,000 ... 13 per cent
Over $1,500,000 and to $2,000,000 ... 14 per cent
Over $2,000,000 and to $3,000,000 ... 15 per cent
Over $3,000,000 ... 16 per cent

(1939, c. 158, s. 4.)

§ 105-6. Rate of tax—Class C.—Where the
person or persons entitled to any beneficial interest in such property shall be in any other degree of relationship or collateral consanguinity than is hereinafter stated, or shall be a stranger in blood to the person who died possessed as aforesaid, or shall be a body politic or corporate, at the following rates of tax (for each one hundred dollars ($100.00) or fraction thereof) of the value of such interest:

<table>
<thead>
<tr>
<th>Value</th>
<th>Rate</th>
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<tr>
<td>First $10,000</td>
<td>8 per cent</td>
</tr>
<tr>
<td>Over $10,000 to $25,000</td>
<td>9 per cent</td>
</tr>
<tr>
<td>Over $25,000 to $50,000</td>
<td>10 per cent</td>
</tr>
<tr>
<td>Over $50,000 to $100,000</td>
<td>11 per cent</td>
</tr>
<tr>
<td>Over $100,000 to $250,000</td>
<td>12 per cent</td>
</tr>
<tr>
<td>Over $250,000 to $500,000</td>
<td>13 per cent</td>
</tr>
<tr>
<td>Over $500,000 to $1,000,000</td>
<td>14 per cent</td>
</tr>
<tr>
<td>Over $1,000,000 to $1,500,000</td>
<td>15 per cent</td>
</tr>
<tr>
<td>Over $1,500,000 to $2,500,000</td>
<td>16 per cent</td>
</tr>
<tr>
<td>Over $2,500,000</td>
<td>17 per cent</td>
</tr>
</tbody>
</table>

(1939, c. 158, s. 5.)

§ 105-7. Estate tax.—(a) A tax in addition to the federal estate tax imposed by this schedule is hereby imposed upon the transfer of the net estate of every decedent dying after March 31, 1939, whether a resident or nonresident of the state, in respect of any property included in the gross estate. See Federal Revenue Act of one thousand nine hundred and twenty-six, or subsequent acts and amendments. (1939, c. 158, s. 6.)

(b) Where no tax is imposed by this schedule because of the exemptions herein or otherwise, and a tax is due the United States under the Federal Estate Tax Act, then a tax shall be due this state equal to the maximum amount of the credit allowed under said Federal Estate Tax Act; said additional tax shall be paid out of the same funds as any other tax against the estate.

(c) The administrative provisions of this schedule, wherever applicable, shall apply to the collection of the tax imposed by this section. The amount of the tax as imposed by subsection (a) of this section shall be computed in full accordance with the Federal Estate Tax Act as contained in the Federal Revenue Act of one thousand nine hundred and twenty-six, or subsequent acts and amendments, because of said tax herein imposed, then the heritage tax imposed by this schedule shall be increased by an estate tax on the net estate so that the aggregate amount of tax due this state shall be the maximum amount of credit allowed under said Federal Estate Tax Act; said additional tax shall be paid out of the same funds as any other tax against the estate.

Editor's Note.—Prior to the 1941 amendment, subsection (a) read, "Taxes that have become due and payable and the pro rata part of taxes accrued for the fiscal year that have not become due and payable."

§ 105-9. Deductions.—In determining the clear market value of property taxed under this article, or schedule, the following deductions, and no others, shall be allowed:

(a) Taxes accrued and unpaid at the death of the decedent and unpaid ad valorem taxes accruing during the calendar year of death.

(b) Drainage and street assessments (fiscal year in which death occurred).

(c) Reasonable funeral and burial expenses.

(d) Debts of decedent.

(e) Estate and inheritance taxes paid to other states, and death duties paid foreign countries, and the net amount of federal estate taxes as finally assessed under the Federal Estate Tax Act of one thousand nine hundred and twenty-six.

(f) No deduction will be allowed for federal estate taxes levied by subsequent acts and amendments.

(g) Amount actually expended for monuments not exceeding the sum of five hundred dollars ($500.00).

(h) Commissions of executors and administrators actually allowed and paid.

(i) Costs of administration, including reasonable attorneys' fees. (1939, c. 158, s. 7; 1941, c. 50, s. 2.)

Editor's Note.—In case a tax has been imposed under Schedule G of the Revenue Act of one thousand nine hundred and twenty-six, or subsequent acts, upon any gift, and thereafter upon the death of the donor, the amount thereof is required by any provision of this article to be included in the gross estate of the decedent, then there shall be credited against and applied in reduction of the tax, which would otherwise be chargeable against the beneficiaries of the estate under the provisions of this article, an amount equal to the tax paid with respect to such gift. Any additional tax found to be due because of the inclusion of gifts in the gross estate of the decedent, as provided herein, shall be a tax against the estate and shall be paid out of the same funds as any other tax against the estate. (1939, c. 158, s. 65.)

§ 105-8. Credit allowed for gift tax paid.—In case a tax has been imposed under Schedule G of the Revenue Act of one thousand nine hundred and twenty-six, or subsequent acts, upon any gift, and thereafter upon the death of the donor, the amount thereof is required by any provision of this article to be included in the gross estate of the decedent, then there shall be credited against and applied in reduction of the tax, which would otherwise be chargeable against the beneficiaries of the estate under the provisions of this article, an amount equal to the tax paid with respect to such gift. Any additional tax found to be due because of the inclusion of gifts in the gross estate of the decedent, as provided herein, shall be a tax against the estate and shall be paid out of the same funds as any other tax against the estate. (1939, c. 158, s. 65.)

Editor's Note.—For comment on this section, see 17 N. C. Law Rev. 381.

§ 105-10. Where no personal representative appointed, clerk of superior court to certify same to commissioner of revenue.—Whenever an estate subject to the tax under this article shall be settled or divided among the heirs-at-law, legatees or devi-
§ 105-11. Tax to be paid on shares of stock before transferred, and penalty for violation.—(a) Property taxable within the meaning of this article shall include bonds or shares of stock in any incorporated company incorporated in this state, regardless of whether or not such incorporated company shall have any or all of its capital stock invested in property outside of this state and doing business outside of this state, and the tax on the transfer of any bonds and/or shares of stock in any such incorporated company owning property and doing business outside of this state shall be paid before waivers are issued for the transfer of such shares of stock. No corporation of this state shall transfer any bonds or stock of said corporation standing in the name of or belonging to a decedent or in the joint names of a decedent and one or more persons, or in trust for a decedent, unless notice of the time of such transfer is served upon the commissioner of revenue at least ten days prior to such transfer, nor until said commissioner of revenue has served upon such corporation a receipt for the amount of any tax which may thereafter be assessed on account of the transfer of such bonds and/or stock, together with the interest thereon, and in addition thereto a penalty of one thousand dollars ($1,000.00), which liability for such tax, interest, and penalty, may be enforced by an action brought by the state in the name of the commissioner of revenue. The word "transfer" as used in this article shall be taken to include the passing of property or any interest therein, in possession or enjoyment, present or future, by distribution, or by statute, descent, devise, bequest, grant, conveyance, devise, or other consideration paid by decedent, if the amount so paid by the decedent bears to the total premiums paid for the insurance. In all such cases, it is declared that life insurance and the transfer of the proceeds thereof is testamentary in nature, and therefore, the payment of the premiums or other consideration by the decedent shall be deemed to effect a transfer from him at his death of benefits equal to such insurance proceeds, or such rateable proportion thereof regardless of (1) whether the decedent had taken or retained any incidents of ownership in said policies or (2) whether the decedent applied for said insurance or (3) whether the decedent was under a legal duty to pay said premiums or (4) whether said policies had been assigned irrevocably or otherwise, except as hereinafter stated. For the purposes of this article, the amount of premiums or other consideration paid by decedent, if the decedent transferred, by assignment or otherwise, a policy of insurance, the amount paid directly or indirectly by the decedent shall be reduced by an amount which bears the same ratio to the amount paid directly or indirectly by the decedent as the consideration in money or money's worth received by the decedent for the transfer bears to the value of the policy at the time of the transfer; or where, with respect to such insurance, the decedent possessed at his death any of the incidents of ownership, exercisable either alone or in conjunction with any other person. The term "incident of ownership," as used herein, does not include a reversionary interest: Provided, if the premiums or other considerations have been paid in whole or in part upon such insurance by a beneficiary thereof, said beneficiary shall not be taxed on that proportion of the insurance proceeds that the amount of the premiums or other consideration paid by said beneficiary bears to the total premiums paid on said insurance.

§ 105-12. Commissioner of revenue to furnish blanks and require reports of value of shares of stock.—(a) The commissioner of revenue shall prepare and furnish, upon application, blank forms covering such information as may be necessary to determine the amount of inheritance tax due the state of North Carolina on the transfer of any such bonds and/or stock; he shall determine the value of such bonds and/or stock, and shall have full authority to do all things necessary to make full and final settlement of all such inheritance taxes due or to become due.

(b) The commissioner of revenue shall have authority, under penalties provided in this article, to require that any reports necessary to a proper enforcement of this article be made by any such incorporated company owning property in this state. (1939, c. 158, s. 10.)

§ 105-13. Life insurance proceeds. — The proceeds of life insurance policies, payable at or after the death of the decedent, shall, in the following instances, be taxable at the rates provided in this article, subject to the exemptions in § 105-3:

1. When such insurance proceeds are receivable by the executor as insurance under policies upon the life of the decedent, regardless of whether the premiums thereon were paid by the decedent.

2. When such insurance proceeds are receivable by all other beneficiaries as insurance under policies upon the life of the decedent—

(a) Where such insurance was purchased with premiums, or other consideration, paid directly or indirectly by the decedent, in the proportion that the amount so paid by the decedent bears to the total premiums paid for the insurance.

(b) Where, with respect to such insurance, the decedent possessed at his death any of the incidents of ownership, exercisable either alone or in conjunction with any other person. The term "incident of ownership," as used herein, does not include a reversionary interest: Provided, if the premiums or other considerations have been paid in whole or in part upon such insurance by a beneficiary thereof, said beneficiary shall not be taxed on that proportion of the insurance proceeds that the amount of the premiums or other consideration paid by said beneficiary bears to the total premiums paid on said insurance.

The decedent shall not be deemed to have paid premiums or other consideration, within the mean-
§ 105-14. Recurring taxes. — Where property transferred has been taxed under the provisions of this article, such property shall not be assessed and/or taxed on account of any other transfer of like kind occurring within two years from the date of the death of the former decedent: Provided, that this section shall apply only to the transfers designated in §§ 105-4 and 105-5. (1939, c. 158, s. 12.)

Cross Reference.—As to definition of "transfer," see § 105-11.

§ 105-15. When all heirs, legatees, etc., are discharged from liability. — All heirs, legatees, devisees, administrators, executors, and trustees shall only be discharged from liability for the amount of such taxes, settlement of which they may be charged with, by paying the same for the use aforesaid as hereinafter provided. (1939, c. 158, s. 13.)

§ 105-16. Discount for payment in six months; interest after twelve months; penalty after two years. — All taxes imposed by this article shall be due and payable at the death of the testator, intestate, grantor, donor, or vendor, and if the same are paid within six months from the date of the death of the testator, intestate, grantor, donor, or vendor, a discount of three per cent (3%) shall be allowed and deducted from such taxes; if not paid within twelve months from date of death of the testator, intestate, grantor, donor, or vendor, such tax shall bear interest at the rate of six per cent (6%) per annum, to be computed from the expiration of twelve months from the date of the death of such testator, intestate, grantor, donor, or vendor, until paid: Provided, that if the taxes herein levied shall not be paid in full within two years from date of death of testator, intestate, grantor, donor, or vendor, then and in such case a penalty of five per cent (5%) upon the amount of taxes remaining due and unpaid shall be added: Provided further, that the penalty of five per cent (5%) herein imposed may be remitted by the commissioner of revenue in case of unavoidable delay in settlement of estate or of pending litigation, and the commissioner of revenue is further authorized, in any case of protracted litigation or delay in settlement not attributable to laches of the party liable for the tax, to remit all or any portion of the interest charges accruing under this schedule, with respect to so much of the estate as was involved in such litigation or other unavoidable cause of delay: Provided, that time for payment and collection of such tax may be extended by the commissioner of revenue for good reasons shown. (1939, c. 158, s. 14.)

§ 105-17. Collection to be made by sheriff if not paid in two years. — If taxes imposed by this article are not paid within two years after the death of the decedent, it shall be the duty of the commissioner of revenue to certify to the sheriff of the county in which the estate is located the amount of tax due upon such inheritance, and the sheriff shall collect the same as other taxes, with an addition of two and one-half per cent (2 1/2%) as sheriff's fees for collecting same, which fees shall be in addition to any salary or other compensation allowed by law to the sheriffs for their services; and the sheriff is hereby given the same rights of levy and sale upon any property upon which the said tax is payable as said officer is given for the collection of any and all other taxes. The sheriff shall make return to the commissioner of revenue of all such taxes within thirty days after collection. (1939, c. 158, s. 15.)

§ 105-18. Executor, etc., shall deduct tax. — The executor or administrator or other trustee paying any legacy or share in the distribution of any estate subject to said tax shall deduct therefrom at the rate prescribed, or if the legacy or share in the estate be not money, he shall demand payment of a sum to be computed at the same rates upon the appraised value thereof for the use of the state; and no executor or administrator shall pay or deliver any specific legacy or article to be distributed, subject to tax, except on the payment into his hands of a sum computed on its value as aforesaid; and in case of neglect or refusal by the party of said legatee to pay the same, such specific legacy or article, or so much thereof as shall be necessary, shall be sold by the executor or administrator at public sale, after notice to such legatee, and the balance that may be left in the
§ 105-19. Legacy for life, etc., tax to be retained, etc., upon the whole amount.—If the legacy or devise subject to said tax be given to a beneficiary for life or for a term of years, or upon condition or contingency, with remainder to take effect upon the termination of the life estate or the happening of the condition or contingency, the tax on the whole amount shall be due and payable as in other cases, and said tax shall be apportioned between such life tenant and the remainderman, such apportionment to be made by computation based upon the mortuary and annuity tables set out as §§ 8-46 and 8-47, and upon the basis of six per centum (6%) of the gross value of the estate for the period of expectancy of the life tenant in determining the value of the respective interests. When property is transferred or limited in trust or otherwise, and the rights, interest, or estate of the transferees or beneficiaries are dependent upon contingencies or conditions whereby they may be wholly or in part created, defeate, extended, or abridged, a tax shall be imposed upon said transfer at the highest rate, within the discretion of the revenue commissioner, which on the happening of any of the said contingencies or conditions would be possible under the provisions of this article, and such tax so imposed shall be due and payable forthwith out of the property transferred, and the commissioner of revenue shall assess the tax on such property. (1939, c. 158, s. 16.)

§ 105-20. Legacy charged upon real estate, heir or devisee to deduct and pay to executor, etc.—Whenever such legacy shall be charged upon or payable out of real estate, the heir or devisee of such real estate, before paying the same to such legatee, shall deduct the tax therefrom at the rates aforesaid, and pay the amount so deducted to the executor or administrator or the commissioner of revenue, and the same shall remain a charge upon such real estate until paid, and in default thereof the same shall be enforced by the decrees of the superior court to obtain from any executor or administrator, the address of the personal representative qualifying, the names and addresses of the heirs-at-law, legatees, devisees, etc., as far as practical; the approximate value and character of the property or estate, both real and personal; the relationship of the heirs-at-law, legatees, devisees, etc., to the decedents, and the provisions of this article, and such tax so imposed shall be due and payable forthwith out of the property transferred, and the commissioner of revenue shall assess the tax on such property. (1939, c. 158, s. 17.)

§ 105-21. Computation of tax on resident and non-resident decedents.—A tax shall be assessed on the transfer of property, including property specifically devised or bequeathed, made subject to tax as aforesaid in this state of a resident or non-resident decedent, if all or any part of the estate of such decedent, wherever situated, shall pass to persons or corporations taxable under this article, which tax shall bear the same ratio to the entire tax which the said estate would have been subject to under this article if such decedent had been a resident of this state, and all his property, real and personal, had been located within this state, as such taxable property within this state bears to the entire estate, wherever situated. It shall be the duty of the personal representative to furnish to the commissioner of revenue such information as may be necessary or required to enable the commissioner to ascertain a proper computation of his tax. Where the personal representative fails or refuses to furnish information from which this assessment can be made, the property in this state liable to tax under this article shall be taxed at the highest rate applicable to those who are strangers in blood. (1939, c. 158, s. 19.)

§ 105-22. Duties of the clerks of the superior court.—(a) It shall be the duty of the clerk of the superior court to obtain from any executor or administrator, at the time of the qualification of such executor or administrator, the address of the personal representative qualifying, the names and addresses of the heirs-at-law, legatees, devisees, etc., as far as practical; the approximate value and character of the property or estate, both real and personal; the relationship of the heirs-at-law, legatees, devisees, etc., to the decedents, and the provisions of this article, and such tax so imposed shall be due and payable forthwith out of the property transferred, and the commissioner of revenue shall assess the tax on such property. (b) It shall also be the duty of the clerk of the superior court of each of the several counties of the state to enter in a book, prepared and furnished by the commissioner of revenue, to be kept for that purpose, and which shall be a public record, a condensed copy of the settlement of inheritance taxes of each estate, together with a copy of the receipt showing payment, or a certificate showing no tax due, as shall be certified to him by the commissioner of revenue. (c) For these services, where performed by the clerk, the clerk shall be paid by the commissioner of revenue, and which receipts are sent in to be recorded, as follows: For recording the certificate of the commissioner of revenue showing no tax due, the sum of fifty cents (50c). For recording the certificate of the commissioner of revenue showing that the tax received by the state is one hundred dollars ($100.00) or less, he shall be paid the sum of one dollar ($1.00). For recording the certificate of the commissioner of revenue showing that the tax received by the state is more than one hundred dollars ($100.00) and not over
five hundred dollars ($500.00) he shall be paid the sum of two dollars ($2.00). For recording the certificate of the commissioner of revenue showing that the tax received by the state is more than five hundred dollars ($500.00) he shall be paid the sum of five dollars ($5.00), which sum shall be the maximum amount paid for recording the certificate of the commissioner of revenue for any one estate: Provided, that where the decedent owns real estate in one or more counties, other than the county in which the administration of the estate is had, then the fee of the clerks of the courts of such other counties for recording the certificates of the commissioner of revenue shall be fifty cents (50c) each, and the same fee shall be paid for like service by the clerks in cases of the settlement of the estates of non-residents. The clerk of the superior court shall receive the sum of one dollar ($1.00) for making up and transmitting to the commissioner of revenue the report required in this section, containing a list of parishes, in which he has property, wherever situated in the county during the preceding month, etc.: Provided further, that where the clerk of the superior court has failed or neglected to make the report required of him in this section, in that case he shall only receive for recording the certificate of the commissioner of revenue the sum of fifty cents (50c).

The clerks of the superior courts of the several counties shall be allowed the fees provided for in this section in addition to other fees or salaries received by them, and any and all provisions in local acts in conflict with this section are hereby repealed. (1939, c. 158, s. 21.)

Editor's Note.—The 1943 amendment increased the fee, in line thirty-one of subsection (c), from fifty cents to one dollar.

§ 105-23. Information by administrator and executor.—Every administrator shall prepare a statement in duplicate, showing as far as can be ascertained the names of all the heirs-at-law and their relationship to decedent, and every executor shall prepare a like statement, accompanied by a copy of the will, showing the relationship of the decedent to all legatees, distributees, and devisees named in the will, and the age at the time of the death of the decedent of all legatees, distributees, devisees to whom property is bequeathed or devised for life or for a term of years, and the names of those, if any, who have died before the decedent, together with the postoffice address of executor, administrator, or trustee. If any of the heirs-at-law, distributees, and devisees are minor children of the decedent, such statement shall also show the age of each of such minor children. The statement shall also contain a complete inventory of all the real property of the decedent located in and outside the state, and of all personal property, wherever situated, of the estate, of all insurance policies upon the life of the decedent, together with an appraisal under oath of the value of each class of property embraced in the inventory, and the value of the whole, together with any deductions permitted by this statute, so far as they may be ascertained at the time of filing such statement; and also the full statement of all gifts or advancements made by deed, grant, or sale to any person or corporation, in trust or otherwise, within three years prior to the death of the decedent. The statement herein provided for shall be filed with the commissioner of revenue at Raleigh, North Carolina, within six months after the qualification of the executor or administrator, upon blank forms to be prepared by the commissioner of revenue. If any administrator or executor fails or refuses to comply with any of the requirements of this section, he shall be liable to a penalty in the sum of five hundred dollars ($500.00), to be recovered by the commissioner of revenue in an action to be brought by the commissioner of revenue to collect such sum in the superior court of Wake county against such administrator or executor. The commissioner of revenue, for good cause shown, may remit all or any portion of the penalty imposed under the provisions of this section. Every executor or administrator may make a tentative settlement of the inheritance tax with the commissioner of revenue, based on the sworn inventory provided in this section: Provided, that this does not apply to estates of less than two thousand dollars ($2,000.00) in value when the beneficiary is his husband or wife or children or grandchildren, or parent or parents of the decedent. If any executor, administrator, collector, committee, trustee or any other fiduciary within or without this state holding or having control of any funds, property, trust or estate, the transfer of which becomes taxable under the provisions of this article, shall fail to file the statements herein required, within the times herein required, the commissioner of revenue is authorized and shall be required to secure the information herein required from the best sources available, and therefrom assess the taxes levied hereunder, together with the penalties herein and otherwise provided. (1939, c. 158, s. 21.)

§ 105-24. Access to safe deposits of a decedent; withdrawal of bank deposit, etc., payable to either husband or wife or the survivor.—No safe deposit company, trust company, corporation, bank, or other institution, person or persons having in possession or control or custody, in whole or in part, securities, deposits, assets, or property belonging to or standing in the name of a decedent and one or more persons, shall deliver or transfer the same to any person whatever, whether in a representative capacity or not, or to the survivor or to the survivors when held in the joint names of a decedent and one or more persons, without retaining a sufficient portion or amount thereof to pay taxes or interest which would thereafter be assessed thereon under this article; but the commissioner of revenue may consent in writing to such delivery or transfer, and such consent shall relieve said safe deposit company, trust company, corporation, bank or other institution, person or persons from the obligation herein imposed. Provided: The clerk of superior court of the resident county of a decedent may authorize in writing any bank, safe deposit company, trust company, or any other institution to transfer to the properly qualified representative of the estate, any funds on deposit in the name of the decedent or the decedent and one or more persons when the total amount of such deposit or deposits is three hundred dollars ($300.00) or less, and when such deposit or deposits compose the total cash assets of the estate. Such authorization shall have the same force and


Chapter 105. Taxation—Inheritance Tax

§ 105-25. Supervision by commissioner of revenue.—The commissioner of revenue shall have complete supervision of the enforcement of all provisions of the Inheritance Tax Act and the collections of all inheritance taxes found to be due thereunder, and shall make all necessary rules and regulations for the just and equitable administration thereof. He shall regularly employ such deputies, attorneys, examiners, or special agents as may be necessary for the reasonable carrying out of its full intent and purpose. Such deputies, examiners, or special agents shall, as often as required to do so, visit the several counties of the state to inquire and ascertain if all inheritance taxes due from estates of decedents, or heirs-at-law, legatees, devisees, or distributees thereof have been paid; to see that all statements required by this article are filed by administrators and executors, or by the beneficiaries under wills where no executor is appointed; to examine into all statements filed by such administrators and executors; to require such administrators and executors to furnish any additional information that may be deemed necessary to determine the amount of tax that should be paid by each estate. If not satisfied, after investigation, with valuation returned by the administrator or executor, the deputy, attorney, examiner, or appraiser shall make an additional appraisal after proper examination and inquiry, or may, in special cases, recommend the appointment by the commissioner of revenue of a special appraiser who, in such case, shall be paid five dollars ($5.00) per day and expenses for his services. The administrator or executor, if not satisfied with such additional appraisal, may appeal within thirty days to the commissioner of revenue, which appeal

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shall be heard and determined as other cases. From this decision the administrator or executor shall have the right to appeal to the superior court of the county in which said estate is situated for the purpose of having said issue tried; said appeal to be made in the same way and manner as is now provided by law for appeals from the decisions of the public utilities commission: Provided, that the tax shall first be paid, or satisfactory surety bond in double the amount of any alleged deficiency shall be filed with the commissioner pending an appeal; and if it shall be determined upon trial that said tax or any part thereof was illegal or excessive, judgment shall be rendered therefor with interest, and the amount of tax so adjudged overpaid or declared invalid shall be certified by the clerk of court to the commissioner of revenue, who is authorized and directed to draw his account on the state treasurer for the amount thereof. (1939, c. 158, s. 23.)

§ 105-26. Proportion of tax to be repaid upon certain conditions.—Whenever debts shall be proven against the estate of a decedent after the distribution of legacies from which the inheritance tax has been deducted in compliance with this article, and the legatee is required to refund any portion of the legacy, a proportion of the said tax shall be repaid to him by the executor or administrator if the said tax has not been paid into the state treasury, or shall be refunded by the state treasurer, if it has been so paid in, upon certificate of the commissioner of revenue. (1939, c. 158, s. 23.)

§ 105-27. Commissioner of revenue may order executor, etc., to file account, etc.—If the commissioner of revenue shall discover that reports and accounts have not been filed, and the tax, if any, has not been paid as provided in this article, he shall issue a citation to the executor, administrator, or trustee of the decedent whose estate is subject to tax, to appear at a time and place therein mentioned, not to exceed twenty days from the date thereof, and show cause why said report and account should not be filed and said tax paid; and when personal service cannot be had, notice shall be given as provided for service of summons by publication in the county in which said estate is located; and if said tax shall be found to be due, the said delinquent shall be adjudged to pay said tax, interest and cost; if said tax shall remain due and unpaid for a period of thirty days after notice thereof, the commissioner of revenue shall certify the same to the sheriff, who shall make collection of said tax, cost and commissions for collection, as provided in § 105-16. (1939, c. 158, s. 24.)

§ 105-28. Failure of administrator, executor, or trustee to pay tax.—Any administrator, executor, or trustee who shall fail to pay the lawful inheritance taxes due upon any estate in his hands or under his control within two years from the time of his qualification shall be liable for the amount of the said taxes, and the same may be recovered in an action against such administrator, executor, or trustee, and the sureties on his official bond. Any clerk of the court who shall allow any administrator, executor, or trustee to make a final settlement of his estate without having paid the inheritance tax due by law, and exhibiting his receipt from the commissioner of revenue therefor, shall be liable upon his official bond for the amount of such taxes. (1939, c. 158, s. 25.)

§ 105-29. Uniform valuation.—(a) If the value of any estate taxed under this schedule shall have been assessed and fixed by the federal government for the purpose of determining the federal taxes due thereon prior to the time the report from the executor or administrator is made to the commissioner of revenue under the provisions of this article, the amount or value of such estate so fixed, assessed, and determined by the federal government shall be stated in such report. If the assessment of the estate by the federal government shall be made after the filing of the report by the executor or administrator with the commissioner of revenue, as provided in this article, the said executor or administrator shall, within thirty days after receipt of notice of the final determination by the federal government of the value or amount of said estate as assessed and determined for the purpose of fixing federal taxes thereon, make report of the amount so fixed and assessed by the federal government, together with a statement of the manner of valuation made by the federal government. If the amount of said estate as assessed and fixed by the federal government shall be in excess of that theretofore fixed or assessed under this schedule for the purpose of determining the amount of taxes due the state from said estate, then the commissioner of revenue shall reassess said estate and fix the value thereof at the amount fixed, assessed, and determined by the federal government, unless the said executor or administrator shall, within thirty days after notice to him from the commissioner of revenue, show cause why the valuation and assessment of said estate as theretofore made should not be changed or increased. If the valuation placed upon said estate by the federal government shall be less than that theretofore fixed or assessed under this article, the executor or administrator may, within thirty days after filing his return of the amount so fixed or assessed by the federal government, file with the commissioner of revenue a petition to have the value of said estate reassessed and the same reduced to the amount as fixed or assessed by the federal government. In either event the commissioner of revenue shall proceed to determine, from such evidence as may be brought to his attention or which he shall otherwise acquire, the correct value of the said estate, and if the valuation is changed, he shall reassess the taxes due by said estate under this article and notify the executor or administrator of such fact. In the event the valuation on said estate shall be decreased, and if there shall have been an overpayment of the tax, the said commissioner shall, within sixty days after the final determination of the value of said estate and the assessment of the correct amount of tax against the same, refund the amount of such excess tax theretofore paid.

(b) If the executor or administrator shall fail to file with the commissioner of revenue the return under oath or affirmation, stating the amount or value at which the estate was assessed by the federal government as provided for in this section, the commissioner of revenue shall assess and
§ 105-30

CH. 105. TAXATION—INHERITANCE TAX

§ 105-30. Reciprocal relations in respect to death taxes.—(a) The terms "death tax" and "death taxes" as used in the five following subsections, shall include inheritance, succession, transfer and estate taxes and any taxes levied against the estate of a decedent upon the occasion of his death.

(b) At any time before the expiration of eighteen months after the qualification in any probate court in this commonwealth of any executor of the will of a resident decedent, and also at any time after the expiration of eighteen months after the qualification in any probate court in this commonwealth of any executor or administrator of a nonresident decedent, such executor or administrator shall file with such court proof that all death taxes, together with interest or penalties thereon, which are due to the state of domicile of such decedent, or to any political subdivision thereof, have been paid or secured, or that no such taxes, interest or penalties are due, as the case may be, unless it appears that letters testamentary or of administration have been issued on the estate of such decedent in the state of his domicile in the four following subsections called the domiciliary state.

(c) The proof required by subsection (b) may be in the form of a certificate issued by the official or body charged with the administration of the death tax laws of the domiciliary state. If such proof has not been filed within the time limited in subsection (b), and if within such time it does not appear that letters testamentary or of administration have been issued in the domiciliary state, the register of probate shall forthwith upon the expiration of such time notify by mail the official or body of the domiciliary state charged with the administration of the death tax laws thereof with respect to such estate, and shall state in such notice so far as is known to him (a) the name, date of death and last domicile of such decedent, (b) the name and address of each executor or administrator, (c) a summary of the values of the real estate, tangible personality, and intangible personality, wherever situated, belonging to such decedent at the time of his death, and (d) the fact that such executor or administrator has not filed theretofore the proof required in subsection (b), or (e) an accounting has not been filed, with a copy of the will and codicils of such decedent, if he died testate, or, if he died intestate, a list of his heirs and next of kin, so far as they are known to such register. Within sixty days after the mailing of such notice the official or body charged with the administration of the death tax laws of the domiciliary state may file with such probate court in this commonwealth a petition for an accounting in such estate, and such official or body of the domiciliary state shall, for the purposes of this section, be a party interested for the purpose of petitioning such probate court for such accounting. If such petition be filed within said period of sixty days, such probate court shall decree such accounting, and upon such accounting being filed and approved shall decree either the payment of any such tax found to be due to the domiciliary state or subdivision thereof or the remission to a fiduciary appointed or to be appointed by the probate court, or other court charged with the administration of estates of decedents, of the domiciliary state, of the balance of the intangible personality after the payment of creditors and expenses of administration in this commonwealth.

(d) No final account of an executor or administrator of a nonresident decedent shall be allowed unless either (1) proof has been filed as required by subsection (b), or (2) notice under subsection (c) has been given to the official or body charged with the administration of the death tax laws of the domiciliary state, and such official or body has not petitioned for an accounting under said subsection within sixty days after the mailing of said notice, or (3) an accounting has been had under said subsection (c), a decree has been made upon such accounting and it appears that the executor or administrator has paid such sums and remitted such securities, if any, as he was required to pay or remit by such decree, or (4) it appears that letters testamentary or of administration have been issued by the domiciliary state and that no notice has been given under said subsection (c).
or exercises such privilege after the expiration of June of each year as the governing body of a county, city or town may determine: Provided, that where the tax is levied on an annual basis and the licensee begins such business, exercising the privilege, or doing the business, exercising the privilege named in the state license to conduct the profession or business named in the state license to the county and/or city and location specified in the state license, unless otherwise provided in this article or schedule. Other license issued for a tax year for the conduct of a business at a specified location shall upon a sale or transfer of the business be deemed a sufficient license for the succeeding purchaser for the conduct of the business specified at such location for the balance of the tax year: Provided, that if the holder of a license under this schedule moves the business for which a license has been paid to another location, a new license may be issued to the licensee at a new location for the balance of the license year, upon surrender of the original license for cancellation and the payment of a fee of five dollars ($5.00) for each license certificate reissued.

Art. 2. Schedule B. License Taxes.

§ 105-33. Taxes under this article.—Taxes in this article or schedule shall be imposed as state license taxes for the privilege of carrying on the business, exercising the privilege, or doing the business, exercising the privilege, or trade for which a state qualification license is required.

(a) If the business made taxable or the privilege to be exercised under this article or schedule is carried on at two or more separate places, a separate state license for each place or location of such business shall be required.

(b) Every state license issued under this article or schedule shall be for twelve months, shall expire on the thirty-first day of May of each year, and shall be for the full amount of tax prescribed: Provided, that where the tax is levied on an annual basis and the licensee begins such business or exercises such privilege after the first day of January and prior to the thirty-first day of May of each year, then such licensee shall be required to pay one-half of the tax prescribed other than the tax prescribed to be computed and levied upon a gross receipts and/or percentage basis for the conducting of such business or the exercising of such privilege to and including the thirty-first day of May, next following. Every county, city and town license issued under this article or schedule shall be for twelve months, and shall expire on the thirty-first day of May or thirtieth day of June of each year as the governing body of such county, city or town may determine: Provided, that where the licensee begins such business or exercises such privilege after the expiration of seven months of the current license year of such municipality, then such licensee shall be required to pay one-half of the tax prescribed other than the tax prescribed to be computed upon a gross receipts and/or percentage basis.

(c) The state license issued under §§ 105-41, 105-42, 105-43, 105-44, 105-45, 105-48, 105-53, 105-54, 105-55, 105-56, 105-57, 105-58 and 105-59 shall be and constitute a personal privilege to conduct the profession or business named in the state license, shall not be transferable to any other person, firm or corporation and shall be construed to limit the person, firm or corporation named in the license to conducting the profession or business and exercising the privilege named in the state license to the county and/or city and location specified in the state license, unless otherwise provided in this article or schedule. Other license issued for a tax year for the conduct of a business at a specified location shall upon a sale or transfer of the business be deemed a sufficient license for the succeeding purchaser for the conduct of the business specified at such location for the balance of the tax year: Provided, that if the holder of a license under this schedule moves the business for which a license has been paid to another location, a new license may be issued to the licensee at a new location for the balance of the license year, upon surrender of the original license for cancellation and the payment of a fee of five dollars ($5.00) for each license certificate reissued.

(d) Wherever, in any section of this article or schedule, the tax is graduated with reference to the population of the city or town in which the business is to be conducted or the privilege exercised, the minimum tax provided in such section shall be applied to the same business or privilege when conducted or exercised outside of the municipality, unless such business is conducted or privilege exercised within one mile of the corporate limits of such municipality, in which event the same tax shall be imposed and collected as if the business conducted or the privilege exercised were inside of the corporate limits of such municipality: Provided, that with respect to taxes in this article, assessed on a population basis, the same rates shall apply to incorporated towns and unincorporated places or towns alike, with the best estimate of population available being used as a basis for determining the tax in unincorporated places or towns. The term "places or towns" means any, unincorporated community, point or collection of people having a geographical name by which it may be generally known, and is so generally designated.

(e) All state taxes imposed by this article shall be paid to the commissioner of revenue, or to one of his deputies; shall be due and payable on or before the first day of June of each year, and after such date shall be deemed delinquent, and subject to all the remedies available and the penalties imposed for the payment of delinquent state license and privilege taxes: Provided, that if a person, firm or corporation begins any business or the exercise of any privilege requiring a license under this article or schedule after the thirty-first day of May and prior to the thirty-first day of the following May of any year, then such person, firm, or corporation shall apply for and obtain a state license for conducting such business or exercising any such privilege in advance, and before the beginning of such business or the exercise of such privilege; and a failure to so apply and to obtain such state license shall be and constitute a delinquent payment of the state license tax due, and such person, firm, or corporation shall be subject to the remedies available and penalties imposed for the payment of such delinquent taxes.
§ 105-34. Amusement parks. — Every person, firm, or corporation engaged in the business of operating a park, open to the public as a place of amusement, and in which there may be either a bowling alley, trained animal show, penny or nickel machine for exhibiting pictures, theatrical performance, or similar entertainment, shall apply for and obtain from the commissioner of revenue a state license for the privilege of conducting such amusement park, and shall pay for such license the following tax:

<table>
<thead>
<tr>
<th>Duration</th>
<th>Tax Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>State license for two months</td>
<td>$500.00</td>
</tr>
<tr>
<td>State license for four months</td>
<td>400.00</td>
</tr>
<tr>
<td>State license for eight months</td>
<td>600.00</td>
</tr>
<tr>
<td>State license for twelve months</td>
<td>800.00</td>
</tr>
</tbody>
</table>

This section shall not apply to bathing beaches which are not operated for more than four months each year.

(a) The licensee shall have the privilege of doing any or all of the things set out in this section; but the operation of a carnival, circus, or a show of any kind that moves from place to place shall not be allowed under the state license provided for in this section.

(b) Counties shall not levy a license tax on the business taxed under this section. (1939, c. 158, s. 102.)

§ 105-35. Amusements—traveling theatrical companies, etc. — Every person, firm, or corporation engaged in the business of a traveling theatrical, traveling moving picture, and/or traveling vaudeville company, giving exhibitions or performances in any hall, tent, or other place not licensed under §§ 105-34 or 105-37, whenever on account of municipal ownership or otherwise, shall apply for and obtain from the commissioner of revenue a state license for the privilege of engaging in such business, and pay for such license a tax of twenty-five dollars ($25.00) for each day or part of a day's exhibits or performances: Provided, that

(a) Artists exhibiting paintings or statutory work of their own hands shall only pay two dollars ($2.00) for such state license.

(b) Such places of amusement as do not charge more than a total of fifty cents (50c) for admission at the door, including a reserved seat, and shall perform or exhibit continuously in any given place as much as one week, shall be required to pay for such state license a tax of twenty-five dollars ($25.00) per week.

(c) The owner of the hall, tent, or other place where such amusements are exhibited or performances held shall be liable for the tax.

(d) In lieu of the state license tax, hereinbefore provided for in this section, such amusement companies, consisting of not more than ten performers, may apply for an annual statewide license, and the same may be issued by the commissioner of revenue for the sum of three hundred dollars ($300.00), paid in advance, prior to the first exhibition in the state, shall be valid in any county of this state, and shall be in full payment of all state license taxes imposed in this section.

(e) Any traveling organization which exhibits animals or conducts side shows in connection with its exhibitions or performances shall not be taxed under this section, but shall be taxed as herein otherwise provided.

(f) The owner, manager, or proprietor of any such amusements described in this section shall apply in advance to the commissioner of revenue for a state license for each county in which a performance is to be given.

Upon all performances taxable under this section there is levied, in addition to the license tax levied in this section, a tax upon the gross receipts of such business at the rate of tax levied in Sched-
the excess thereof shall be applied as an advance payment of the tax upon gross receipts herein levied, and the license tax shall be applied as a credit upon or advance payment of the gross receipts tax. The commissioner of revenue may adopt such regulations as may be necessary to effectuate the provisions of this section and shall prescribe the form and character of reports to be made, and shall have such authority of supervision as may be necessary to effectuate the purposes of this subchapter.

(g) Counties, cities and towns may levy a license tax not in excess of the license tax levied by the state.

(b) Where the taxpayer elects to pay an annual state-wide license in the sum of three hundred dollars ($300.00) in advance, as provided for in subsection (d) of this section, counties, cities and towns may each levy a license tax not in excess of ten dollars ($10.00) per week, provided such places of amusement do not charge more than a total of fifty cents (50c) for admission at the door, as provided for in subsection (b) of this section. (1939, c. 158, s. 103.)

§ 105-36. Amusements—manufacturing, selling, leasing, or distributing moving picture films or checking attendance at moving picture shows.—Every person, firm, or corporation engaged in the business of manufacturing, selling, or leasing, furnishing, and/or distributing films to be used in moving pictures within this state shall apply for and obtain from the commissioner of revenue a state-wide license for the privilege of engaging in such business in this state, and shall pay for such license a tax of six hundred and twenty-five dollars ($625.00): Provided, that persons, firms, or corporations engaged exclusively in the business of selling, leasing or furnishing and/or distributing films for use in schools, public or private, and other institutions of learning, in this state shall pay a tax of twenty-five dollars ($25.00).

Any person, firm, or corporation engaged under contract or for compensation in the business of checking the attendance of any moving picture or show for the purpose of ascertaining attendance and/or amount of admission receipts at any theatre or theatres shall apply for and obtain from the commissioner of revenue a state license for the privilege of engaging in such business in this state, and shall pay for such license an annual tax of ten dollars ($10.00) per week, provided such total of fifty cents (50c) for admission at the door, as provided for in subsection (b) of this section.

§ 105-37. Amusements—moving pictures or vaudeville shows—admission.—Every person, firm, or corporation engaged in the business of operating a moving picture show or place where vaudeville exhibitions or performances are given or operating a theatre or opera house where public exhibitions or performances are given for compensation shall apply for and obtain from the commissioner of revenue a state license for the privilege of engaging in such business, and shall pay for such state license for each room, hall, or tent used the following tax:

<table>
<thead>
<tr>
<th>Seating Capacity</th>
<th>Cities or Towns with Less Than 1,500 Population</th>
<th>Cities or Towns with 1,500 to 3,000 Population</th>
<th>Cities or Towns with 3,000 to 5,000 Population</th>
<th>Cities or Towns with 5,000 to 10,000 Population</th>
<th>Cities or Towns with 10,000 to 15,000 Population</th>
<th>Cities or Towns with 15,000 to 25,000 Population</th>
<th>Cities or Towns with More Than 25,000 Population</th>
</tr>
</thead>
<tbody>
<tr>
<td>Seats up to 600</td>
<td>$125.00</td>
<td>$200.00</td>
<td>$250.00</td>
<td>$300.00</td>
<td>$350.00</td>
<td>$400.00</td>
<td>$450.00</td>
</tr>
<tr>
<td>Seats 600 to 1,200</td>
<td>$150.00</td>
<td>$250.00</td>
<td>$300.00</td>
<td>$350.00</td>
<td>$400.00</td>
<td>$450.00</td>
<td>$500.00</td>
</tr>
<tr>
<td>Seats over 1,200</td>
<td>$200.00</td>
<td>$300.00</td>
<td>$350.00</td>
<td>$400.00</td>
<td>$450.00</td>
<td>$500.00</td>
<td>$550.00</td>
</tr>
</tbody>
</table>

(a) For any moving picture show operated more than two miles from the business center of any city having a population of twenty-five thousand, or over (for the purpose of this provision, the term “business center” to be defined as the intersection of the two principal business streets of the city), the tax levied shall be one-third of the annual tax provided above, based upon the population of the city in which such theatre is located or adjacent to.

(b) For any moving picture show operated within the city limits or within one mile of the corporate limits of any city having a population of twenty-five thousand, or over, and known as neighborhood or suburban theatres, or for any theatre operated exclusively for colored people in a city having a population of ten thousand, or over, the tax levied shall be one-third of the above tax, based upon the population of such city.

(c) For any moving picture show operated at bathing beaches or resort towns for less than six months each year, the tax levied shall be one-half the annual tax provided above, based upon the population of the city or town in which such seasonal moving picture show shall be operated.

(d) For any motion picture show operating three days or less each week, the tax levied shall be one-half the annual tax provided above, based upon the population of the city or town in which such theatre is located.

(e) Counties shall not levy any license tax on the business taxed under the foregoing portion of this section, but cities and towns may levy a license tax not in excess of the tax levied by such city or town as of and in effect January first, one thousand nine hundred and forty-three.

(f) Upon any and all other forms of entertainment and amusement not otherwise taxed or
specifically exempted in this article, for which an admission is charged, every person, firm, or corporation engaged in such business shall pay an annual license tax for each room, hall, or tent where such admission charges are made graduated according to population, as follows:

<table>
<thead>
<tr>
<th>City Size</th>
<th>License Tax</th>
</tr>
</thead>
<tbody>
<tr>
<td>In cities or towns of less than 1,500 pop.</td>
<td>$10.00</td>
</tr>
<tr>
<td>In cities or towns of 1,500 and less than 3,000 pop.</td>
<td>15.00</td>
</tr>
<tr>
<td>In cities or towns of 3,000 and less than 5,000 pop.</td>
<td>20.00</td>
</tr>
<tr>
<td>In cities or towns of 5,000 and less than 10,000 pop.</td>
<td>25.00</td>
</tr>
<tr>
<td>In cities or towns of 10,000 and less than 15,000 pop.</td>
<td>30.00</td>
</tr>
<tr>
<td>In cities or towns of 15,000 and less than 25,000 pop.</td>
<td>40.00</td>
</tr>
<tr>
<td>In cities or towns of 25,000 population or over</td>
<td>50.00</td>
</tr>
</tbody>
</table>

In addition to the license tax levied in the above schedule of this subsection, such person, firm, or corporation shall pay an additional tax upon the gross receipts of such business at the rate of tax levied in Schedule E, §§ 105-164 to 105-187, upon retail sales of merchandise. Reports shall be made to the commissioner of revenue in such form as he may prescribe within the first ten days of each month, covering all such gross receipts for the previous month and the additional tax herein levied shall be paid monthly at the time such reports are made. The annual license tax herein levied shall be treated as an advance payment of the tax upon gross receipts herein levied, and the annual license tax shall be applied as a credit upon or advance payment of the gross receipts tax.

Provided, that athletic contests of all kinds, high school and elementary school contests, for which an admission is charged in excess of fifty cents (50c), including football, baseball, basketball, dances, wrestling, and boxing contests, shall pay an annual license tax of fifty cents ($0.50), including football, baseball, basketball, and an additional charge upon the gross receipts herein levied shall be treated as an advance payment of the tax upon gross receipts herein levied, and the annual license tax shall be applied as a credit upon or advance payment of the gross receipts tax.

In addition to the license tax levied in the above schedule of this subsection, such person, firm, or corporation shall pay an additional tax upon the gross receipts of such business at the rate of tax levied in Schedule E, §§ 105-164 to 105-187, upon retail sales of merchandise. Reports shall be made to the commissioner of revenue in such form as he may prescribe within the first ten days of each month, covering all such gross receipts for the previous month and the additional tax herein levied shall be paid monthly at the time such reports are made. The annual license tax herein levied shall be treated as an advance payment of the tax upon gross receipts herein levied, and the annual license tax shall be applied as a credit upon or advance payment of the gross receipts tax.

Editor's Note.—The 1943 amendment rewrote the part of this section ending with subsection (e). Prior to the amendment subsections (f) and (g) were designated (b) and (c), respectively. The amendment made changes in the paragraph immediately following the tax schedule in subsection (f). It also inserted the references to said subsection in subsection (g).

Educational Entertainment Hall Exempt.—A musical con-
revenue, with full and particular instructions as to the state license tax to be paid. Before giving any of the exhibitions or performances provided for in such statement, the person, firm, or corporation making such statement shall pay the commissioner of revenue the tax so fixed and determined. If one or more of such exhibitions or performances included in such statement and for which the tax has been paid shall be canceled, the commissioner of revenue may, upon proper application made to him, refund the tax for such canceled exhibitions or performances. Every such person, firm, or corporation shall give to the commissioner of revenue a notice of not less than five days before giving any of such exhibitions or performances in each county.

(d) The sheriff of each county in which such exhibitions or performances are advertised to be exhibited shall promptly communicate such information to the commissioner of revenue; and if the statement required in this section has not been filed as provided herein, or not filed in time for certified copies thereof, with proper instructions, to be transmitted to the sheriffs of the several counties and the division deputy commissioner, the commissioner shall cause his division deputy to attend at one or more points in the state where such exhibitions or performances are advertised or expected to exhibit, for the purpose of securing such statement prescribed in this section, of fixing and determining the amount of state license tax with which such person, firm, or corporation is taxable, and to collect such tax or give instructions for the collection of such tax.

(e) Every person, firm, or corporation by whom or which any such exhibition or performance described in this section is given in any county, city or town, or within five miles thereof, wherein is held an annual agricultural fair, during the week of such annual agricultural fair, shall pay a state license of one thousand dollars ($1,000.00) for each exhibition or performance in addition to the license tax first levied in this section, to be assessed and collected by the commissioner of revenue or his duly authorized deputy.

(f) The provisions of this section, or any other section of this article, shall not be construed so as to allow a person, firm, or corporation to avoid without the payment of the tax imposed in this section, any exhibition or performance described in this section for charitable, benevolent, educational, or any other purpose whatsoever, by any person, firm, or corporation who is engaged in giving such exhibitions or performances, no matter what terms of contract may be entered into or under what auspices such exhibitions or performances are given. It being the intent and purpose of this section that every person, firm, or corporation who or which is engaged in the business of a carnival company or a show of like kind, moving picture and vaudeville shows, museums and menageries, merry-go-rounds, ferris wheels, riding devices, and other like amusements, and enterprises, conducted for profit, under the same general management, or an aggregate of shows, amusements, eating places, riding devices, or any of them operating together on the same lot or contiguous lots or streets, traveling from place to place, whether owned and actually operated by separate persons, firms, or corporations or not, filling week-stand engagements, or giving week-stand exhibitions, under canvas or not, shall apply for and obtain from the commissioner of revenue a state license for the privilege of engaging in such business or amusement, and shall pay for such license for each week, or part of a week, a tax based according to the population of the city or town in which such carnival is showing as follows:

In cities or towns of less than 2,500 population ........................................... $200.00
In cities or towns of 2,500 population and less than 10,000 population ............... 300.00
In cities or towns of more than 10,000 population ............................................. 500.00

Provided that any carnival operating within a radius of five miles of any city shall pay the same

§ 105-39. Amusement—carnival companies, etc. —Every person, firm, or corporation engaged in the business of a carnival company or a show of like kind, moving picture and vaudeville shows, museums and menageries, merry-go-rounds, ferris wheels, riding devices, and other like amusements, and enterprises, conducted for profit, under the same general management, or an aggregate of shows, amusements, eating places, riding devices, or any of them operating together on the same lot or contiguous lots or streets, traveling from place to place, whether owned and actually operated by separate persons, firms, or corporations or not, filling week-stand engagements, or giving week-stand exhibitions, under canvas or not, shall apply for and obtain from the commissioner of revenue a license for the privilege of engaging in such business or amusement, and shall pay for such license for each week, or part of a week, a tax based according to the population of the city or town in which such carnival is showing as follows:
tax as if they were actually showing within the city limits of said town. Provided further that if such a carnival operates over five miles from any city or town such a carnival shall be liable for a tax of one hundred dollars ($100.00) per week or part of a week for each such riding device, provided that counties, cities and towns may levy and collect a license tax upon such riding devices not in excess of five dollars ($5.00) for each such device.

Provided, further, that it shall be unlawful under this section for the owners and/or operators of riding devices to operate, or cause to be operated, any show, game, stand or other attraction whatsoever.

(a) This section shall not repeal any local act prohibiting any of the shows, exhibitions, or performances mentioned in this section, or limit the authority of the board of county commissioners or any court to assess a tax, or other governing body of any city or town, in prohibiting such shows, exhibitions, or performances.

If the commissioner of revenue shall issue a state license for any such show, exhibition, or performance in any county or municipality having a local statute prohibiting the same, then the said state license shall not authorize such show, exhibition, or performance to be held in such county or municipality, but the commissioner of revenue shall refund, upon proper application, the tax paid for such state license.

(b) No person, firm, or corporation, nor any aggregation of same, giving such shows, exhibitions, or performances, shall be relieved from the payment of the tax levied in this section, regardless of whether or not the state derives a benefit from same. Nor shall any carnival operating or giving performances or exhibitions, in connection with any fair in North Carolina, be relieved from the payment of tax levied in this section. It is the intent and purpose of this section that every person, firm, or corporation, or aggregation of same which is engaged in the giving of such shows, exhibitions, performances, or amusements, whether the whole or a part of the proceeds are for charitable, benevolent, educational, or other purposes whatsoever, shall pay the state license tax provided for in this section.

It is not the purpose of this article to discourage agricultural fairs in the state, and to further this cause, no carnival company will be allowed to have a regularly advertised agricultural fair, fifteen days prior to the dates of said fair. An agricultural fair shall be construed as meaning one that has operated at least one year prior to March 24, 1939.

Upon all performances taxable under this section there is levied, in addition to the license tax levied in this section, a tax upon the gross receipts of such business at the rate of tax levied in Schedule E, §§ 105-164 to 105-187, upon retail sales of merchandise. The license tax herein levied shall be treated as an advance payment of the tax upon the gross receipts herein levied, and the license tax shall be applied as a credit upon or advance payment of the gross receipts tax. The commissioner of revenue may adopt such regulations as may be necessary to effectuate the provisions of this section and shall prescribe the form and character of reports to be made, and shall have such authority or supervision as may be necessary to effectuate the purposes of this subchapter.

Nothing herein contained shall prevent American Legion Posts in North Carolina from holding fairs or tobacco festivals on any dates which they may select, provided said fairs and festivals have heretofore been held as annual events.

(c) Counties, cities and towns may levy a license tax on the business taxed hereunder not in excess of one-half of that levied by the state. (1939, c. 158, c. 107; 1941, c. 50, s. 3.)

Editor's Note.—The 1941 amendment struck out the third paragraph of this section and inserted the above in place thereof.

For comment on the 1941 amendment, see 19 N. C. Law Rev. 529.

§ 105-40. Amusements—certain exhibitions, performances, and entertainments exempt from license tax. — All exhibitions, performances, and entertainments, except as in this article expressly mentioned as not exempt, produced by local talent exclusively, and for the benefit of religious, charitable, benevolent, or educational purposes, and where no compensation is paid to such local talent shall be exempt from the state license tax. (1939, c. 158, s. 108.)

Educational Entertainment Hall Exempt.—A musical conservatory, owning a hall in which it gives entertainments for the special benefit of its pupils and teachers, charging admission thereto, is not liable for the opera house tax provided in § 105-40. Southern Methodist University, 130 N. C. 276, 277, 41 S. E. 531.

§ 105-41. Attorneys at law and other professionals.—Every practicing attorney at law, practicing physician, veterinary, surgeon, osteopath, chiropractor, chiropodist, dentist, oculist, optician, optometrist, any person practicing any professional art of healing for a fee or reward, civil engineer, electrical engineer, mining engineer, mechanical engineer, architect and landscape architect, photographer, canvasser for any photographer, agent of a photographer in transmitting pictures or photographs to be copied, enlarged or colored (including all persons enumerated in this section employed by the state, county, municipality, a corporation, firm or individual), and every person, whether acting as an individual, as a member of a partnership, or as an officer and/or agent of a corporation, who is engaged in the business of selling or offering for sale, buying or offering to buy, negotiating the purchase, sale, or exchange of real estate, or who is engaged in the business of leasing or offering to lease, renting or offering to rent, or of collecting any rents as agent for another for compensation, or who is engaged in the business of soliciting and/or negotiating loans on real estate as agent for another for a commission, for purposes of this subchapter, shall apply for and obtain from the commissioner of revenue a state-wide license for the privilege of engaging in such business or profession, or the doing of the act named, and shall pay for such license twenty-five dollars ($25.00): Provided, that no professional man or woman shall be required to pay a privilege tax after he or she has arrived at the age of seventy-five years.
Every person engaged in the public practice of accounting as a principal, or as a manager of the business of public accountant, shall pay for such license twenty-five dollars ($25.00), and in addition shall pay a license of twelve and fifty-one hundredths dollars ($12.50) for each person employed who is engaged in the capacity of observing or handling the work of auditing, devising or installing systems of accounts.

Every licensed mortician or embalmer shall in like manner apply for and obtain from the commissioner of revenue a state-wide license for practicing his profession, whether for himself or in the employ of another of ten dollars ($10.00). Licenses issued under this section are issued as personal privilege licenses and shall not be issued in the name of a firm or corporation: Provided, that a licensed photographer having a located place of business in this state, shall be liable for a license tax on each agent or solicitor, employed by him for soliciting business. If any person engages in more than one of the activities for which a privilege tax is levied by this section, such person shall be liable for a privilege tax with respect to each activity engaged in.

(a) Only one-half of the tax levied in this section shall be collected from those persons whose gross receipts from the business or profession for the preceding year did not exceed one thousand dollars ($1,000.00).

(b) License revocable for failure to pay tax.

Whenever it shall be made to appear to any judge of the superior court that any person practicing any profession for which the payment of a license tax is required by this section has failed, or fails, to pay the professional tax levied in this section, and execution has been issued for the same by the commissioner of revenue and returned by the proper officer "no property to be found," or returned for other cause without payment of the tax, it shall be the duty of the judge presiding in the superior court of the county in which such person resides, upon presentation therefor, to cause the clerk of said court to issue a rule requiring such person to show cause by the next term of court why such person should not be deprived of license to practice such profession or apprenticeship, or fail to pay such professional tax. Such rule shall be served by the sheriff upon said person twenty days before the next term of the court, and if at the return term of court such person fails to show sufficient cause, the said judge may enter a judgment suspending the professional license of such person until all such tax as may be due shall have been paid, and such order of suspension shall be binding upon all courts, boards and commissions having authority of law in this state with respect to the granting or continuing of license to practice any such profession.

(c) Counties, cities, or towns shall not levy any license tax on the business or professions taxed under this section; and the state-wide license herein provided for shall privilege the licensee to engage in such business or profession in every county, city, or town in this state. (1939, c. 158, s. 109; 1941, c. 50, s. 3; 1943, c. 400, s. 2.)

Editor's Note.—The 1941 amendment struck out a provision of subsection (c) excepting photographers, etc. The 1943 amendment added the last sentence of the fourth paragraph. It also directed that former subsection (d), providing an exception as to certain temporary photography, be stricken out. This subsection had already been omitted upon codification.

Persons Making "Negatives" Are Photographers Subject to License Tax.—To solicit persons to have their photographs taken, arrange for the sitting, and actually have the negative or negatives taken, and arrange for the working up and delivery of the negatives or photographs taken, when such work is done in this state and the subject is not a resident of this state, is a practice of photography within the meaning of this section. Lucas v. Charlotte, 14 F. Supp. 161, 167. Although the "negatives" are sent to another state for development and printing, when the receipt of the negatives or photographs does not constitute an interference with or burden upon interstate commerce. 1d.

This section gives to each county and city the privilege of levying a privilege tax upon photographers. Lucas v. Charlotte, 14 F. Supp. 163, 165.

Discriminatory Statute Applying Only to Certain Real Estate Brokers Is Unconstitutional.—Ch. 241, Public-Local Laws of 1927, requiring real estate brokers and salesmen in certain designated counties to be licensed by a real estate commission on the basis of moral character and proficiency in the public interest, and requiring the payment of a license fee in addition to the license required by this section, was held unconstitutional as discriminatory. State v. Warren, 211 N. C. 75, 189 S. E. 210.


§ 105-41.1. Bondsmen.—Every person, firm, or corporation, excepting agents of insurance or bonding companies which are licensed by the commissioner of insurance to issue bonds, engaged in the business of writing or executing, for a consideration, appeals, earnest, or bail bonds, or any type of bond or undertaking required in connection with criminal proceedings in any of the courts of this state, shall apply for and obtain from the commissioner of revenue a state-wide license for the privilege of engaging in such business and shall pay for such license the following tax:

In cities or towns of less than 2,000 population $10.00
In cities or towns of 2,000 and less than 5,000 population 15.00
In cities or towns of 5,000 and less than 10,000 population 20.00
In cities or towns of 10,000 population or over 40.00

Counts, cities and towns may levy a license tax on the business taxed under this section in an amount not in excess of the tax levied by the state. (1943, c. 400, s. 2.)

Editor's Note.—As to taxation and regulation of professional bondsmen in Cumberland County, see Session Laws, 1913, c. 316; in Wake County, see Session Laws 1941, c. 210.

§ 105-42. Detectives. — Every person, whether acting as an individual, as a member of a partnership, or as an officer and/or agent of a corporation, who is engaged in business as a detective or what is ordinarily known as "secret service work," or who is engaged in the business of soliciting such business, shall apply for and obtain from the commissioner of revenue a state-wide license for the privilege of engaging in such business, and shall pay for such license a tax of not more than twenty-five dollars ($25.00): Provided, any person regularly employed by the United States government, any state or political subdivision of any state shall not be required to pay the license herein provided for. (1939, c. 158, s. 110.)

§ 105-43. Real estate auction sales.—(a) Every person, firm, or corporation engaged in the business of conducting auction sales of real estate for
§ 105-44. Coal and coke dealers.—(a) Every person, firm, or corporation, either as agent or principal, engaged in and conducting the business of selling and/or delivering coal or coke in car-load lots, or in greater quantities, shall be deemed a wholesale dealer, and shall apply for and procure from the revenue commissioner a state license and pay for such license the sum of seventy-five dollars ($75.00): Provided, that if such wholesale dealer shall also sell and/or deliver coal or coke in less than carload lots, he shall not be subject to the retailer's license tax provided in this section.

(b) Every person, firm, or corporation engaged in and conducting the business of selling and/or delivering coal or coke at retail shall apply for and procure from the commissioner of revenue a state license for the privilege of engaging in such business in this state, and shall pay for such license a tax of two hundred and fifty dollars ($250.00). (1939, c. 158, s. 111.)

§ 105-45. Collecting agencies.—Every person, firm, or corporation engaged in the business of collecting, for a profit, claims, accounts, bills, notes, or other money obligations for others, and of rendering an account for same, shall be deemed a collection agency, and shall apply for and receive from the commissioner of revenue a state license for the privilege of engaging in such business, and pay for such license a tax of fifty dollars ($50.00).

(a) This section shall not apply to a regularly licensed practicing attorney at law.

(b) Counties shall not levy any license tax on the business taxed under this section, but cities and towns may levy a license tax not in excess of that levied by the state. (1939, c. 158, s. 113.)

§ 105-46. Undertakers and retail dealers in coffins.—Every person, firm, or corporation engaged in the business of burying the dead, or in the retail sale of coffins, shall apply for and procure from the revenue commissioner a state license for transacting such business within this state, and shall pay for such license the following tax:

In cities or towns of less than 500 population ................................. $ 10.00
In cities or towns of 500 and less than 5,000 population ....................... 25.00
In cities or towns of 5,000 and less than 10,000 population .................... 40.00
In cities or towns of 10,000 and less than 15,000 population ................... 50.00
In cities or towns of 15,000 and less than 25,000 population ................... 75.00
In cities or towns of 25,000 population or over .................................. 100.00

This section shall not apply to a cabinet-maker (who is not an undertaker) who makes coffins to order.

No county shall levy any license tax on the business taxed under this section, but cities and towns may levy a license tax not in excess of that levied by the state. (1939, c. 158, s. 114.)

§ 105-47. Dealers in horses and/or mules.—Every person, firm, or corporation engaged in the business of purchasing for the purpose of resale, either at wholesale or retail, horses and/or mules shall apply for and procure from the commissioner of revenue a state license for the privilege of engaging in such business in this state and shall pay for such license an annual tax for each location where such business is carried on as follows:

Where not more than one carload of horses and/or mules is purchased for the purpose of resale ................................................. $ 25.00
Where more than one carload and not
more than two carloads of horses and/or mules are purchased for the purpose of resale .......................... 50.00
Where more than two carloads of horses and/or mules are purchased for the purpose of resale .......................... 100.00

For the purpose of calculating the amount of tax due under the above schedule, a carload of horses and/or mules shall be twenty-five (25) and purchases for the preceding license tax year shall be used as a medium for arriving at the amount of tax due for the ensuing year: Provided, however, that if during the current license year horses and/or mules are purchased for the purpose of resale in such quantities that would establish liability for a greater tax than that previously paid, it shall be immediately remitted to the commissioner of revenue with the license which has already been issued in order that it may be canceled and a corrected license issued.

In addition to the above license, every person, firm, or corporation engaged in the business of purchasing for the purpose of resale and/or selling horses and/or mules at public auction, either on his own behalf or for any other person, whether a commission or fee is or is not charged, shall apply for and procure from the commissioner of revenue a state license for each place of auction and shall pay for such license an annual tax of one hundred dollars ($100.00).

In addition to the above license, every transient vendor of horses and/or mules who has no permanent or established place of business in this state shall apply for and procure from the commissioner of revenue a state license for each county in which horses and/or mules are sold and shall pay for such license an annual tax of three hundred dollars ($300.00).

(a) In addition to the annual licenses levied in this section, every person, firm, or corporation, engaged in the business of purchasing for the purpose of resale, either at wholesale or retail, horses and/or mules shall pay a tax of three dollars ($3.00) per head on all such horses and/or mules purchased for the purpose of resale. "Purchase" shall be taken to mean and shall include all horses and/or mules acquired or received as a result of outright purchase or on consignment, account or otherwise for resale, either at wholesale or retail: Provided, however, that "purchases" shall not include the acquisition of horses and/or mules which are acquired or received as a result of an allowance for credit for horses and/or mules taken in part payment on horses and/or mules subject to the tax imposed in this section, and it shall be the duty of the commissioner of revenue or his duly authorized agents to assess the additional per-head tax levied in this section on purchases of horses and/or mules purchased for the purpose of resale and/or sell thereof to himself or his duly authorized agent for the purpose of resale, either at wholesale or retail, shall be due and payable immediately upon receipt of such horses and/or mules within this state. The commissioner of revenue may, however, in his discretion, where he thinks circumstances justify it, permit licensed and established dealers to file monthly reports, which reports shall be due to be filed on or before the fifteenth (15th) of each month for all purchases during the preceding month, and such report when filed shall be accompanied by a remittance for the amount of tax shown to be due. Reports shall be filed in such form and in such manner as may be prescribed by the commissioner of revenue, and failure to file the report herein prescribed and pay the tax as shown to be due thereon shall subject such dealer to a penalty of five per cent (5%) of the amount of tax due for each month or fraction thereof that such report may be delinquent.

(c) Every person, firm, or corporation engaged in the business of purchasing for the purpose of resale, either at wholesale or retail, horses and/or mules shall keep a full, true and accurate record of all purchases and/or sales of all horses and/or mules until such purchases and sales of all horses and/or mules until such purchases and sales, including purchases and freight bills, have been checked by a duly authorized agent of the commissioner of revenue. Failure to comply with the provisions of this section in this respect shall be prima facie evidence of attempting to evade the additional taxes levied in this section and shall subject such dealer, in addition to all other penalties imposed by this article, to the additional per-head tax on all purchases and/or sales from whatever source such horses and/or mules are acquired or received, and it shall be the duty of the commissioner of revenue or his duly authorized agents to assess the additional tax upon an estimation of purchases and/or sales from the best information obtainable.

(d) As a condition to the issuance or the continuance of the annual license levied in this section, and in order to secure the payment of the additional per-head tax levied on purchases and/or sales in this section, the commissioner of revenue may in his discretion, when it appears reasonably necessary therefor, require any dealer in horses and/or mules, applying for a license under this section, to post a surety bond or other adequate security sufficient to guarantee and secure the payment of any tax due under this section.

(e) Any person, firm, or corporation, required
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to procure from the commissioner of revenue a license under this section, who shall purchase and sell or offer for sale by principal or agent any horses and/or mules without first having obtained such license, or shall fail, neglect or refuse to file any report and pay the additional taxes levied in this section when due and payable, shall in addition to the other penalties imposed by this article, be deemed guilty of a misdemeanor and upon conviction shall be fined not to exceed one hundred dollars ($100.00) and/or imprisoned not less than thirty (30) days within the discretion of the court.

(f) Counties, cities and towns may levy an annual license tax on the business taxed under this section not in excess of twelve dollars and fifty cents ($12.50). (1939, c. 158, s. 115; 1941, c. 50, s. 3.)

Editor's Note.—The 1941 amendment added at the end of the second sentence of the second paragraph of subsection (a) the following: "unless sold to a licensed dealer for the purpose of resale."

§ 105-48. Phenologists.—Any person engaged in the practice of phrenology for compensation shall procure from the commissioner of revenue a state license for engaging in such practice, and shall pay for such license not in excess of that levied by the state. (1939, c. 158, s. 116.)

§ 105-49. Bicycle dealers.—Any person, firm, or corporation engaged in the business of buying and/or selling bicycles, supplies and accessories shall apply for and procure a state license from the commissioner of revenue for the privilege of transacting such business, and shall pay tax for such license as follows:

<table>
<thead>
<tr>
<th>Category</th>
<th>Tax Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>In cities and towns of less than 10,000</td>
<td>$10.00</td>
</tr>
<tr>
<td>In cities and towns of 10,000 and less than 20,000</td>
<td>$20.00</td>
</tr>
<tr>
<td>In cities or towns of 20,000 population or more</td>
<td>$25.00</td>
</tr>
</tbody>
</table>

Counties shall not levy a license tax on the business taxed under this section, but cities and towns may levy a license tax not in excess of that levied by the state. (1939, c. 158, s. 117.)

Cross Reference.—For temporary reduction of the taxes levied under this section, see § 105-113.1.

§ 105-50. Pawnbrokers. —Every person, firm, or corporation engaged in and conducting the business of pawnbroker without a license as provided in this section, or violating any of the provisions of this section, shall be guilty of a misdemeanor and fined not less than fifty dollars ($50.00) nor more than five hundred dollars ($500.00).

(a) Before such pawnbroker shall receive any article or thing of value from any person or persons, on which a loan or advance is made, he shall issue a duplicate ticket, one to be delivered to the owner of said personal property and the other to be attached to the article, and said ticket shall have an identifying number on the one side, together with the date at the expiration of which the pledger forfeits his right to redeem, and on the other a full and complete copy of this subsection; but such pawnbroker may, after the pledger has forfeited his right to redeem the specific property pledged, sell the same at public auction, deducting from the proceeds of sale the money or fair value of the thing advanced, the interest accrued, and the cost of making sale, and shall pay the surplus remaining to the pledger.

(b) Any person, firm, or corporation transacting the business of pawnbroker without a license as provided in this section, or violating any of the provisions of this section, shall be guilty of a misdemeanor and fined not less than fifty dollars ($50.00) nor more than five hundred dollars ($500.00).

(c) Counties, cities, and towns may levy a license tax on the business taxed under this section not in excess of that levied by the state. (1939, c. 158, s. 118.)

Broker and Pawnbroker Distinguished.—There is a great difference between the terms "broker" and "pawnbroker." A broker is an agent, middleman or negotiator, who works for a commission. A pawnbroker is not an agent at all. He is one who lends money upon personal property as security. Brokers and pawnbrokers constitute distinct classes, and entirely different license taxes may be assessed upon them. Schau & Co. v. Charlotte, 118 N. C. 733, 24 S. E. 526.

§ 105-51. Cash registers, adding machines, typewriters, refrigerating machines, washing machines, etc.—Every person, firm, or corporation engaged in the business of selling and/or delivering and/or renting cash registers, typewriters, adding or bookkeeping machines, billing machines, check protectors or protectographs, kelvinators, frigidaires, or other refrigerating machines, lighting systems, washing machines, mechanically or electrically operated, burglar alarms, addressograph machines, multigraph and other duplicating machines, vacuum cleaners, mechanically or electrically operated oil burners and coal stokers, card punching, assorting and tabulating machinery, shall apply for and procure from the commissioner of revenue a state license for each place where such business is transacted in this state, and shall pay for such license a tax of ten dollars ($10.00).

Counties, cities, and towns shall not levy a license tax on the business taxed under this section. (1939, c. 158, s. 119.)

Cross Reference.—For temporary reduction of the taxes levied under this section, see § 105-113.1.

§ 105-52. Sewing machines.—(a) Every person, firm, or corporation engaged in the business of selling sewing machines within this state shall apply for and obtain from the commissioner of revenue a state-wide license for the privilege of engaging in such business and shall pay for such license a tax of one hundred dollars ($100.00) per annum for each such make of machines sold or offered for sale.

(b) In addition to the annual license tax imposed in subsection (a) of this section, such per-
son, firm, or corporation engaged in the business taxed under this section shall pay a tax at the rate of tax levied in Schedule E, §§ 105-164 to 105-187, on retail sales of merchandise on the total receipts during the preceding year from the sale, lease, or exchange of sewing machines and/or accessories within the state, which said tax shall be paid to the commissioner of revenue at the time of securing the annual license provided for in subsection (a) of this section: Provided, that the tax on sales in the preceding year, levied in this subsection, shall apply only for the fiscal year ending May thirty-first, one thousand nine hundred thirty-five: Provided further, that on and after June first, one thousand nine hundred thirty-five, the additional tax on sales levied in this subsection shall be assessed and collected under the provisions of Schedule E, §§ 105-164 to 105-187, the same as the tax on sales of other merchandise. (c) Any person, firm, or corporation obtaining a license under the foregoing sections may employ agents and secure a duplicate copy of such license for each such agent by paying a tax of ten dollars ($10.00) to the commissioner of revenue. Each such duplicate license so issued shall contain the name of the agent to whom it is issued, shall not be transferable, and shall license the licensee to sell or offer for sale only the sewing machines sold by the holder of the original license. 

(d) Any merchant or dealer who shall purchase sewing machines from a manufacturer or a dealer who has paid the license tax provided for in this section may sell such sewing machines without paying the annual state-wide license tax provided for in subsection (a), but shall procure the duplicate license provided for in subsection (c) of this section: Provided, that the tax imposed by this subsection shall be the only tax required to be paid by dealers in secondhand sewing machines exclusively. 

(e) Any person, firm, or corporation who or which violates any of the provisions of this section, shall, in addition to all other penalties imposed in this article, pay an additional tax of double the state-wide annual license, and the duplicate tax imposed in this section. 

(f) No county shall levy a license tax on the business taxed under this section, except that the county may levy a license tax not in excess of five dollars ($5.00) on each agent in a county who holds a duplicate license provided for in this section. Cities and towns shall not levy a license tax on the business taxed under this section. (1939, c. 158, s. 120.) § 105-53. Peddlers.—(a) Any person, firm, or corporation who or which shall carry from place to place any goods, wares, or merchandise, and offer to sell or barter the same, or actually sells or barters the same, shall be deemed a peddler, except such person, firm, or corporation who or which is a wholesale dealer, with an established warehouse in this state and selling only to merchants for resale, and shall apply for and procure from the commissioner of revenue a state license for the privilege of transacting such business, and shall pay for such license the following tax: Peddler, on foot, for each county..............$10.00 Peddler, with horse or other animal, and with or without vehicle, each county, for each vehicle .................... 15.00 Peddler, with vehicle propelled by motor or other mechanical power, for each county, for each vehicle .............. 25.00 (b) Any person, firm, or corporation employing the service of another as peddler, whether on a salary or commission basis, or furnishing merchandise to be sold by a peddler under any kind of contractual agreement, shall be liable for the payment of the taxes levied above in this section, instead of the peddler. Provided, however, any person peddling fruits, vegetables, or products of the farm shall pay a license tax of twenty-five dollars ($25.00) per year, which license shall be state-wide. Counties, cities and towns may levy a tax under this subsection not in excess of one-half of the state tax. Provided, however, no county, city or town shall issue any license, or permit any person, firm, or corporation to do any business under the provisions of this subsection, until and unless such person shall produce and exhibit to the tax collector of such county, city or town, his or its state license for the privilege of engaging in such business. 

(c) Any person, firm, or corporation who or which sells or offers to sell from a cart, truck, automobile, or other vehicle operated over and upon the streets and/or highways within this state any fresh fruits and/or vegetables shall be deemed a peddler within the meaning of this section and shall pay the annual license tax levied in subsection (a) of this section with reference to the character of the vehicle employed. Any person, firm, or corporation who or which sells or offers for sale from any railway car fresh fruits and/or vegetables shall be deemed a peddler within the meaning of this section, and shall pay an annual tax of twenty-five dollars ($25.00). Nothing in this section shall apply to the sale of farm products raised on the premises owned or occupied by the person, firm, or corporation, his or its bona fide agent or employee selling same. 

(d) Every itinerant salesman or merchant who shall expose for sale, either on the street or in a building occupied, in whole or in part, for that purpose, any goods, wares or merchandise, not being a regular merchant in such county, shall apply for in advance and procure a state license from the commissioner of revenue for the privilege of transacting such business, and shall pay for such license a tax of one hundred dollars ($100.00) in each county in which he shall conduct or carry on such business. Any salesman or merchant, offering for sale goods, wares or merchandise, other than fruits and farm products, shall be deemed an itinerant, within the meaning of this subsection, who conducts said business within the county for less than six consecutive months, except in case of discontinuance for one of the reasons hereinafter mentioned. When any salesman or merchant, beginning said business, does not pay the tax herein levied in advance, on the ground of stated intention to become a regular merchant,
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In this section Confederate soldiers, disabled or offers for sale books, periodicals, printed goods, wares, or merchandise with vehicle propulsion, require said salesman or merchant in North Carolina to obtain a $250 license to enable him to display goods for purpose of securing orders for selling or bartering the identical goods he carries about with him. State v. Rhyne, 119 N. C. 405, 119 S. E. 785. A peddler is primarily one who travels around on foot, selling or bartering the identical goods he carries. State v. Frank, 164 N. C. 1004, 75 S. E. 785.

Former Subdivision Requiring License for Display of Goods by One Not Regular Retailer Was Unconstitutional.

Former subdivision (e) requiring one not a regular retail merchant in North Carolina to obtain a $250 license to entitle him to display goods for purpose of securing orders for retail sale, violated "commerce" clause of federal constitution as applied to a New York merchandise establishment which rented display room in a North Carolina hotel for several days and took orders for goods corresponding to samples, which orders were filled by shipping direct to customers from New York City, where regular retail merchants in North Carolina were subject to only an annual $1 license tax for privilege of doing business. Best & Co. v. Maxwell, 311 U. S. 454, 61 S. Ct. 334, 85 L. Ed. 275. For decision this date, see 138 N. C. 232.

Nature of Peddling.—To peddle is not a matter of right under our laws, which any person can demand upon the payment of the tax. It is a privilege that may be granted by the county commissioners of the county, and no license must be granted to a peddler. The privilege is personal to the applicant, and is not assignable. State v. Rhyne, 119 N. C. 405, 119 S. E. 785.

Power of Legislature.—Under the N. C. Const. Art. V., sec. 3, the General Assembly may tax trades, etc. The term "trade" includes the business of peddling. Smith v. Wilkins, 164 N. C. 135, 70 S. E. 168.

Nature of Tax.—Peddlers and transient dealers are commonly taxed a specific sum because they are likely to escape any other. A peddler's tax is on the occupation, not on the goods, and one who engages in the business, whether as agent or owner, must pay it. State v. Rhyne, 119 N. C. 405, 119 S. E. 785.

Presumption as to Having License.—The case of State v. Crump, 104 N. C. 763, 10 S. E. 468, contains a dictum to the effect that if a peddler is required by proper authorities to exhibit his license and he fails to do so the presumption is that he has none.

Discretion of County Commissioners.—The discretion vested in the county commissioners to exempt from the peddler's tax the "poor and infirm" is necessary to the administration of statutes like this, and will not be interfered with unless arbitrarily exercised. Smith v. Wilkins, 164 N. C. 135, 70 S. E. 168.

Not Applicable to Citizens of Other States.—The provision of a statute similar to this was held unconstitutional on the grounds that it was made to apply to citizens of other states, and thus pined on commerce. In re Spain, 47 Fed. 238. See also, In re Flinn, 57 Fed. 496.

Sales by Samples.—This section does not apply to sales by sample of goods not at the time thereof sale, and ready for immediate delivery, but applies only where goods are actually exposed and offered for sale, and ready for motor or other mechanical power, taxed by the state under subsection (a) of this section, a tax not exceeding two hundred dollars ($200.00) for each vehicle, which said tax may, in the discretion of the governing body, be graduated in accordance with the size or weight of said vehicles, the amount of merchandising space in and on said vehicles, the average value of goods carried, the types of products offered for sale, or any other reasonable principle, except that the tax shall not exceed two hundred and one-half ton capacity or less shall not exceed twenty-five dollars ($25.00).

No county, city, or town shall levy any license tax under this section upon the persons so exempted in this section, nor upon drummers selling by wholesale. (1939, c. 158, s. 121; 1941, c. 50, s. 3; 1943. c. 400, s. 2.)

Cross Reference.—The tax imposed by this section does not apply to the sale of gasoline to dealers for resale. See § 105-39, subsection (I), subdivision (d).

Editor's Note.—The 1941 amendment struck out former subdivision (e) requiring one not a regular retail merchant in North Carolina to obtain a $250 license to entitle him to display goods for purpose of securing orders for retail sale, violated "commerce" clause of federal constitution as applied to a New York merchandise establishment which rented display room in a North Carolina hotel for several days and took orders for goods corresponding to samples, which orders were filled by shipping direct to customers from New York City, where regular retail merchants in North Carolina were subject to only an annual $1 license tax for privilege of doing business. Best & Co. v. Maxwell, 311 U. S. 454, 61 S. Ct. 334, 85 L. Ed. 275. For decision this date, see 138 N. C. 232.
§ 105-54. Contractors and construction companies.—(a) Every person, firm, or corporation who, for a fixed price, commission, fee, or wage, offers or bids to construct within the state of North Carolina any building, highway, street, sidewalk, bridge, culvert, sewer or water system, drainage or dredging system, electric or steam railway, reservoir or dam, hydraulic or power plant, transmission line, tower, dock, wharf, excavation, grading or other improvement or structure, or any part thereof, the cost of which exceeds the sum of ten thousand dollars ($10,000.00), shall apply for and obtain from the commissioner of revenue an annual state-wide license, and shall pay for such license a tax of one hundred dollars ($100.00) at the time of or prior to offering or submitting any bid on any of the above enumerated projects.

(b) In addition to the tax levied in subsection (a) of this section, every person, firm, or corporation who, for a fixed price, commission, fee, or wage, undertakes or executes a contract for the construction, or who superintends the construction of any of the above enumerated projects, shall, before or at the time of entering into such projects and/or such contract, apply for and procure from the commissioner of revenue a state-wide license and shall pay for such license the following tax:

<table>
<thead>
<tr>
<th>Project Cost</th>
<th>Tax Rate</th>
<th>Total Tax</th>
</tr>
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<tbody>
<tr>
<td>$ 5,000 and not more than</td>
<td>$ 10,000</td>
<td>$ 25.00</td>
</tr>
<tr>
<td>$ 10,000 and not more than</td>
<td>$ 50,000</td>
<td>$ 50.00</td>
</tr>
<tr>
<td>$ 50,000 and not more than</td>
<td>$ 100,000</td>
<td>$ 125.00</td>
</tr>
<tr>
<td>$ 100,000 and not more than</td>
<td>$ 250,000</td>
<td>$ 375.00</td>
</tr>
<tr>
<td>$ 250,000 and not more than</td>
<td>$ 500,000</td>
<td>$ 800.00</td>
</tr>
<tr>
<td>$ 500,000 and not more than</td>
<td>$ 750,000</td>
<td>$ 1,250.00</td>
</tr>
<tr>
<td>$ 750,000 and not more than</td>
<td>$1,000,000</td>
<td>$ 2,000.00</td>
</tr>
</tbody>
</table>

(c) The application for license under subsection (b) of this section shall be made to the commissioner of revenue and shall be accompanied by the affidavit of the applicant, stating the contract price, if known, and if the contract price is not known, his estimate of the entire cost of the said improvement or structure, and if the applicant proposes to construct only a part of said improvement or structures, the contract price, if known, or his estimated cost of the part of the project he proposes to superintend or construct.

In the event the construction of any of the above mentioned improvements or structures shall be divided and let under two or more contracts to the same person, firm, or corporation, the several contracts shall be considered as one contract for the purpose of this article, and the commissioner of revenue shall collect from such person, firm, or corporation the license tax herein imposed as if only one contract had been entered into for the entire improvement or structure.

(d) In the event any person, firm, or corporation has procured a license in one of the lower classes provided for in subsection (b) of this section, and constructs or undertakes to construct or to superintend any of the above mentioned improvements or structures or parts thereof, the completed cost of which is greater than that covered by the license already secured, application shall be made to the commissioner of revenue, accompanied by the license certificate held by the applicant, which shall be surrendered to the commissioner of revenue, and upon paying the difference between the cost of the license surrendered and the price of the license applied for, the commissioner of revenue shall issue to the applicant the annual state-wide license applied for, showing thereon that it was issued on the surrender of the former license and payment of the additional tax.

(e) No employee or sub-contractor of any person, firm, or corporation who or which has paid the tax herein provided for, shall be required to pay the same tax provided for in this section while so employed by such person, firm, or corporation.

(f) Counties shall not levy any license tax on the business taxed under this section, but cities and towns may levy an annual contractor's license tax not in excess of ten dollars ($10.00) when the license provided for under this section has been paid: Provided, that this subsection shall not be construed to prevent the collection of building, electrical, and plumbing inspection charges by municipalities to cover the actual cost of said inspection.

(g) The tax under this section shall not apply to the business taxed in § 105-91. (1939, c. 158, s. 132.)

§ 105-55. Installing elevators and automatic sprinkler systems.—Every person, firm, or corporation engaged in the business of selling or installing elevators or automatic sprinkler systems shall apply for and procure from the commissioner of revenue an annual state-wide license for the transaction of such business in this state, and shall pay for such license a tax of one hundred dollars ($100.00).

(a) Counties, cities, and towns in which there
§ 105-56. Repairing and servicing elevators and automatic sprinkler systems.—Every person, firm, or corporation engaged in the business of repairing or servicing elevators or automatic sprinkler systems, shall apply for and procure from the commissioner of revenue, an annual state-wide license for the privilege of transacting such business in this state and shall pay for such license the following tax based on population:

<table>
<thead>
<tr>
<th>Municipalities</th>
<th>Tax Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>less than two thousand population</td>
<td>$5.00</td>
</tr>
<tr>
<td>more than two thousand and less than five thousand population</td>
<td>7.50</td>
</tr>
<tr>
<td>more than five thousand and less than ten thousand population</td>
<td>10.00</td>
</tr>
<tr>
<td>more than ten thousand and less than twenty thousand population</td>
<td>12.50</td>
</tr>
<tr>
<td>more than twenty thousand and less than thirty thousand population</td>
<td>15.00</td>
</tr>
<tr>
<td>more than thirty thousand and less than forty thousand population</td>
<td>17.50</td>
</tr>
<tr>
<td>more than forty thousand and less than fifty thousand population</td>
<td>20.00</td>
</tr>
<tr>
<td>more than fifty thousand population</td>
<td>25.00</td>
</tr>
</tbody>
</table>

(a) Counties, cities and towns in which there is located a principal office or a branch office may levy a tax on the business taxed under this section not in excess of that levied by the state.

(b) The tax under this section shall not apply to fortune tellers or other artists practicing the art of palmistry, clairvoyance, and other crafts of a similar kind, when appearing under contract in regularly licensed theatres taxed under § 105-37.

(c) Any county, city, or town may levy a license tax on the business taxed under this section not in excess of that levied by the state. (1939, c. 158, s. 122 1/2.)

§ 105-57. Mercantile agencies.—(a) Every person, firm, or corporation engaged in the business of reporting the financial standing of persons, firms or corporations for compensation shall be deemed a mercantile agency, and shall apply for and procure from the commissioner of revenue a state license for the privilege of transacting such business within this state, and shall pay for such license a tax of five hundred dollars ($500.00) in each county in which they offer to trade horses, mules, or other things of value, or to practice the telling of fortunes or any of their crafts.

(b) Any person representing any mercantile agency operating in this state, shall apply for a statewide license for the privilege of transacting such things, and shall pay for such license a tax of five hundred dollars ($500.00) per county in which they offer to trade horses, mules, or other things of value, or to practice the telling of fortunes or any of their crafts.

(c) Counties, cities, or towns shall not levy any tax on mercantile agencies, as herein defined. (1939, c. 158, s. 123; 1941, c. 50, s. 3.)

Editor's Note.—The 1941 amendment substituted the above for the former section.

§ 105-58. Gypsies and fortune tellers.—(a) Every company of gypsies or other bands of persons, living in wagons, tents, or otherwise, who or any of whom trade horses, mules, or other things of value, or receive reward for telling or pretending to tell fortunes, shall apply for and procure from the commissioner of revenue a state license for the privilege of transacting such things, and shall pay for such license a tax of five hundred dollars ($500.00) in each county in which they offer to trade horses, mules, or other things of value, or to practice the telling of fortunes or any of their crafts.

(b) Any person or persons, other than those mentioned in subsection (a) of this section, receiving rewards for pretending to tell and/or telling fortunes, practicing the art of palmistry, clairvoyance, and other crafts of a similar kind, shall apply for in advance and procure from the commissioner of revenue a state license for the privilege of practicing such arts or crafts, and shall pay for such license a tax of two hundred dollars ($200.00) for each county in which they offer to practice their profession or crafts: Provided, that the tax levied under this section shall not apply to fortune tellers or other artists practicing the art of palmistry, clairvoyance, and other crafts of a similar kind, when appearing under contract in regularly licensed theatres taxed under § 105-37.

(c) Any county, city, or town may levy a license tax on the business taxed under this section not in excess of that levied by the state. (1939, c. 158, s. 124.)

§ 105-59. Lightning rod agents.—(a) No manufacturer or dealer, whether person, firm, or corporation, shall sell, or offer for sale, in this state any brand of lightning rod, and no agent of such manufacturer or dealer shall sell, or offer for sale, or erect any brand of lightning rod unless such brand has been submitted to and approved by the insurance commissioner and a license granted for its sale in this state. The fee for such license, including seal, shall be fifty dollars ($50.00).

(b) Upon written notice from any manufacturer or dealer licensed under the preceding subsection of the appointment of a suitable person to act as his agent in this state, and upon filing an application for license upon the prescribed form, the insurance commissioner may, if he is satisfied as to the reputation and moral character of such applicant, issue him a license as general agent of such manufacturer or dealer. Said license shall set forth the brand of lightning rod licensed to be sold, and the fee for such license, including seal, shall be fifty dollars ($50.00).

(c) Such general agent may appoint local agents to represent him in any county in the state.
§ 105-60. Hotels.—Every person, firm, or corporation engaged in the operation of any hotel in this state shall apply for and procure from the commissioner of revenue a state license for the privilege of transacting such business, and shall pay for such license the following tax:

(a) For hotels operating on the American plan for rooms in which rates per person per day are:

<table>
<thead>
<tr>
<th>Rate Per Person Per Day</th>
<th>Tax</th>
</tr>
</thead>
<tbody>
<tr>
<td>Less than two dollars</td>
<td>$.60</td>
</tr>
<tr>
<td>Two dollars and less than three dollars</td>
<td>.90</td>
</tr>
<tr>
<td>Three dollars and less than four dollars and fifty cents</td>
<td>1.80</td>
</tr>
<tr>
<td>Four dollars and less than six dollars</td>
<td>4.20</td>
</tr>
<tr>
<td>Six dollars and less than seven dollars and fifty cents</td>
<td>5.40</td>
</tr>
<tr>
<td>Seven dollars and fifty cents and less than fifteen dollars</td>
<td>6.00</td>
</tr>
<tr>
<td>Fifteen dollars and over</td>
<td>7.20</td>
</tr>
</tbody>
</table>

(b) For hotels operating on the European plan for rooms in which the rates per person per day are:

<table>
<thead>
<tr>
<th>Rate Per Person Per Day</th>
<th>Tax</th>
</tr>
</thead>
<tbody>
<tr>
<td>Less than two dollars</td>
<td>$1.25</td>
</tr>
<tr>
<td>Two dollars and less than three dollars</td>
<td>3.00</td>
</tr>
<tr>
<td>Three dollars and less than four dollars and fifty cents</td>
<td>4.50</td>
</tr>
<tr>
<td>Four dollars and fifty cents and less than six dollars</td>
<td>5.50</td>
</tr>
<tr>
<td>Six dollars and less than seven dollars and fifty cents</td>
<td>6.50</td>
</tr>
<tr>
<td>Seven dollars and fifty cents and less than ten dollars</td>
<td>7.50</td>
</tr>
<tr>
<td>Ten dollars and over</td>
<td>8.50</td>
</tr>
</tbody>
</table>

§ 105-61. Tourist homes and tourist camps.

(a) Every person, firm, or corporation engaged in the business of operating a tourist home, tourist camp, or similar place advertising in any manner for transient patronage, or soliciting such business, shall apply for and procure from the commissioner of revenue a state license for the privilege of transacting such business, and shall pay the following tax:

Homes or camps having five rooms or less, ten dollars ($10.00); houses or camps having more than five rooms, two dollars ($2.00) per room. For the purpose of this section, the sitting-room, dining room, kitchen, and rooms occupied by the owner or lessee of the premises, or members of his family, for his or her personal or private use, shall not be counted in determining the number of rooms for the basis of the tax. The tax herein levied shall be in addition to any tax levied in § 105-62 for the sale of prepared food.

(b) Counties shall not levy any license tax on the business taxed under this section, but cities and towns may levy a license tax not in excess of one-half of the base tax levied by the state. (1939, c. 158, s. 126; 1943, c. 400, s. 2.)
with chairs, stools, or benches, and shall be one dollar ($1.00) per person, with a minimum tax of five dollars ($5.00): Provided, that the tax levied in this paragraph shall not apply to industrial plants maintaining a non-profit restaurant, caffeteria or other place where food is sold as a business, and drug stores, service stations, and all other stands or places where prepared sandwiches only are served, shall pay a tax of five dollars ($5.00).

(b) Counties shall not levy any license tax on the business taxed under this section, but cities and towns may levy a license tax not in excess of one-half of the base tax levied by the state. (1939, c. 158, s. 127.)

§ 105-63. Cotton compresses. — Every person, firm, or corporation engaged in the business of compressing cotton shall pay an annual license tax of three hundred dollars ($300.00) on each and every compress.

§ 105-64. Billiard and pool tables. — Every person, firm or corporation who shall rent, maintain, own a building wherein there is a table or tables at which billiards or pool is played, whether operated by slot or otherwise, shall apply for and procure from the commissioner of revenue a state license for the privilege of operating such billiard or pool tables, and shall pay for such license a tax for each table as follows:

<table>
<thead>
<tr>
<th>Table Size</th>
<th>Tax Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Not more than 2 feet wide and 4 feet long</td>
<td>$5.00</td>
</tr>
<tr>
<td>Not more than 2 1/2 feet wide and 5 feet long</td>
<td>10.00</td>
</tr>
<tr>
<td>Not more than 3 feet wide and 6 feet long</td>
<td>15.00</td>
</tr>
<tr>
<td>Not more than 3 1/2 feet wide and 8 feet long</td>
<td>20.00</td>
</tr>
<tr>
<td>More than 3 1/2 feet wide and 8 feet long</td>
<td>25.00</td>
</tr>
</tbody>
</table>

Provided, each such billiard or pool table so licensed shall receive a number and receipt from the commissioner of revenue when the license is issued, and it shall be the duty of each operator to attach said numbered license to said table or machine and display the same at all times.

Failure to have such license and receipt on display attached to said machine or table shall be prima facie evidence that the tax has not been paid hereunder.

(a) This section shall not apply to fraternal organizations having a national charter, American Legion Posts, Young Men's Christian Associations, and Young Women's Christian Associations.

(b) If the commissioner of revenue shall have issued any such state license to any person, firm, or corporation to operate any billiard or pool tables in any city or town, the board of aldermen or other governing body of such city or town shall have the right at any time, and notwithstanding the issuance of such state license, to prohibit any billiard or pool tables within its limits, unless otherwise provided in its charter; and in the event any city or town shall exercise the right to prohibit the keeping and operation of such billiard or pool tables, the commissioner of revenue shall receive the tax for the time which the right is not allowed to be exercised bears to the time for which the tax is paid.

And, where the commissioner of revenue has issued any such license and the said billiard or pool tables is or are to be, or are operated outside of the corporate limits of any incorporated city or town, the board of county commissioners may by resolution request that such license be revoked, and upon receipt of such resolution the commissioner of revenue shall forthwith revoke said license and refund the proportion of the tax thereof during the time which the right is not allowed to be exercised bears to the time for which the tax is paid.

(c) Counties may levy a license tax on the business taxed under this section upon such billiard or pool tables as are located outside of incorporated cities or towns, and counties and towns may levy a license tax upon such as are within the city limits, but in neither case shall the license tax so levied be in excess of the tax levied by the state. (1939, c. 158, s. 129; 1943, c. 400, s. 2.)

Editor's Note.—Prior to the 1943 amendment this section also applied to bowling alleys.

Constitutionality.—A license tax imposed upon a business is not void as contravening the State Constitution upon the theory that the statute gives an invalid arbitrary power to the county commissioners with reference to the issuance of the license among applicants therefor, as to locality or otherwise; and the tax so imposed will nevertheless remain, these different portions of the law not being so interdependent that one must fall with the other. Brunswick-Balke-Collender Co. v. Mecklenburg, 181 N. C. 386, 107 S. E. 317.

Same.—License without City Limits.—Billiard and pool tables kept open for indiscriminate use by the public are liable to become a source of disorder and demoralization, coming within the police powers, and requiring, in the nature of the business, that power be lodged in some governmental board to withhold or revoke a license imposed by statute for the conduct of the business, and such license not subject to the same degree of police protection as those to which the latter not subject to the same degree of police protection are subject. Brunswick-Balke-Collender Co. v. Mecklenburg, 181 N. C. 386, 107 S. E. 317.

§ 105-64.1. Bowling alleys.—Every person, firm, or corporation who shall rent, maintain, or own a building wherein there is a bowling alley or alleys of like kind shall apply for and procure from the commissioner of revenue a state license for the privilege of operating such bowling alley or alleys, and shall pay for such license a tax of ten dollars ($10.00) for each alley kept or operated.

(a) This section shall not apply to fraternal organizations having a national charter, American Legion Posts, Young Men's Christian Associations, and Young Women's Christian Associations.

(b) If the commissioner of revenue shall have issued any such state license to any person, firm, or corporation to operate any bowling alley or alleys, in any city or town, the board of aldermen or other governing body of such city or town shall have the right at any time, and notwithstanding the issuance of such state license, to prohibit any
§ 105-65. Merchandising, music, and weighing machines.—(1) Every person, firm, or corporation engaged in the business of operating, maintaining, or placing on location anywhere within the state of North Carolina, any machine or machines, in which is kept any article or merchandise to be played, sold, or purchased, any machine which plays records, or produces music, or any weighing machine, shall apply for and procure from the commissioner of revenue a statewide license to be known as an annual operator's license, and shall pay for such license the following tax:

Operators of Music Machines ............ $100.00
Operators of Cigarette Vendors ......... 100.00
Operators of Slot Drink Vendors ..... 100.00
Operators of Food Vending or Merchandising Machines ............... 25.00
Operators of Weighing Machines ....... 25.00

(2) In addition to the above annual operator's license, every person, firm, or corporation operating any of the above machines, shall apply for and obtain from the commissioner of revenue, what shall be termed a statewide license for each machine operated and shall pay therefor the following annual tax:

Music Machines ........................ $10.00
Cigarette Vendors ........................ 5.00
Slot Drink Vendors ...................... 15.00
Weighing Machines ...................... 2.50
1c Food Vending or Merchandising Machines ......................... .50
5c Food Vending or Merchandising Machines ........................ 1.00

Provided, that the above tax on food vending or merchandising machines shall not apply to machines that vend solely peanuts, neither shall the tax apply to machines that vend candy containing fifty per cent (50%) or more peanuts, nor to penny self-service machines contributing twenty per cent (20%) of their gross revenue to work for the visually handicapped.

(3) The applicant for license under this section shall, in making application for license, specify the serial number of the machine or machines proposed to be operated, together with a description of the merchandise or service offered for sale thereby, and the amount of deposit required by or in connection with the operation of such machine or machines. The license shall carry the serial number to correspond with that on the application, and no such license shall be transferable to any other machines. It shall be the duty of the person in whose place of business the machine is operated or located to see that the proper state license is attached in a conspicuous place on the machine before its operation shall commence: Provided, that when application is made under this section for license to operate a machine vending bottled drinks or cigarettes, the applicant for such license shall specify the serial number of the license issued under § 105-79 or § 105-84, as the case may be, and this serial number shall be placed upon the license issued for such machine.

(4) If any person, firm, or corporation shall fail, neglect or refuse to comply with the terms and provisions of this section or shall fail to attach the proper state license to any machine as herein provided, the commissioner of revenue, or his agents, or deputies, shall forthwith seize and remove such machine, and shall hold the same until the provisions of this section have been complied with. In addition to the above provision the applicant shall be further liable for the additional tax imposed under § 105-112.

(5) Sales of merchandise herein referred to shall be subject to the provisions of Schedule "E", §§ 105-164 to 105-187, and the tax therein levied shall be paid by the operator of such machines.

(6) Counties, cities and towns may levy and collect a license tax not in excess of fifty per cent (50%) of the total amount collected by the state from music machines, weighing machines, and 1c and 5c food vending machines. Provided, that counties, cities and towns shall not levy and collect an annual operator's occupational license for the operation of the above named machines, neither shall any county, city or town levy and collect any tax whatsoever from operators of soft drink vendors: Provided, further, that counties, cities and towns shall not levy and collect any per machine license tax from operators of cigarette vendors. Counties, cities and towns may levy and collect an annual operator's occupational license on cigarette vendors not in excess of ten dollars ($10.00).

Counties, cities and towns levying a tax under the provisions of this section shall have power through their tax collecting officers, upon nonpayment of the tax levied by them, or of any interest or penalty thereon, or upon failure to attach the evidence of license issued by them to any such machines, to seize, remove and hold such machines until all such defaults have been remedied. (1939, c. 158, s. 130; 1941, c. 50, s. 3; 1943, c. 105; 1943, c. 400, s. 2.)

Editor's Note.—The 1941 amendment substituted the above for the former section.

The cases below were decided under the statute as it read prior to the 1941 amendment.
The first 1943 amendment added at the end of subsection (2) the provision as to penny self-service machines. The second 1943 amendment added the proviso at the end of subsection (3).

All of the subsections of this section must be construed in pari materia, and upon such construction the section discloses the legislative intent to impose a license tax of $30.00 on slot machines vending soft drinks as an exception to the general classification of mechanical vending machines. Snyder v. Maxwell, 217 N. C. 617, 9 S. E. (2d) 19.

Tax on Vendors of Soft Drinks Is Based on Reasonable Classification.—The provision of this section, imposing a license tax of $30.00 on the privilege of operating a vending machine selling soft drinks at the retail price of five cents while imposing a smaller tax on vending machines selling other kinds of merchandise at the same price, prescribes classifications based upon real and reasonable distinctions, since it is a matter of common knowledge that the sale of soft drinks has obtained a unique commercial place, affording unusual opportunities for gainful returns, thus justifying the imposition of a higher license tax upon the privilege of selling this kind of merchandise by vending machine. Snyder v. Maxwell, 217 N. C. 617, 9 S. E. (2d) 19.

Criminal Provisions Not Repealed.—The provisions of the Flasgan Act, chapter 196 Public Laws of 1937, § 14-304 et seq., prescribing the possession and distribution of a coin slot machine in the operation of which the user may secure additional chances or rights to use the machine, is not repealed by this section, since subsection 5 expressly negatives the intention to license or legalize any gaming slot machine or device, and since subsection 1 excludes from its licensing provisions slot machines which "automatically vend" any prize, coupon or reward which may be used in the further operation of such machine, the word "vend" being equivalent to the word "give" and the intention to exclude from the licensing provisions a machine which provides a player with additional plays or games as a premium, prize, or reward irrespective of whether physical objects or money or reward are, or are not, delivered to the player. State v. Abbott, 218 N. C. 470, 11 S. E. (2d) 539, followed in 218 N. C. 480, 481, 482, 11 S. E. (2d) 545, 546, 547. Injunction.—Plaintiff, the owner of certain slot machines which had been seized by officers of the law, instituted action to restrain the officers from interfering with the operation of the said machines, alleging that plaintiff had paid such state and county licenses thereon and that the machines were lawful under the provisions of this section and that if defendants were not restrained plaintiff would be forced out of his lawful business. The court dissolved the temporary restraining order thereon issued on the ground that it was without jurisdiction to interfere with the enforcement of the criminal laws of the state in any event, since plaintiff, although engaged in the business of vending slot machines, vending soft drinks as an exception to the general classification of mechanical vending machines, did not, delivered to the player. State v. Abbott, 218 N. C. 470, 11 S. E. (2d) 539, followed in 218 N. C. 480, 481, 482, 11 S. E. (2d) 545, 546, 547. Injunction.—Plaintiff, the owner of certain slot machines which had been seized by officers of the law, instituted action to restrain the officers from interfering with the operation of the said machines, alleging that plaintiff had paid such state and county licenses thereon and that the machines were lawful under the provisions of this section and that if defendants were not restrained plaintiff would be forced out of his lawful business. The court dissolved the temporary restraining order thereon issued on the ground that it was without jurisdiction to interfere with the enforcement of the criminal laws of the state in any event, since plaintiff, although engaged in the business of vending slot machines, vending soft drinks as an exception to the general classification of mechanical vending machines, did not, delivered to the player. State v. Abbott, 218 N. C. 470, 11 S. E. (2d) 539, followed in 218 N. C. 480, 481, 482, 11 S. E. (2d) 545, 546, 547. Injunction.—Plaintiff, the owner of certain slot machines which had been seized by officers of the law, instituted action to restrain the officers from interfering with the operation of the said machines, alleging that plaintiff had paid such state and county licenses thereon and that the machines were lawful under the provisions of this section and that if defendants were not restrained plaintiff would be forced out of his lawful business. The court dissolved the temporary restraining order thereon issued on the ground that it was without jurisdiction to interfere with the enforcement of the criminal laws of the state in any event, since plaintiff, although engaged in the business of vending slot machines, vending soft drinks as an exception to the general classification of mechanical vending machines, did not, delivered to the player. State v. Abbott, 218 N. C. 470, 11 S. E. (2d) 539, followed in 218 N. C. 480, 481, 482, 11 S. E. (2d) 545, 546, 547. Injunction.—Plaintiff, the owner of certain slot machines which had been seized by officers of the law, instituted action to restrain the officers from interfering with the operation of the said machines, alleging that plaintiff had paid such state and county licenses thereon and that the machines were lawful under the provisions of this section and that if defendants were not restrained plaintiff would be forced out of his lawful business. The court dissolved the temporary restraining order thereon issued on the ground that it was without jurisdiction to interfere with the enforcement of the criminal laws of the state in any event, since plaintiff, although engaged in the business of vending slot machines, vending soft drinks as an exception to the general classification of mechanical vending machines, did not, delivered to the player. State v. Abbott, 218 N. C. 470, 11 S. E. (2d) 539, followed in 218 N. C. 480, 481, 482, 11 S. E. (2d) 545, 546, 547. Injunction.—Plaintiff, the owner of certain slot machines which had been seized by officers of the law, instituted action to restrain the officers from interfering with the operation of the said machines, alleging that plaintiff had paid such state and county licenses thereon and that the machines were lawful under the provisions of this section and that if defendants were not restrained plaintiff would be forced out of his lawful business. The court dissolved the temporary restraining order thereon issued on the ground that it was without jurisdiction to interfere with the enforcement of the criminal laws of the state in any event, since plaintiff, although engaged in the business of vending slot machines, vending soft drinks as an exception to the general classification of mechanical vending machines, did not, delivered to the player. State v. Abbott, 218 N. C. 470, 11 S. E. (2d) 539, followed in 218 N. C. 480, 481, 482, 11 S. E. (2d) 545, 546, 547.


§ 105-66. Bagatelle tables, merry-go-rounds, etc.—Every person, firm, or corporation that is engaged in the operation of a bagatelle table, merry-go-round, or other riding device, hobby horse, switchback railway, shooting gallery, swimming pool, skating rink, or other amusement of any like kind, or a place for other games or play with or without name (unless used solely and exclusively for private amusement or exercise), at a permanent location, shall apply for and procure from the commissioner of revenue a state license for the privilege of operating such objects of amusement, and shall pay for each subject enumerated the following tax:

In cities or towns of less than 10,000 population $10.00

In cities or towns of 10,000 population and over 25.00

(a) The tax under this section shall not apply to machines and other devices licensed under §§ 105-64 and 105-65.

(b) Counties, cities, or towns may levy a license tax on the business taxed under this section not in excess of that levied by the state. (1939, c. 158, s. 131.)

§ 105-67. Security dealers.—(a) Every person, firm, or corporation who or which is engaged in the business of dealing in securities as defined in §§ 78-1 to 78-24, or who or which maintains a place for or engaged in the business of buying and/or selling shares of stock in any corporation, bonds, or any other securities on commission or brokerage, shall apply for and procure from the commissioner of revenue a state license for the privilege of transacting such business, and shall pay for such license the following tax:

In cities or towns of less than 5,000 population $25.00

In cities or towns of 5,000 and less than 10,000 population 50.00

In cities or towns of 10,000 and less than 15,000 population 100.00

In cities or towns of 15,000 and less than 25,000 population 200.00

In cities or towns of 25,000 population and above 300.00

(b) Every dealer, as defined herein, who shall maintain in the state of North Carolina more than one office for dealing in securities, as hereinebefore defined, shall apply for and procure from the commissioner of revenue a license for the privilege of transacting such business at each such office, and shall pay for such license the same tax as hereinebefore fixed.

(c) Every foreign dealer, as dealer is hereinebefore defined, who shall maintain an office in this state, or have a salesman in this state, shall apply for and procure from the commissioner of revenue a state license for the privilege of transacting such business, and shall pay for such license the same tax as hereinebefore imposed.

(d) If such person, firm, or corporation described in sub-section (a) of this section maintains and/or operates a leased or private wire and/or ticker service in connection with such business the annual license tax shall be as follows:

In cities and towns of less than 10,000 population $150.00

In cities and towns of 10,000 and less than 15,000 population 250.00

In cities and towns of 15,000 and less than 20,000 population 350.00

In cities and towns of 20,000 to 25,000 population 450.00

In cities and towns of 25,000 or more 600.00

Provided, that the tax levied in subsection (d) shall not apply to private wire service not connected with or handling quotations of a stock exchange, grain or cotton exchange.

(c) Counties shall not levy any license tax on the business taxed under this section, but cities...
and towns may levy a license tax not in excess of fifty dollars ($50.00). (1939, c. 158, s. 132.)

Cross Reference—For temporary reduction of the taxes levied under this section, see § 105-113.1.

§ 105-68. Cotton buyers and sellers on commission.—(1) Every person, firm, or corporation who or which engages in the business of buying and/or selling on commission any cotton, grain, provisions, or other commodities, either for actual, spot, or instant delivery, shall apply for and procure from the commissioner of revenue a state license for the privilege of transacting such business in this state, and shall pay for such license a tax of fifty dollars ($50.00).

(2) Every person, firm, or corporation who or which engages in the business of buying or selling any cotton, grain, provisions, or other commodities, either for actual, spot, or instant future delivery, and also maintains and/or operates a private or leased wire and/or ticker service in connection with such business shall apply for and procure from the commissioner of revenue a state license for the privilege of transacting such business in this state and shall pay for such license the following tax:

<table>
<thead>
<tr>
<th>Population</th>
<th>License Tax</th>
</tr>
</thead>
<tbody>
<tr>
<td>Less than 10,000</td>
<td>$100.00</td>
</tr>
<tr>
<td>10,000 to 15,000</td>
<td>$200.00</td>
</tr>
<tr>
<td>15,000 to 25,000</td>
<td>$400.00</td>
</tr>
<tr>
<td>More than 25,000</td>
<td>$600.00</td>
</tr>
</tbody>
</table>

Persons, firms, and corporations who pay the tax imposed in subsection (d) of § 105-67 shall not be required to pay the tax imposed in this subsection.

(3) Every person, firm, or corporation, domestic or foreign, who or which is engaged in the business of selling any cotton either for actual, spot, instant, or future delivery, in excess of five thousand bales per annum, shall be deemed to be a cotton merchant, shall apply for and obtain from the commissioner of revenue a state-wide license for each office or agency maintained in this state for the sale of cotton and shall pay for each such license the following tax:

<table>
<thead>
<tr>
<th>Population</th>
<th>License Tax</th>
</tr>
</thead>
<tbody>
<tr>
<td>Less than 10,000</td>
<td>$50.00</td>
</tr>
<tr>
<td>10,000 to 15,000</td>
<td>$100.00</td>
</tr>
<tr>
<td>15,000 to 25,000</td>
<td>$200.00</td>
</tr>
<tr>
<td>More than 25,000</td>
<td>$300.00</td>
</tr>
</tbody>
</table>

(4) Counties shall not levy any license tax on the business taxed under this section, but cities and towns may levy a license tax not in excess of fifty dollars ($50.00). (1939, c. 158, s. 133.)

§ 105-69. Manufacturers, producers, bottlers and distributors of soft drinks.—(a) Every person, firm, or corporation or association manufacturing, producing, bottling and/or distributing in bottles, or other closed containers, soda water, coca-cola, pepsi-cola, chero-cola, ginger ale, grape and other fruit juices or imitations thereof, carbonated or malted beverages and like preparations, or preparations of any nature whatever commonly known as soft drinks, shall apply for and obtain from the commissioner of revenue a state license for the privilege of doing business in this state, and shall pay for such license the following base tax for each place of business:

**Low-Pressure Equipment**

Where the machine or the equipment unit used in the manufacture of the above beverage is a:

- 51 spouts or greater capacity, low pressure filler $1,800.00
- 41 spouts and less than 51 spouts, low pressure filler 1,500.00
- 36 spouts and less than 41 spouts, low pressure filler 1,200.00
- 32 spouts and less than 36 spouts, low pressure filler 1,000.00
- 24 spouts and less than 32 spouts, low pressure filler 700.00
- 18 spouts and less than 24 spouts, low pressure filler 500.00
- 12 spouts and less than 18 spouts, low pressure filler 175.00

**High-Pressure Equipment**

Where the machine or the equipment unit used in the manufacture of the above beverage is a Royal (8-head), Shields (6-head), Adriance (6-head), or other high-pressure equipment having manufacturer's rating capacity of over sixty bottles per minute, one thousand two hundred dollars ($1,200.00).

Royal (4-head), Adriance (2-head), Shields (2-head), full equipment having manufacturer's rating capacity of over fifty and less than sixty bottles per minute, one thousand dollars ($1,000.00).

Royal (4-head), Adriance (2-head), Shields (2-head) (full automatic), or other high-pressure equipment having manufacturer's rating capacity of more than forty and less than fifty bottles per minute, seven hundred dollars ($700.00).

Dixie (automatic), Shields (2-head hand feed), Adriance (1-head), Calleson (1-head), Senior (high-pressure), Junior (high-pressure), or Burns or other high-pressure equipment having manufacturer's rating capacity of more than twenty-four bottles and less than forty bottles per minute, one hundred five dollars ($105.00).

Single-head Shields, Modern Bond (power), Baltimore (semi-automatic), and all other machines or equipment having manufacturer's rating capacity of less than twenty-four bottles per minute and all foot-power bottling machines, seventy dollars ($70.00).

Provided, that any bottling machine or equipment unit not herein specifically mentioned shall bear the same tax as a bottling machine or equipment unit of the nearest rated capacity as herein enumerated: Provided further, that where any person, firm, corporation, or association has within his or its bottling plant or place of manufacture more than one bottling machine or equipment unit, then such person, firm, corporation, or association shall pay the tax as herein specified upon every such bottling machine or equipment unit if in actual operation: Provided further, that where no standard high or low-pressure bottling machine is used to fill the containers, a tax of fifty dollars ($50.00) shall apply. The tax levied in this section shall not apply to any
product containing more than fifty per cent (50%) of milk, put up in containers for sale as food rather than soft drink preparations.

(b) Every person, corporation, or association distributing, selling at wholesale, or jobbing bottled beverages as enumerated in subsection (a) of this section shall pay an annual license tax for the privilege of doing business in this state, as follows:

In cities or towns of 30,000 inhabitants or more ........................................... $100.00
In cities or towns of 20,000 inhabitants and less than 30,000 inhabitants .................. 90.00
In cities or towns of 10,000 inhabitants and less than 20,000 inhabitants .................. 80.00
In cities or towns of 5,000 inhabitants and less than 10,000 inhabitants .................. 70.00
In cities and towns of 2,500 inhabitants and less than 5,000 inhabitants .................. 60.00
In rural districts and towns of less than 2,500 inhabitants .................................. 50.00

The tax levied in this subsection shall not include the right to sell products authorized to be sold under Schedule F, §§ 18-63 to 18-92.

(c) Every distributing warehouse selling or supplying to retail stores cereal or carbonated beverages manufactured or bottled within the state, but outside of the county in which such cereal or carbonated beverages are manufactured or bottled, shall pay one-half of the annual license tax for the privilege of doing business in this state provided for in subsection (b) of this section.

(d) Every distributing warehouse selling or supplying to retail stores cereal or carbonated beverages on which the tax has not been paid under the provisions of subsection (a) of this section shall pay the annual license tax for the privilege of doing business in the state provided in subsection (b) of this section.

(e) Each truck, automobile, or other vehicle coming into this state from another state, and selling and/or delivering carbonated beverages on which the tax has not been paid under the provisions of subsection (a) of this section, shall pay an annual license tax for the privilege of doing business in this state in the sum of two hundred dollars ($200.00) per truck, automobile, or vehicle. The license secured from the state under this section shall be posted in the cab of the truck, automobile, or vehicle.

(f) No county shall levy a tax on any business taxed under the provisions of this section, nor shall any city or town in which any person, firm, corporation, or association taxed hereunder has its principal place of business levy and collect any additional tax except such of one-half of the tax levied by the state under subsection (a) of this section as shall be sufficient to cover the cost of collecting the same, which shall be paid to the state when collected.

§ 105-70. Packing houses.—Every person, firm, or corporation engaged in or operating a meat packing house in this state, and every wholesaler dealer in meat packing-house products who owns, leases, or rents and operates a cold-storage room or warehouse in connection with such wholesale business, shall apply for and procure from the commissioner of revenue a state license for the privilege of conducting such business in this state, and shall pay for such license the sum of one hundred dollars ($100.00) for each county in which is located such a packing house or a cold storage room or warehouse. Every person, firm, or corporation maintaining a cold-storage room or warehouse and distributing such products to other stores owned in whole or in part by the distributor for sale at retail shall be deemed a wholesale dealer or distributor in the meaning of this section. Counties shall not levy any tax on business taxed under this section. (1939, c. 165, s. 25.)

Cross Reference.—See N. C. Const., Art. V, § 3, and notes thereto.

§ 105-71. Newspaper contests.—Every person, firm, or corporation that conducts contests and offers a prize, prizes, or other compensation to obtain subscriptions to newspapers, magazines, or other periodicals in this state shall apply for and procure from the commissioner of revenue a state license for the privilege of conducting such contests, and shall pay for such license the following tax for each such contest:

Monthly, weekly, semi-weekly newspaper, magazine or other periodical ................................ $5.00
Daily newspaper or other daily periodical.................................................. 200.00

Counties, cities and towns may levy a tax not to exceed one-half of that levied by the state under the provisions of this section. (1939, c. 158, s. 136.)

§ 105-72. Persons, firms, or corporations selling certain oils.—(a) Every person, firm, or corporation engaged in the business of selling illuminating or lubricating oil or greases, or benzine, naphtha, gasoline, or other products of like kind shall apply for and procure from the commissioner of revenue a state license for the privilege of conducting such business, and shall pay for the same a tax of two dollars and fifty cents ($2.50).

(b) In addition to the tax herein levied under subsection (a) of this section, such person, firm, or corporation shall pay to the commissioner of revenue, on or before the first day of July of each year, an annual additional license tax equal to five per cent (5%) of the total gross sales for the preceding year or part of the year that the business is so conducted or the privilege so exercised, when the total gross sales of such commodities exceed five thousand dollars ($5,000.00), or $5.00 for a part of the year.

(c) The amount of such total gross sales shall be returned to the commissioner of revenue on or before the date specified in subsection (b) of this
sektion by such person, firm, or corporation, verified by the oath of the person making the return, upon such forms and in such detail as may be required by the commissioner of revenue.

(d) Counties shall not levy any license tax on the business taxed under this section; but cities or towns in which there is located an agency, station, or warehouse for the distribution or sale of such commodities enumerated in this section may levy the following license tax:

In incorporated towns and cities of less than 10,000 population .................................................. $ 25.00
In cities and towns of 10,000 population and over ........................................................................ 50.00

(e) Any person, firm, or corporation subject to this license tax, and doing business in this state without having paid such license tax, shall be fined one thousand dollars ($1,000.00), and in addition thereto double the tax imposed by this section.

(f) No license or privilege tax, other than the license tax permitted in this section to cities or towns, shall be levied or collected for the privilege of engaging in or doing the business named in this section from any person, firm, or corporation paying the inspection fees and charges provided for under the chapter, agriculture, except license taxes levied in §§ 105-89 and 105-99. (1939, c. 158, s. 137.)

§ 105-73. Building and loan associations. — Every building and loan association, domestic or foreign, operating under a charter granted by authority of the laws of this state or any other state, or the United States, for the purpose of making loans to its members only and of enabling its members to acquire real estate, make improvements thereon, and remove encumbrances therefrom by the payment of money in periodic instalments or principal sums, and for the accumulation of a fund to be returned to members who do not obtain advances for such purposes, shall pay to the insurance commissioner, on or before the first day of April of each year, the following annual license tax for the privilege of doing business in this state:

(a) A tax of thirteen cents (13c) on each one hundred dollars ($100.00) of liability on actual book value of shares of stock outstanding on the thirty-first day of December of the preceding year, as shown by reports of such association to be made to the insurance commissioner. The tax levied herein shall be in addition to the license fee required under § 54-25, and expenses and cost of examination required under § 54-29.

(b) Counties, cities, and towns shall not levy any license tax on the business taxed in this section. (1939, c. 158, s. 138.)

§ 105-74. Pressing clubs, dry cleaning plants, and hat blockers.—Every person engaging in any of the businesses as herein defined shall apply for and procure from the commissioner of revenue a state license for the privilege of conducting such a business, and pay for each such place of business the following tax in each city or town in which he operates any such place of business, except branch offices where located in the same city or town as the parent establishment shall pay one-half the tax levied on the parent establishment:

In cities or towns of less than 1,000 population .................................................. $ 15.00
In cities or towns of 1,000 and less than 5,000 population ................................. 30.00
In cities or towns of 5,000 and less than 10,000 population ................................. 60.00
In cities or towns of 10,000 population ................................................................. 90.00
In cities or towns of 20,000 and less than 50,000 population .................... 120.00
In cities or towns of 50,000 population and over .............................................. 150.00

Provided that pressing clubs, cleaning plants, and/or hat blocking establishments, as same are defined in this section in cities or towns of 5,000 population or over, employing four or less operators or employees, including the owner if he works in said plant, shall be liable for only one-half the amount of license tax specified above.

Every person, firm, or corporation soliciting cleaning work and/or pressing in any city or town where the actual cleaning and/or pressing is done in a cleaning plant or press shop located outside the city or town wherein the soliciting is done, shall pay to the insurance commissioner, on or before the first day of April of each year, the following annual license tax for the privilege of soliciting in said city or town, and pay for the same an amount equal to the tax which would be paid by said cleaning plant or press shop as if the said cleaning plant or press shop was actually located and being operated in the city or town in which the soliciting is done.

Cities and towns of under 10,000 population may levy a license tax not in excess of $25.00; cities and towns of 10,000 population and over may levy a license tax not in excess of $50.00. Counties shall not levy a license tax on the business taxed under this section.

Definitions: For the purpose of this section, the following definitions shall apply:

"Dry cleaning plants and/or hat blocking establishments" shall mean any place of business, establishment or vehicle wherein the services of dry cleaning, wet cleaning as a process incidental to dry cleaning, spotting and/or pressing, finishing and/or reblocking hats, garments, or wearing apparel of any kind is performed.

"Retail outlet" shall mean any place of business or vehicle where garments are accepted to be dry cleaned and/or pressed, but where the actual dry cleaning and/or pressing is performed on the premises or vehicles, and where the cleaning and/or pressing is performed by a dry cleaning plant or press shop operating under a trade name other than that of the retail outlet. "Branch office" shall mean an additional establishment where garments are accepted to be dry cleaned and/or pressed, when same is owned and operated by a dry cleaning plant, press shop, or retail outlet and under the same trade name, but where the actual dry cleaning and/or pressing is not performed on the premises.

"Soliciting" as used herein shall mean the acceptance of any article or garment to be dry cleaned and/or pressed.
"Person" as used herein shall mean any person, firm, corporation, partnership, or association.

The term "employee" as used herein shall mean any person working either partially or full time for a cleaning plant, press shop, hat blocking establishment, retail outlet or branch office and shall include all drivers, solicitors and route salesmen irrespective of the method of payment they receive for their services, and shall also include independent contractors soliciting under the same style and firm name as the processing plant. It shall also include any member of the firm, association, corporation or partnership who actually performs any work of any nature in the business.

This section shall not apply to any bona fide student of any college or university in this state operating such pressing or dry cleaning business at such college or university during the school term of such college or university. (1939, c. 158, s. 139; 1943, c. 400, s. 2.)

Editor's Note.—The 1943 amendment changed the schedule of license taxes and inserted the proviso immediately following. It also changed the first sentence of the fifth paragraph and struck out the former last two paragraphs of the section.

§ 105-75. Barber shops.—Every person, firm, or corporation engaged in the business of conducting a barber shop, beauty shop or parlor, or other shop of like kind shall apply for and procure from the commissioner of revenue a state license for the privilege of conducting such business, and shall pay for such license the following tax:

For each barber chair maintained in a barber shop $2.50

For each barber, manicurist, cosmetologist, beautician, or operator in beauty parlor, or other shop of like kind in any office, hotel, or other place 2.50

Counties shall not levy a license tax under this section, but cities and towns may levy a license tax not in excess of that levied by the state. (1939, c. 158, s. 140; 1943, c. 400, s. 2.)

Editor's Note.—The 1943 amendment lowered the tax for each barber, manicurist, etc., from $5.00 to $2.50.

§ 105-76. Shoeshine parlors.—Every person, firm, or corporation who or which maintains or operates a place of business wherein is operated a shoeshine parlor, stand, or chair or other device for the benefit of conducting such business, and shall pay for such license a tax of one dollar ($1.00) per chair or stool.

Counties shall not levy any license tax on the business taxed under this section, but cities and towns may levy a license tax not in excess of one-half of that levied by the state. (1939, c. 158, s. 141.)

§ 105-77. Tobacco warehouses.—Every person, firm, or corporation engaged in the business of operating a warehouse for the sale of leaf tobacco upon commission shall, on or before the first day of June of each year, apply for and obtain from the commissioner of revenue a state license for the privilege of operating such warehouse for the next ensuing year, and shall pay for such license the following tax:

For a warehouse in which was sold during the preceding year ending the first day of June:

Less than 1,000,000 pounds $50.00

1,000,000 pounds and less than 2,000,000 75.00

2,000,000 pounds and less than 3,000,000 175.00

3,000,000 pounds and less than 4,000,000 250.00

4,000,000 pounds and less than 5,000,000 400.00

5,000,000 pounds and less than 6,000,000 500.00

For all in excess of 6,000,000 pounds $500.00 and six cents per thousand pounds.

(a) If a new warehouse not in operation the previous year, the person, firm, or corporation operating such warehouse may procure a license by payment of the minimum tax provided in the foregoing schedule, and at the close of the season for sales of tobacco in such warehouse shall furnish the commissioner of revenue a statement of the number of pound- of tobacco sold in such warehouse for the current year, and shall pay an additional license tax for the current year based on such total volume of sales in accordance with the schedule in this section.

If an old warehouse with new or changed ownership or management, the tax shall be paid according to the schedule in this section, based on the sale during the preceding year, just as if the old ownership or management had continued its operation.

(b) The commissioner of agriculture shall certify to the commissioner of revenue, on or before the first day of June of each year, the name of each person, firm, or corporation operating a tobacco warehouse in each county in the state, together with the number of pounds of leaf tobacco sold by such person, firm, or corporation in each warehouse for the preceding year, ending on the first day of June of the current year.

(c) The commissioner of agriculture shall report to the solicitor of any judicial district in which a tobacco warehouse is located which the owner or operator thereof shall have failed to make a report of the leaf tobacco sold in such warehouse during the preceding year, ending the first day of June of the current year, and such solicitor shall prosecute any such person, firm or corporation under the provisions of this section.

(d) The tax levied in this section shall be based on official reports of each tobacco warehouse to the state department of agriculture showing amount of sales for each warehouse for the previous year.

(e) The commissioner of revenue or his deputies shall have the right, and are hereby authorized, to examine the books and records of any person, firm, or corporation operating such warehouse, for the purpose of verifying the reports made and of ascertaining the number of pounds of leaf tobacco sold during the preceding year, or other years, in such warehouse.

(f) Any person, firm, or corporation who or which violates any of the provisions of this section shall, in addition to all other penalties provided for in this article, be guilty of a misdemeanor, and upon conviction shall be fined not less than five hundred dollars ($500.00) and/or imprisoned, in the discretion of the court.

(g) No county shall levy any license tax on the business taxed under this section. Cities and towns may levy a tax not in excess of fifty dollars ($50.00) for each warehouse. (1939, c. 158, s. 142.)

§ 105-78. News dealers on trains.—Every person, firm, or corporation engaged in the business of selling books, magazines, papers, fruits, confections, or other articles of merchandise on railroad trains or other common carriers in this state shall apply for and obtain a state license from the commissioner of revenue for the privilege of conducting such business, and shall pay for such license the following tax:

Where such person, firm, or corporation operates on railroads or other common carriers on:

Less than 300 miles $250.00

Three hundred and less than 500 miles $500.00

Five hundred miles or more $1,000.00

This section shall not apply to any railroad company engaged in selling such articles to passengers on its train and paying the tax upon the retail sales of merchandise levied in Schedule E, §§ 105-164 to 105-187.

Counties, cities, and towns shall not levy any license tax on the business taxed under this section. (1939, c. 158, s. 143.)

§ 105-79. Soda fountains, soft drink stands. —Every person, firm, or corporation engaged in the business of operating a soda fountain or soft drink stand shall apply for and obtain from the commissioner of revenue a state license for the privilege of conducting such business, and shall pay for such license the following tax:

On soda fountains.

On each carbonated draft arm of each soda fountain, a tax of ten dollars ($10.00).

On each stand at which soft drinks are sold, the same not being strictly a soda fountain, and on each place or business where bottled carbonated drinks are sold at retail, the license tax shall be five dollars ($5.00).

In addition to the license tax levied in this section, the tax shall be paid upon the gross sales at the rate of tax levied in Schedule E, §§ 105-164 to 105-tax upon the retail sales of E, the same not being strictly a soda fountain, and on each place or business where bottled carbonated drinks are sold at retail, the license tax shall be five dollars ($5.00).

In addition to the license tax levied in this section, the tax shall be paid upon the gross sales at the rate of tax levied in Schedule E, §§ 105-164 to 105-tax upon the retail sales of E, the same not being strictly a soda fountain, and on each place or business where bottled carbonated drinks are sold at retail, the license tax shall be five dollars ($5.00).

Cross Reference.—For temporary reduction of the taxes levied under this section, see § 105-113.1.

§ 105-80. Dealers in pistols, etc.—Every person, firm, or corporation who is engaged in the business of keeping in stock, selling, and/or offering or ordering for sale any of the articles hereinafter enumerated in this section shall apply for and obtain from the commissioner of revenue a state license for the privilege of engaging in such business, and shall pay for each license the following tax:

For pistols $50.00

For bowie knives, dirks, daggers, sling-shots, ledged canes, iron or metallic knuckles, or articles of like kind 200.00

For blank cartridge pistols 200.00

(a) If such person, firm, or corporation deals only in metallic cartridges, the tax shall be five dollars ($5.00).

(b) Counties, cities, or towns may levy a license tax on the business taxed under this section not in excess of that levied by the state. (1939, c. 158, s. 147; 1941, c. 50, s. 3.)

Editor's Note.—The 1941 amendment reduced the tax in subsection (a) from ten to five dollars.

§ 105-81. Dealers in cap pistols, fireworks, etc.—Every person, firm, or corporation engaged in the business of selling or offering for sale fire crackers, fireworks, or other articles of like kind, cap pistols, or pistols so constructed that they can be treated to release the hammer be used to fire caps, shall apply for and obtain from the commissioner of revenue a state license for the privilege of engaging in such business, and shall pay for the same a tax of one hundred dollars ($100.00).

Counties, cities, or towns may levy a license tax on the business taxed under this section not in excess of twice that levied by the state. (1939, c. 158, s. 146.)

§ 105-82. Pianos, organs, victrolas, radios, accessories.—Every person, firm, or corporation engaged in the business of selling, offering or ordering for sale any of the articles hereinafter enumerated in this section shall apply for and obtain from the commissioner of revenue a state license for the privilege of conducting such business, and shall pay for each license the following tax:

For pianos and/or organs, graphophones, victrolas, or other instruments using discs or cylinder records, and/or the sale of records for either or all of these instruments, radios or radio accessories, an annual license tax of ten dollars ($10.00).

(a) Any person, firm, or corporation applying for and obtaining a license under this section may employ traveling representatives or agents, but such traveling agents or representatives shall obtain from the commissioner of revenue a duplicate license of such person, firm, or corporation who or which he represents, and pay for the same a tax of ten dollars ($10.00).

Each duplicate license issued is to contain the name of the agent to whom it is issued, the instrument to be sold, and the same shall not be transferable.

Representatives or agents holding such duplicate copy of such license are licensed thereby to sell or offer for sale only the instrument and/or articles authorized to be sold by the person, firm, or corporation holding the original license, and such license shall be good and valid in any county in the state.

(b) Every person, firm, or corporation violating any of the provisions of this section shall be guilty of a misdemeanor and shall pay a penalty of two hundred and fifty dollars ($250.00), and in addition thereto double the state license tax levied in this section for the then current year.

(c) Counties shall not levy any license tax on the business taxed under this section, except that the county in which the agent or representative holding a duplicate copy of the license aforesaid does business may impose a license tax not in excess of five dollars ($5.00). Cities or towns may levy a license tax on the business taxed under this section not in excess of one-half of that levied by the state. (1939, c. 158, s. 147; 1943, c. 400, s. 2.)

Cross Reference.—For temporary reduction of the taxes levied under this section, see § 105-113.1.

Editor's Note.—The 1943 amendment directed that the
words "does business" be inserted in line five of subsection (c). This insertion had already been made upon the codification of this section.

Sales by Sample.—An act requiring every one, before engaging in selling pianos or organs in the state by sample, list or otherwise, to pay a certain sum for a license, is, in the case of one selling by sample and list, as agent for a manufacturer and dealer located in another state, void, failing to regulation of interstate commerce. Ex parte Hough, 69 Fed. 330.

Employment of Several Agents.—If the licensee employs more than one salesman he must take out and furnish each salesman with an additional license. This because the license authorizes only the person having it in possession to sell under it. State v. Morrison, 126 N. C. 1123, 36 S. E. 129.

§ 105-83. Installment paper dealers.—(a) Every person, firm, or corporation, foreign or domestic, engaged in the business of dealing in, buying, and/or discounting installment paper, notes, bonds, contracts, evidences of debt and/or other securities, where a lien is reserved or taken upon personal property located in this state to secure the payment of such obligations, shall apply for and obtain from the commissioner of revenue a state license for the privilege of engaging in such business or for the purchasing of such obligations in this state, and shall pay for such license an annual tax of one hundred dollars ($100.00).

(b) In addition to the tax levied in subsection (a) of this section, such person, firm, or corporation shall submit to the revenue commissioner quarterly on the first day of January, April, July, and October of each year, upon forms prescribed by the said commissioner, a full, accurate, and complete statement, verified by the officer, agent, or person making such statement, of the total face value of the installment paper, notes, bonds, contracts, evidences of debt, and/or other securities described in this section dealt in, bought and/or discounted within the preceding three months and, at the same time, shall pay a tax of one-third of one per cent of the face value of such obligations dealt in, bought and/or discounted for such period.

(c) If any person, firm, or corporation, foreign or domestic, shall deal in, buy and/or discount any such paper, notes, bonds, contracts, evidences of debt and/or other securities described in this section without applying for and obtaining a license for the privilege of engaging in such business or dealing in such obligations, or shall fail, refuse, or neglect to pay the taxes levied in this section, such obligation shall not be recoverable or the collection thereof enforceable at law or by suit in equity in any of the courts of this state until and when the license taxes prescribed in this section have been paid, together with any and all penalties prescribed in this article for the non-payment of taxes.

(d) This section shall not apply to corporations organized under the state or national banking laws.

(e) Counties, cities and towns shall not levy any license tax on the business taxed under this section. (1939, c. 158, s. 149.)

§ 105-85. Laundries.—Every person, firm, or corporation engaged in the business of operating a laundry, including wet or damp wash laundries, where steam, electricity, or other power is used, or who engages in the business of supplying or renting clean linen or towels, shall apply for and obtain from the commissioner of revenue a state license for the privilege of engaging in such business, and shall pay for such license the following tax:

- In cities or towns of less than 5,000 population ........................................ $ 12.50
- In cities or towns of 5,000 and less than 10,000 population .......................... 25.00
- In cities or towns of 10,000 and less than 15,000 population ...................... 37.50
- In cities or towns of 15,000 and less than 20,000 population ....................... 50.00
- In cities or towns of 20,000 and less than 25,000 population ...................... 60.00
- In cities or towns of 25,000 and less than 30,000 population ...................... 72.50
- In cities or towns of 30,000 and less than 35,000 population ....................... 85.00
- In cities or towns of 35,000 and less than 40,000 population ...................... 100.00
- In cities or towns of 40,000 and less than 45,000 population ...................... 112.50
- In cities or towns of 45,000 population and above .................................. 125.00

Provided, however, that any laundry or other concern herein referred to where the work is performed exclusively by hand or home-size machines only, and where not more than four persons are employed, including the owners, the license tax shall be one-third of the amount stipulated in the foregoing schedule.

Every person, firm, or corporation soliciting laundry work or supplying or renting clean linen or towels in any city or town, outside of the city or town wherein said laundry or linen supply or towel supply business is established, shall procure from the commissioner of revenue a state license as provided in the above schedule, and shall pay for such license a tax based according to the population of the city or town, for the privilege of soliciting therein. The additional tax levied in this paragraph shall apply to the soliciting of laundry work or linen supply or towel supply work in any city or town in which there is a laundry, linen supply or towel supply establishment located in the said city or town. The soliciting of business for or by any person, firm, or corporation engaged in the business of laundry work and/or supplying or renting clean linen or towels shall and the same is hereby construed to be engaging in the said business. Any person, firm, or corporation soliciting in said city or town shall procure from the commissioner of revenue a state license for the privilege of soliciting in said city or town, said tax to be in the sum equal to the

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amount which would be paid if the solicitor had
an establishment and actually engaged in such
business in the said city or town; provided the
solicitor has paid a state, county and municipal
license in this state.

Counties, cities and towns, respectively, may levy a license tax not in excess of twelve dollars and fifty cents ($12.50) on any person, firm, or corporation engaged in the business of laundry work and/or supplying or renting clean linens or towels in instances when said work is performed outside the said county or town, or when the linen or towels are supplied by business outside said county or town.

In addition to the annual tax levied in this section, there is hereby levied a tax of one per cent (1%) on the gross receipts of such laundries, as the same are defined in this section, or of such persons, firms or corporations supplying or renting clean linen or towels. The word "laundry" or "laundries" as hereafter used in this section, shall include laundries as defined in this section and persons, firms, or corporations renting clean linen or towels. Laundries shall add to the amount charged each customer, except those exempted herein one per cent (1%) of said amount and this added amount shall be paid by each customer as a tax. Provided, the failure of any laundry to add, and collect from its customers one per cent (1%) of the amount charged its customers shall not relieve said laundry from liability for the tax herein imposed. Reports shall be made to the commissioner of revenue in such form as he may prescribe within the first ten days of each month, covering all such gross receipts for the previous month, and the tax herein levied shall be paid monthly at the time such reports are made. There shall be excluded from the gross receipts taxed under this section, all sales to the United States government, the state of North Carolina or any agency or subdivision thereof, and sales to charitable or religious organizations or institutions, and hospitals not operated for profit.

Failure to file reports herein prescribed and pay the tax shown to be due thereon, within the time prescribed, shall subject such laundries to a penalty of five per centum per month of the amount of tax due from the date the tax is due. If the taxpayer shall refuse to make the reports required under this section, then such reports shall be made by the commissioner or his duly authorized agents from the best information available, and such reports shall be prima facie correct for the purpose of this article, and the amount of tax due thereby shall be a lien against all the property of the taxpayer until discharged by payments, and if payment not be made within thirty days after demand therefor by the commissioner or his duly authorized agents, there shall be added not more than one hundred per centum as damages, together with interest at the rate of one per centum per month from the time such tax was due. If such tax be paid within thirty days after notice by the commissioner, then there shall be added not more than ten per centum as damages per month from the time such tax was due until paid.

The commissioner for good cause may extend the time for making any report required under the provisions of this section, and may grant such additional time within which to make such report as he may deem proper, but the time for filing any such report shall not be extended beyond the fifteenth day of the month next succeeding the regular due date of such report. If the time for filing a report be extended, interest at the rate of one-half of one per centum per month from the time the report was required to be filed to the time of payment shall be added and paid. (1939, c. 158, s. 150; 1943, c. 400, s. 2.)

Editor's Note.—The 1943 amendment added the last paragraph and rewrote the two paragraphs preceding it.

§ 105-86. Outdoor advertising.—(a) Every person, firm, or corporation who or which is engaged in the business of outdoor advertising by placing, erecting or maintaining one or more outdoor advertising signs or structures of any nature by means of sign boards, poster boards, or printed bulletins, or other painted matter, or any other outdoor advertising devices, erected upon the grounds, walls, or roofs of buildings, shall apply for and obtain from the commissioner of revenue a state license for the privilege of engaging in such business in this state, and shall pay annually for said license as follows:

For posting or erecting 20 or more signs or panels $25.00
For posting or erecting less than 20 signs or panels, for each sign or panel 1.00

And in addition thereto the following license tax for each city, town or other place in which such sign boards, poster boards, painted bulletins and other painted or printed matter or other outdoor advertising devices are maintained, in cities and towns of:

<table>
<thead>
<tr>
<th>Population</th>
<th>License Tax</th>
</tr>
</thead>
<tbody>
<tr>
<td>Less than 1,000</td>
<td>$5.00</td>
</tr>
<tr>
<td>1,000 to 1,999</td>
<td>10.00</td>
</tr>
<tr>
<td>2,000 to 2,999</td>
<td>15.00</td>
</tr>
<tr>
<td>3,000 to 3,999</td>
<td>20.00</td>
</tr>
<tr>
<td>4,000 to 4,999</td>
<td>25.00</td>
</tr>
<tr>
<td>5,000 to 7,499</td>
<td>30.00</td>
</tr>
<tr>
<td>7,500 to 14,999</td>
<td>50.00</td>
</tr>
<tr>
<td>15,000 to 24,999</td>
<td>100.00</td>
</tr>
<tr>
<td>25,000 to 49,999</td>
<td>150.00</td>
</tr>
<tr>
<td>50,000 population and over</td>
<td>200.00</td>
</tr>
</tbody>
</table>

In each county outside of cities and towns 25.00

Provided, that the tax levied in this section shall not apply to regularly licensed motion picture theatres taxed under § 105-37 upon any advertising signs, structures, boards, bulletins, or other devices erected by or placed by the theatre upon property where the theatre has secured by permission of the owner.

Every person, firm, or corporation who or which places, erects or maintains one or more outdoor advertising signs, structures, boards, bulletins or devices as specified in this section shall be deemed to be engaged in the business of outdoor advertising, but when the applicant intends to advertise his own business exclusively by the erection or placement of such outdoor advertising signs, structures, boards, bulletins or devices as specified in this section, he may be licensed to do so upon the payment annually of one dollar ($1.00) for each sign up to one thousand (1,000) in number, and for each sign or panel (1,000) or more, the sum of one thousand dollars ($1,000.00) for the privilege in lieu of all other taxation as provided in this section, except such further taxation as
may be imposed upon him by cities or towns, acting under the power to levy not in excess of one-half of that specified in paragraph two of subsection (a) of this section.

(b) Every person, firm, or corporation shall show in the opposing manner that it is within the state line and within the limits of the incorporated town or city or county within which, and the county within which, it is maintaining or proposing to maintain said sign boards, poster boards, painted bulletins or other painted or printed signs or other outdoor advertising devices within the state of North Carolina. No person, firm, or corporation, licensed under the provisions of this section, shall erect or maintain any outdoor advertising structure, device or display until a permit for the erection of such structure, device or display shall have been obtained from the commissioner of revenue. Application for such permit shall be in writing, signed by the applicant or his duly authorized agent, upon blanks furnished by the commissioner of revenue, in such form and requiring such information as said commissioner of revenue may prescribe. Each application shall have attached thereto the written consent of the owners or duly authorized agent of the property on which structures, device or display is to be erected or maintained, and shall state thereon the beginning and ending dates of such written permission: Provided, the subsection shall not apply to persons, firms, or corporations who or which advertise their own official business exclusively, and who or which have been licensed therefor pursuant to subsection (a) of this section.

(c) It shall be unlawful for any person engaged in the business of outdoor advertising to in any manner paint, print, place, post, tack or affix, or cause to be painted, printed, placed, posted, tacked or affixed any sign or other printed or painted advertisement on or to any stone, tree, fence, stump, pole, building or other object which is upon the property of another without first obtaining the written consent of such owner thereof, and any person, firm, or corporation who in any manner paints, prints, places, posts, tacks or affixes, or causes to be painted, printed, posted, tacked or affixed any such advertisement on the property of another except as herein provided shall be guilty of a misdemeanor, and shall be punished by a fine not exceeding fifty dollars ($50.00), or imprisonment of thirty days: Provided, that the provisions of this section shall not apply to legal notices.

(d) It shall be unlawful for any person, firm, or corporation to paint, print, place, post, tack or affix any advertising matter within the limits of the right of way of public highways of the state without the permission of the state highway and public works commission, or upon the streets of the incorporated towns of the state without permission of the governing authorities, and it shall be the duty of the highway and public works commission or any other administrative body or other governing authorities of the cities and towns of said state to remove said advertising matters therefrom.

(e) Every person, firm, or corporation owning or maintaining sign boards, poster boards, printed bulletins, or other outdoor advertisements of any nature within this state shall have imprinted on the same the name of such person, firm, or corporation in sufficient size to be plainly visible and permanently affixed thereto.

(f) A license shall not be granted any person, firm, or corporation having his or its principal place of business outside the state for the display of any advertising of any nature whatsoever, designed or intended for the display of advertising matter, until such person, firm, or corporation shall have furnished and filed with the commissioner of revenue a surety bond to the state, approved by him, in such sum as he may fix, not exceeding five thousand dollars ($5,000.00), conditioned that such licensee shall fulfill all requirements of law, and lawful regulations and orders of said commissioner of revenue, relative to the display of advertisements. Such surety bond shall remain in full force and effect as long as any obligations of such licensee to the state shall remain unsatisfied.

(g) No advertising, or other signs specified in this section, shall be erected in the highway right of way so as to obstruct the vision or otherwise to increase the hazards, and all signs upon the highways shall be placed in a manner to be approved by the said highway and public works commission.

(h) Any person, firm, or corporation who or which shall refuse to or neglect to comply with the terms and provisions of this section, and who shall fail to pay the tax herein provided for within thirty days after the same shall become due, or who shall paint, print, place, post, tack, affix or display any advertising sign or other matter contrary to the provisions of this section, the highway and public works commission of the state of North Carolina or other governing body having jurisdiction over the roads and highways of the state, and the governing authorities of cities and towns and its agents and employees, and the board of county commissioners of the various counties of said state and its employees are directed to forthwith seize and remove or cause to be removed all advertisements, signs or other matter displayed contrary to the provisions of this section.

For the purpose of more effectually carrying into effect the provisions of this section, the commissioner of revenue is authorized and directed to prepare and furnish to the highway and public works commission or other governing body having jurisdiction over the roads and highways of the state a sufficient number of permits to be executed by the owner, lessee or tenant occupying the lands adjacent to the highways of the state, upon which advertisements, signs or other matter displayed contrary to the provisions of this section, in words as follows:

"I, (we), (owner), (lessee), (tenant), authorize and direct the Highway and Public Works Commission of the State of North Carolina to remove from my lands the following signs and advertising matter placed upon my lands unlawfully or without my permission: .........................."

And the said highway and public works commission or other governing body having jurisdiction over the roads and highways of the state shall
§ 105-87. Motor advertisers.——(a) Every person, firm, or corporation operating over the streets or highways of this state any motor vehicle or other mechanical conveyance equipped with radio, phonograph, or other similar mechanism to produce music, or having any loudspeaker attachment or other sound magnifying device to produce sound effects for advertising purposes, whether advertising his or its own business containing twelve (12) square feet or less bearing an announcement of or advertising surface: Provided, that this exemption shall not apply if the signs or panels are displayed in more than five counties. (1939, c. 158, s. 151; 1943, c. 400, s. 2.)

§ 105-88. Loan agencies or brokers. — Every person, firm, or corporation engaged in the regular business of making loans or lending money, accepting liens on, or contracts of assignments of, salaries or wages, or any part thereof, or other security or evidences of debt for repayment of such loans in installment payments or otherwise, and maintaining in connection with same any office or other located or established place for the conduct, negotiation, or transaction of such business and/or advertising or soliciting such business in any manner whatsoever, shall be deemed a loan agency, and shall apply for and procure from the commissioner of revenue a state license for the privilege of transacting or negotiating such business at each office or place so maintained, and shall pay for such license a tax of seven hundred fifty dollars ($750.00).

(a) Nothing in this section shall be construed to apply to banks, industrial banks, trust companies, building and loan associations, cooperative credit unions, nor installment paper dealers defined and taxed under other sections of this article, nor shall it apply to the business of negotiating loans on real estate as described in § 105-41, nor to pawnbrokers lending or advancing money on specific articles of personal property. It shall apply to those persons or concerns operating what are commonly known as loan companies or finance companies and whose business is as hereinbefore described, and those persons, firms, or corporations pursuing the business of lending money and taking as security for the payment of such loan and interest an assignment of wages or an assignment of wages with power of attorney to collect same, or other order or chattel mortgage or bill of sale upon household or kitchen furniture.

(b) At the time of making any such loan, the person, or officer of the firm or corporation making the same, shall give to the borrower in writing in convenient form a statement showing the amount received by the borrower, the amount to be paid back to the borrower, and the time in which said amount is to be paid, and the rate of interest and discount agreed upon.

(c) Any such person, firm, or corporation failing, refusing, or neglecting to pay the tax herein levied shall be guilty of a misdemeanor, and in addition to double the tax due shall be fined not less than two hundred and fifty dollars ($250.00) and/or imprisoned, in the discretion of the court. No such loan shall be collectible at law in the courts of this state in any case where the person making such loan has failed to pay the tax levied herein, and/or otherwise complied with the provisions of this section.

(d) Counties, cities, and towns may levy a license tax on the business taxed under this section not in excess of one hundred dollars ($100.00). (1939, c. 158, s. 152.)

§ 105-89. Automobiles and motorcycle dealers and service stations.—(1) Automotive Service Stations.—Every person, firm, or corporation engaged in the business of servicing, storing, painting, repairing, welding, or upholstering motor vehicles, trailers, semi-trailers, or engaged in the business of retail selling and/or delivering of any tires, tools, batteries, electrical equipment, automotive accessories, including radios designed for exclusive use in automobiles, or supplies, motor
fuels and/or lubricants, or any of such commodities, in this state, shall apply for and obtain from the commissioner of revenue a state license for the privilege of engaging in such business in this state, and shall pay for such license an annual tax for each location where such business is carried on, as follows:

- In cities or towns of less than 2,500 population: $10.00
- In cities or towns of 2,500 and less than 5,000 population: $15.00
- In cities or towns of 5,000 and less than 10,000 population: $20.00
- In cities or towns of 10,000 and less than 20,000 population: $30.00
- In cities or towns of 20,000 and less than 30,000 population: $40.00
- In cities or towns of 30,000 or more: $50.00

(a) In rural sections where a service station is operated, the tax shall be five dollars ($5.00) per pump.

(b) The tax levied in this section shall in no case be less than five dollars ($5.00) per pump.

(c) No additional license tax under this subsection shall be levied upon or collected from any employee, agent, or salesman whose employer or principal has paid the tax for each location levied in this subsection.

(d) The tax imposed in § 105-53 shall not apply to the sale of gasoline to dealers for resale.

(e) Counties, cities, and towns may levy a license tax in each place of business located therein under this subsection not in excess of one-fourth of that levied by the state.

(2) Motorcycle Dealers.—Every person, firm, or corporation engaged in the business of buying, selling, distributing, and/or exchanging motorcycles or motorcycle supplies or any of such commodities at wholesale, shall apply for and obtain from the commissioner of revenue a state license for the privilege of engaging in such business in this state, and shall pay for such license an annual tax for each location where such business is carried on, as follows:

- In unincorporated communities and in cities or towns of less than 2,500 population: $15.00
- In cities or towns of 2,500 and less than 5,000 population: $20.00
- In cities or towns of 5,000 and less than 10,000 population: $25.00
- In cities or towns of 10,000 and less than 20,000 population: $30.00
- In cities or towns of 20,000 and less than 30,000 population: $35.00
- In cities or towns of 30,000 or more: $40.00

(a) A motorcycle dealer paying the license tax under this subsection may buy, sell, and/or deal in bicycle and bicycle supplies without the payment of an additional license tax.

(b) No additional license tax shall be levied upon or collected from any employee or salesman whose employer has paid the tax levied in this subsection.

(c) No motorcycle dealer shall be issued dealer's tags until the license tax levied under this subsection has been paid.
and supplies in this state shall apply for and obtain from the commissioner of revenue a state license for the privilege of engaging in such business in this state, and shall pay for such license an annual tax for each location where such business is carried on, as follows:

In unincorporated communities and in cities or towns of less than 1,000 population ........................................... $ 25.00
In cities or towns of 1,000 and less than 2,500 population .................................................. 50.00
In cities or towns of 2,500 and less than 5,000 population ............................................... 75.00
In cities or towns of 5,000 and less than 10,000 population ............................................. 110.00
In cities or towns of 10,000 and less than 20,000 population ........................................... 140.00
In cities or towns of 20,000 and less than 30,000 population .......................................... 175.00
In cities or towns of 30,000 or more ........................................... 200.00

Provided, that persons, firms, or corporations dealing in secondhand or used motor vehicles exclusively shall be liable for the tax as set out in the foregoing schedule unless such business is of a seasonal, temporary, transient, or itinerant nature, in which event the tax shall be three hundred dollars ($300.00) for each location where such business is carried on.

(a) Any person, firm, or corporation who or which deals exclusively in motor fuels and lubricants, and has paid the license tax levied under subsection one of this section, shall not be subject to any license tax under subsections two, three, and four of this section.

(b) No additional license tax under this subsection shall be levied upon or collected from any employee or salesmar whose employer has paid the tax levied in this subsection; nor shall the tax apply to dealers in semi-trailers weighing not more than five hundred pounds and carrying not more than one-thousand-pound load, and to be towed by passenger cars.

(c) No dealer shall be issued dealer's tags until the license tax levied under this subsection has been paid.

(d) Premises on which used cars are stored or sold when owned or operated by a licensed new car dealer under the same name shall not be deemed as a separate place of business when conducted within the corporate limits of any city or town in which such new car business is conducted.

(e) Counties, cities, and towns may levy a license tax on each place of business located therein, taxed under this subsection, not in excess of one-fourth of that levied by the state, with the exception that the minimum tax may be as much as twenty dollars ($20.00): Provided, if such business is of a seasonal, temporary, transient, or itinerant nature, counties, cities, and towns may levy a tax of three hundred dollars ($300.00) for each location where such business is carried on. (1939, c. 158, s. 153.)

Cross Reference.—For temporary reduction of the taxes levied under this section, see § 105-113.1.

Constitutionality.—A provision in a former statute as to the reduction of the license tax if three-fourths of the assets are invested in this state was held constitutional in Bethlehem Motors Corp. v. Flynt, 175 N. C. 399, 100 S. E. 691. American Exch. Nat. Bank v. Lacy, 188 N. C. 25, 28, 123 S. E. 475.—Ed. Note.

§ 105-90. Bank as "Dealer."—Where a dealer in automobiles has sold to the bank, to which he was indebted, his automobiles on hand, for the purpose of securing the debt, under provisions that he was to sell and collect and hold the proceeds in trust for the purpose stated, and has thereafter left the State, and the bank has assumed to continue the sales and make collection therefrom, the bank may not avoid payment of the tax upon the ground that it was not a dealer, etc., in contemplation of the statute, and thus evade the practical efficiency of the statute and reduce it to a nullity. American Exch. Nat. Bank v. Lacy, 188 N. C. 25, 123 S. E. 475.

Tax on Operators of Gasoline Pumps.—The provision of this section, prescribing that no county, city or town shall levy a license tax on the business of selling gasoline at retail in excess of one-fourth of the State license tax does not preclude a city from levying a tax on operators of gasoline pumps located on sidewalks along certain streets between the curb and the property line when such city tax is levied in the nature of a permit in the exercise of regulatory police power. State v. Evans, 205 N. C. 434, 171 S. E. 640.

§ 105-90. Emigrant and employment agents.—(a) Every person, firm, or corporation, either as agent or principal, engaged in soliciting, hiring, and/or contracting with laborers, male or female, in this state for employment out of the state shall apply for and obtain from the commissioner of revenue a state license for each county for the privilege of engaging in such business, and shall pay for such license a tax of five hundred dollars ($500.00) for each county in which such business is carried on.

(b) Every person, firm, or corporation who or which engages in the business of securing employment for a person or persons and charging therefor a fee, commission, or other compensation shall apply for and obtain from the commissioner of revenue a state license for the privilege of engaging in such business: And provided further, that the privilege of engaging in such business, and shall pay for such license the following annual tax for each location in which such business is carried on: In unincorporated communities and in cities and towns of less than 2,500 population ........................................... $100.00
In cities or towns of 2,500 and less than 5,000 population .......................................... 200.00
In cities or towns of 5,000 and less than 10,000 population ........................................... 300.00
In cities or towns of 10,000 or more population ........................................... 500.00

Provided, that this section shall not apply to any employment agency operated by the federal government, the state, any county or municipality, or whose sole business is procuring employees for work in the production and harvesting of farm crops within the state: And provided further, that under this section the tax on any employment agency whose sole business is the placement of teachers and/or other school employees and which
has been approved by the state superintendent of
civil action in the superior court or other court of
have the correct information.

(c) Any person, firm, or corporation violating
the provisions of this section shall be guilty of a
misdemeanor and fined, in addition to other pen-
alties provided by law, two thousand dollars
($1,000.00) and/or imprisoned, in the discretion of
the court.

(d) Counties, cities and towns may levy a license
on the business taxed under this section not in
excess of that levied by the state. (1939, c. 158, s.
154.)

Generally.—This statute is a severe measure imposing a
tax upon the business of hiring hands, and its validity can
be sustained only upon this view. Lane v. Commissioners,
139 N. C. 443, 445, 53 S. E. 140. See also State v. Hunt,
129 N. C. 686, 40 S. E. 216.

The occupation of an “enigmatic agent,” as defined in
chapter 75, Acts of 1891, similar to this section, does not
belong to that class of trades or occupations which are so
inherently harmful or dangerous to the public that they
cannot, either directly or indirectly, be restricted or prohib-
ited. Lane v. Commissioners, 114 Ga. 53, 39 S. E. 913.

Lane, J., construing a section worded exactly as this,
says, “The legislative enactment imposing a tax upon
enigmatic agents, and providing a penalty for the failure
to register and pay such tax, was clearly intended to apply
to persons who, as agents of others, make it their business
to hire laborers in this state to be sent beyond the limits
of the state and then employed by others. To extend its
application to a resident of another state, who, being in this
state, incidentally employs laborers on his own behalf to
work for him beyond the limits of this state, does not be
entirely unwarranted.” Cited and approved in Carr v.
Commissioners, 136 N. C. 125, 127, 48 S. E. 597.

Scope of Section.—In Theus v. State, 114 Ga. 53, 39 S.
E. 913, the court said: “When the constitution confers upon
the legislature the power, to levy taxes, the amount of the
tax to be levied is committed to

Amount of Tax Not Reviewable.—A tax on the business
taxed under this section and
the commissioner of revenue a state license for the privi-

Municipalities of ten thousand and less than
twenty thousand population .......... 12.50
Municipalities of twenty thousand and less
than thirty thousand population ....... 15.00
Municipalities of thirty thousand and less
than forty thousand population ....... 17.50
Municipalities of forty thousand and less
than fifty thousand population ....... 20.00
Municipalities of fifty thousand population
or more ........................................ 25.00

§ 105-93. Process tax.—(a) In every indictment
or criminal proceeding finally disposed of in
the superior court, the party convicted or adjudged
to pay the cost shall pay a tax of two dollars ($200.00).
Provided, that this tax shall not be levied
in cases where the county is required to pay the
cost.
(b) At the time of suing out the summons in a
civil action in the superior court or other court of
record, or the docketing of an appeal from the
lower court in the superior court, the plaintiff or
the appellant shall pay a tax of two dollars ($200.00):

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Provided, that this tax shall not be demanded of any plaintiff or appellant who has been duly authorized to sue or appeal in forma pauperi, but when in cases brought or in appeals in forma pauperi, the costs are taxed against the defendants the tax shall be included in the bill of costs: Provided, that this tax shall not be levied in cases where the county is required to pay the cost and in tax foreclosure suits.

(c) No county, city, or town, or other municipal corporation shall be required to pay said tax upon the institution of any action brought by it, but whenever such plaintiff shall recover in such action, the said tax shall be included in the bill of costs and collected from the defendant.

(d) In any case where the party has paid the aforesaid cost in a civil action and shall recover in the final decision of the case, then such cost so paid by him shall be retaxed against the losing party adjudged to pay the cost, plus five per cent (5%) which the clerk of the superior court may retain for his services, and this shall be received by him, whether he is serving on a salary or fee basis, and if on a salary basis, shall be in addition to such salary.

(e) This section shall not apply to cases in the jurisdiction of magistrates' courts, whether civil or criminal, except upon appeals to the superior court from the judgment of such magistrate, and shall not apply for the docketing in the superior court of a transcript of a judgment rendered in any other court, whether of record or not.

(f) The tax provided for in this section shall be levied and assessed by the clerk of the superior court or other court in all cases described herein; and on the first Monday in January, April, July, and October of each and every year he shall make to the commissioner of revenue a sworn statement and report in detail, showing the number of the case on the docket, the name of the plaintiff or appellant in civil action, or the defendant in criminal action, and accompany such report and statement with the amount of such taxes collected, or which should have been collected, by him in the preceding three months. Any clerk of the superior court failing to make the report and pay the amount of tax due under this section within the first fifteen days of the month in which such report is required to be made, shall be liable for a penalty of ten per cent (10%) on the amount of tax which may be due at the time such report should be made. (1939, c. 158, s. 157.)

Where Appeal Is from Clerk to Judge.—Where an appeal is taken from an order of the clerk of the Superior Court to the judge thereof, the judge has jurisdiction by mandate of § 1-275, and no "docketing" is involved within the meaning of this section, nor is the clerk a "lower court," to the judge thereof, the judge has jurisdiction without the payment of the tax. Windsor v. McVay, 236 N. C. 730, 175 S. E. 83.

### § 105-94. Morris Plan or industrial banks.

Every person, firm, or corporation engaged in the business of operating a Morris Plan or industrial bank in the state shall apply for and obtain a state license from the commissioner of revenue for the privilege of engaging in such business, and shall pay for such license the following tax:

When the total resources as of December thirty-first of the previous calendar year are—

<table>
<thead>
<tr>
<th>Total Resources</th>
<th>Tax</th>
</tr>
</thead>
<tbody>
<tr>
<td>Less than $250,000</td>
<td>$75.00</td>
</tr>
<tr>
<td>$250,000 and less than $500,000</td>
<td>150.00</td>
</tr>
<tr>
<td>$500,000 and less than $1,000,000</td>
<td>225.00</td>
</tr>
<tr>
<td>$1,000,000 and less than $2,000,000</td>
<td>300.00</td>
</tr>
<tr>
<td>$2,000,000 and less than $5,000,000</td>
<td>450.00</td>
</tr>
<tr>
<td>$5,000,000 and over</td>
<td>600.00</td>
</tr>
</tbody>
</table>

(a) Any such bank that shall begin business during the current tax year applicable to this article, the tax shall be calculated on the total resources at the beginning of business.

(b) Every person, firm, or corporation engaged in the business of soliciting loans or deposits for a Morris Plan or other industrial bank not licensed as such by the state for the county in which such person, firm, or corporation solicits business shall apply for and obtain from the commissioner of revenue a state license for the privilege of engaging in such business, and shall pay for such license a tax of fifty dollars ($50.00) per annum, in each county in which business is solicited.

(c) Counties shall not levy any license tax on the business taxed under this section, but cities and towns may levy a license tax not in excess of one-half (1/2%) of that levied by the state. (1939, c. 158, s. 158.)

### § 105-95. Marriage license.

There shall be levied on all marriage licenses a state license tax of three dollars on each such license, which shall be assessed and collected by the register of deeds of the county in which the license is issued.

The register of deeds of each county shall submit to the commissioner of revenue, on the first Monday in January, April, July, and October of each year a sworn statement or report in detail, showing the names of the persons to whom such license has been issued during the preceding three months, and accompany such sworn report or statement with the amount of such state taxes collected by him or that should have been collected by him in the preceding three months.

The counties may levy one dollar ($1.00) upon such marriage license, to be assessed and collected by the register of deeds and accounted for to the county treasurer at the same time and in the same manner as he accounts to the commissioner of revenue for the state tax. (1939, c. 158, s. 159.)

### § 105-96. Marble yards.

Every person, firm, or corporation engaged in the business of manufacturing, erecting, jobbing, selling, or offering for sale monuments, marble tablets, gravestones or articles of like kind, or, if a non-resident, selling and erecting monuments, marble tablets, or gravestones at retail shall apply for and obtain from the commissioner of revenue a state license for the privilege of engaging in such business in this state, and shall pay for such license the following tax:

<table>
<thead>
<tr>
<th>Population</th>
<th>Tax</th>
</tr>
</thead>
<tbody>
<tr>
<td>In unincorporated communities and cities</td>
<td>$15.00</td>
</tr>
<tr>
<td>or towns of less than 2,000 population</td>
<td>$15.00</td>
</tr>
<tr>
<td>or towns of 2,000 and less than 5,000 population</td>
<td>25.00</td>
</tr>
<tr>
<td>or towns of 5,000 and less than 10,000 population</td>
<td>30.00</td>
</tr>
<tr>
<td>or towns of 10,000 and less than 15,000 population</td>
<td>40.00</td>
</tr>
<tr>
<td>or towns of 15,000 and less than 20,000 population</td>
<td>50.00</td>
</tr>
</tbody>
</table>
§ 105-97. Manufacturers of ice cream.—(a)
Every person, firm, or corporation engaged in the business of manufacturing or distributing ice cream at wholesale shall apply for and obtain from the commissioner of revenue a state license for the purpose of obtaining a state license for the privilege of doing business in this state in excess of one—

<table>
<thead>
<tr>
<th>Number of Additional Stores</th>
<th>License Tax</th>
</tr>
</thead>
<tbody>
<tr>
<td>Not more than four additional stores</td>
<td>$65.00</td>
</tr>
<tr>
<td>Five additional stores and not more than eight</td>
<td>$85.00</td>
</tr>
<tr>
<td>Nine additional stores and not more than twelve</td>
<td>$95.00</td>
</tr>
<tr>
<td>Thirteen additional stores and not more than sixteen</td>
<td>$105.00</td>
</tr>
<tr>
<td>Seventeen additional stores and not more than twenty</td>
<td>$115.00</td>
</tr>
<tr>
<td>Twenty additional stores and not more than thirty</td>
<td>$140.00</td>
</tr>
<tr>
<td>Thirty-one additional stores and not more than fifty</td>
<td>$175.00</td>
</tr>
<tr>
<td>Fifty-one additional stores and not more than one hundred</td>
<td>$200.00</td>
</tr>
<tr>
<td>One hundred and one additional stores and not more than two hundred</td>
<td>$225.00</td>
</tr>
<tr>
<td>Two hundred and one additional stores and over</td>
<td>$250.00</td>
</tr>
</tbody>
</table>

The term "chain store" as used in this section shall include stores operated under separate charters of incorporation, if there is common ownership of a majority of stock in such separately incorporated companies, and/or if there is similarity of name of such separately incorporated companies have the benefit in whole or in part of group purchase of merchandise, or of common management. And in like manner the term "chain store" shall apply to any group of stores where a majority interest is owned by an individual or partnership.

§ 105-98. Branch or chain stores.—Every person, firm, or corporation engaged in the business of operating or maintaining in this state, under the same general management, supervision, or ownership, two or more stores, or mercantile establishments where goods, wares, and/or merchandise is sold or offered for sale, or from which such goods, wares, and/or merchandise are sold and/or distributed at wholesale or retail, or who or which controls by lease, either as lessor or lessee, or by contract, the manner in which any such store or stores are operated, or the kinds, character, or brands of merchandise which are sold therein, shall be deemed a branch or chain store operator, and shall apply for and obtain from the commissioner of revenue a state license for the purpose of engaging in such business of a branch or chain store operator, and shall pay for such license a tax according to the following schedule:

On each and every store operated in this state in excess of one—

<table>
<thead>
<tr>
<th>Number of Additional Stores</th>
<th>License Tax</th>
</tr>
</thead>
<tbody>
<tr>
<td>Not more than four additional stores</td>
<td>$65.00</td>
</tr>
<tr>
<td>Five additional stores and not more than eight</td>
<td>$85.00</td>
</tr>
<tr>
<td>Nine additional stores and not more than twelve</td>
<td>$95.00</td>
</tr>
<tr>
<td>Thirteen additional stores and not more than sixteen</td>
<td>$105.00</td>
</tr>
<tr>
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<td>$115.00</td>
</tr>
<tr>
<td>Twenty additional stores and not more than thirty</td>
<td>$140.00</td>
</tr>
<tr>
<td>Thirty-one additional stores and not more than fifty</td>
<td>$175.00</td>
</tr>
<tr>
<td>Fifty-one additional stores and not more than one hundred</td>
<td>$200.00</td>
</tr>
<tr>
<td>One hundred and one additional stores and not more than two hundred</td>
<td>$225.00</td>
</tr>
<tr>
<td>Two hundred and one additional stores and over</td>
<td>$250.00</td>
</tr>
</tbody>
</table>

The term "chain store" as used in this section shall include stores operated under separate charters of incorporation, if there is common ownership of a majority of stock in such separately incorporated companies, and/or if there is similarity of name of such separately incorporated companies have the benefit in whole or in part of group purchase of merchandise, or of common management. And in like manner the term "chain store" shall apply to any group of stores where a majority interest is owned by an individual or partnership.

§ 105-113. Cross Reference.—For temporary reduction of the taxes levied under this section, see § 105-113.

Constitutionality and Nature of Tax.—The classification [1023]
§ 105-99. Wholesale distributors of motor fuels.

—Every person, firm, or corporation engaged in the business of distributing or selling at wholesale any motor fuels in this state shall apply to the commissioner for an annual license to engage in such business, and shall pay for such privilege an additional annual license tax determined and measured by the number of pumps owned or leased by the distributor or wholesaler through which such motor fuels are sold, at retail, according to the following schedule:

- For the first 100 pumps .......... $ 4.00 per pump
- For 101 additional pumps and not more than 200 pumps .......... 5.00 per pump
- For 201 additional pumps and not more than 300 pumps .......... 6.00 per pump
- For 301 additional pumps and not more than 400 pumps .......... 7.00 per pump
- For 401 additional pumps and not more than 500 pumps .......... 8.00 per pump
- For 501 additional pumps and not more than 600 pumps .......... 9.00 per pump
- For all over 600 pumps .......... 10.00 per pump

Any contract or agreement, oral or written, express or implied by the terms or the effects of which the tax herein imposed shall be passed on directly or indirectly to any person, firm, or corporation not engaged in the business hereby taxed is hereby declared to be against the public policy of this state and null and void, and any person, firm, or corporation negotiating such an agreement, or receiving the benefits thereof, shall be guilty of a misdemeanor and fined and imprisoned in the discretion of the court.

The tax herein imposed shall be in addition to all other taxes imposed by this chapter or under any other laws.

Counties, cities and towns shall not levy any tax by reason of the additional tax imposed by this section, but this section shall in no way affect the right given to counties, cities, and towns to levy taxes under § 105-99.

The business taxed under this section shall not be taxed under § 105-98. (1939, c. 158, s. 162 1/2.)

Cross Reference. —For temporary reduction of the taxes levied under this section, see § 105-113.1.

§ 105-100. Patent rights and formulas. —Every person, firm, or corporation engaged in the business of selling or offering for sale any patent right or formula shall apply in advance and obtain from the commissioner of revenue a separate state license for each and every county in this state where such patent right or formula is to be sold or offered for sale, and shall pay for each such separate license a tax of ten dollars ($10.00).

Counties, cities, or towns may levy a license on the business taxed under this section not in excess of the taxes levied by the state. (1939, c. 158, s. 163.)

In General. —It is within the legislative power of taxation, in respect to corporations, to levy any two or more of the following taxes simultaneously (1) on the franchise (including corporate dividends); (2) on the tangible property of the corporation; and (3) on the shares of the capital stock in the hands of the stockholders. The tax on the items last named is a privilege tax levied on the privilege of carrying on its business, and for the purpose of raising revenue, and not an ad valorem tax. Nor does the tax herein imposed constitute an arbitrary classification, and unconstitutional. Great Atlantic & Pacific Tea Co. v. Doughton, 196 N. C. 145, 144 S. E. 701.

§ 105-101. Tax on seals affixed by officers. —Whenever the seal of the state, of the state treasurer, of the secretary of state, or of any other public official required by law to keep a seal (not including clerks of courts, notaries public, and other officials) shall be affixed to any paper, the tax to be paid by the party applying for same shall be as follows:

- For the Great Seal of the state on warrants and missions, $2.50.
- For the Great Seal of the state on warrants of extradition for fugitives from justice from other states, the same fee and seal tax shall be collected from the state making the requisition which is charged in this state for like service. For the seal of the state department, to be collected by the secretary of state, 1.00.
- For the seal of the state treasurer, to be collected by him, 1.00.
- For a scroll, when used in the absence of a seal, the tax shall be on the scroll, and the same as for the seal.

(a) All officers shall keep a true, full, and accurate account of the number of times any of such seals or scrolls are used, and shall deliver to the governor of the state a sworn statement thereof.

(b) All seals affixed for the use of any county of the state, used on the commissions of officers of the national guard, and any other public official not having a salary, under the pension law, or under any process of court, or to any commission issued by the governor to any person in the employ of the state, or to be employed by the state shall be exempt from taxation. (1939, c. 158, s. 166.)

§ 105-102. Junk dealers. —Every person, firm, or corporation engaged in the business of buying and/or selling or dealing in what is commonly
§ 105-103. Unlawful to operate without license.

—When a license tax is required by law, and whenever the general assembly shall levy a license tax on any business, trade, employment, or profession, or for doing any act, it shall be unlawful for any person, firm, or corporation without a license to engage in such business, trade, employment, profession, or the doing of any act for which a state license is required, shall, unless otherwise provided by law, make application therefor in writing to the commissioner of revenue of the state in which such business, trade, employment, or profession is to be exercised; the name and resident address of the applicant, whether the applicant is an individual, firm, or corporation; the nature of the business, trade, employment, or profession; number of years applicant has prosecuted such business, trade, employment, or profession in this state, and such other information as may be required by the commissioner of revenue. The application shall be accompanied by the license tax prescribed in this article.

(b) Upon receipt of the application for a state license with the tax prescribed by this article, the commissioner of revenue, if satisfied of its correctness, shall issue a state license to the applicant to engage in the business, trade, employment, or profession in the name of and at the place set out in the application. No license issued by the commissioner of revenue shall be valid or have any legal effect unless and until the tax prescribed by law has been paid, and the fact of such shall appear on the face of the license. (1939, c. 158, s. 182.)

§ 105-105. Persons, firms, and corporations engaged in more than one business to pay tax on each. — Where any person, firm, or corporation is engaged in more than one business, trade, employment, or profession which is made under the provisions of this article subject to state license taxes, such persons, firms, or corporations shall pay the license tax prescribed in this article for each separate business, trade, employment, or profession. (1939, c. 158, s. 183.)

§ 105-106. Effect of change in name of firm.—No change in the name of a firm, partnership, or corporation, nor the taking in of a new partner, nor the withdrawal of one or more of the firm, shall be considered as commencing business; but if any one or more of the partners remain in the firm, or if there is change in ownership of less than a majority of the stock, if a corporation, the business shall be regarded as continuing. (1939, c. 158, s. 184.)

§ 105-107. License may be changed when place of business is changed.—When a person, firm, or corporation has obtained a state license to engage in any business, trade, employment, or profession at any definite location in a county, and desires to remove to another location in the same county, the commissioner of revenue may, upon proper application, grant such person, firm, or corporation permission to make such move, and may endorse upon the state license his approval of change in location. (1939, c. 158, s. 185.)

§ 105-108. Property used in a licensed business
not exempt from taxation.—A state license, issued under any of the provisions of this article shall not be construed to exempt from other forms of taxation the property employed in such licensed business, trade, employment, or profession. (1939, c. 158, s. 186.)

§ 105-109. Engaging in business without a license.—(a) All state license taxes under this article or schedule, unless otherwise provided for, shall be due and payable annually on or before the first day of June of each year, or at the date of engaging in such business, trade, employment and/or profession, or doing the act.

(b) If any person, firm, or corporation shall continue the business, trade, employment, or profession, or to do the act, after the expiration of a license previously issued, without obtaining a new license, he or it shall be guilty of a misdemeanor, and upon conviction shall be fined and/or imprisoned in the discretion of the court, but the fine shall not be less than ten per cent (10%) of the tax in addition to the tax and the costs; and if such failure to apply for and obtain a new license be continued, such person, firm, or corporation shall pay additional tax of five per cent (5%) of the amount of the state license tax which was due and payable on the first day of June of the current year, in addition to the state license tax imposed by this article, for each and every thirty days that such state license tax remains unpaid from the date that same was due and payable, and such additional tax shall be assessed by the commissioner of revenue and paid with the state license tax, and shall become a part of the state license tax. The penalties for delayed payment hereinafter provided shall not impair the obligation to procure a license in advance or modify any of the pains and penalties for failure to do so.

The provisions of this section shall apply to taxes levied by the counties of the state under authority of this article in the same manner and to the same extent as they apply to taxes levied by the state.

(c) If any person, firm, or corporation shall commence to exercise any privilege or to promote any business, trade, employment, or profession, or to do any act requiring a state license under this article without such state license, he or it shall be guilty of a misdemeanor, and shall be fined and/or imprisoned in the discretion of the court; and if such failure, neglect, or refusal to apply for and obtain such state license be continued, such person, firm, or corporation shall pay an additional tax of five per cent (5%) of the amount of such state license tax which was due and payable at the commencement of the business, trade, employment or profession, or doing the act, in addition to the state license tax imposed by this article, and unless otherwise provided for, shall be and constitute a distinct and a separate offense. (1939, c. 158, s. 187.)

§ 105-110. Each day's continuance in business without a state license a separate offense.—Each and every day that any person, firm, or corporation shall continue to exercise or engage in any business, trade, employment, or profession, or do any act in violation of the provisions of this article, shall be and constitute a distinct and a separate offense. (1939, c. 158, s. 188.)

§ 105-111. Duties of commissioner of revenue. —(a) Except where otherwise provided, the commissioner of revenue shall be the duly authorized agent of this state for the issuing of all state licenses and the collection of all license taxes under this article, and it shall be his duty and the duty of his deputies to make diligent inquiry to ascertain whether all persons, firms, or corporations in the various counties of the state who are taxable under the provisions of this article have applied for the state license and paid the tax thereon levied.

(b) The commissioner of revenue shall continuously keep in his possession a sufficient supply of blank state license certificates, with corresponding sheets and duplicates consecutively numbered; shall stamp across each state license certificate that is to be good and valid in each and every county of the state the words "state-wide license," and shall stamp or imprint on each and every license certificate the words "issued by the commissioner of revenue."

(c) Neither the commissioner of revenue nor any of his deputies shall issue any duplicate license unless expressly authorized to do so by a provision of this article or schedule, and unless the original license is lost or has become so mutilated as to be illegible, and in such cases the commissioner of revenue is authorized to issue a duplicate certificate for which the tax is paid, and shall stamp upon its face "duplicate." (1939, c. 158, s. 189.)

§ 105-112. License to be procured before beginning business.—(a) Every person, firm, or corporation engaging in any business, trade, and/or profession, or doing any act for which a state license is required and a tax is to be paid under the provisions of this article or schedule, shall, annually in advance, on or before the first day of June of each year, or before engaging in such business, trade, and/or profession, or doing the act, apply for and obtain from the commissioner of revenue a state license for the privilege of engaging in such business, trade, and/or profession, or doing such act, and shall pay the tax levied therefor.

(b) Licenses shall be kept posted where business is carried on. No person, firm, or corporation shall
engage in any business, trade, and/or profession, or do the act for which a state license is required in this article or schedule without having such state license posted conspicuously at the place where such business, trade, and/or profession is carried on; and if the business, trade, and/or profession is such that license cannot be so posted, then the itinerant licensee shall have such license required by this article or schedule in his actual possession at the time of carrying on such business, trade, and/or profession, or doing the act named in this article or schedule, or a duplicate thereof.

(2) Any person, firm, or corporation failing, neglecting, or refusing to have the state license required under this article or schedule posted conspicuously at the place of business for which the license was obtained, or to have the same or a duplicate thereof in actual possession if an itinerant, shall pay an additional tax of twenty-five dollars ($25.00) for each and every separate offense, and each day’s failure, neglect, or refusal shall constitute a separate offense. (1939, c. 158, s. 190.)

§ 105-113. Sheriff and city clerk to report.—The sheriff of each county and the clerk of the board of aldermen of each city or town in the state shall, on or before the fifteenth day of June of each year, make a report to the commissioner of revenue, containing the names and the business, trade, and/or the profession of every person, firm, or corporation in his county or city who or which is required to apply for and obtain a state license under the provisions of this article or schedule, and upon such forms as shall be provided and in such detail as may be required by the commissioner of revenue. (1939, c. 158, s. 191.)

§ 105-113.1. Privilege taxes payable in advance; reduction.—The license taxes levied under this article upon the business of selling particular kinds of merchandise or commodities are levied for the privilege of engaging in the business of selling such articles, merchandise or commodities in the normal course of business.

The taxes are required to be paid in advance at the beginning of the tax year with no provision for refund for any cause with possible exception of the indirect method prescribed by the one thousand nine hundred and forty-three amendment to the Revenue Act providing for the transfer of such licenses under certain conditions.

§ 105-113.2. War conditions have affected business licenses levied under Schedule B more than any other taxes levied by the state.

Under war conditions priorities, rationing, and restrictions upon the sale of particular articles of merchandise have so restricted business opportunities in many lines as to make the application of the license taxes now levied wholly unreasonable, and relief must be granted to those businesses which have suffered severely, and provisions must be made to provide relief for those businesses which will suffer severely before the convening of the next general assembly; therefore, Schedule B license privilege taxes levied by the state under this article are reduced as follows:

(a) The taxes levied by the state under § 105-49 are reduced 50%.
(b) The taxes levied by the state under § 105-51 are reduced 50%.
(c) The taxes levied by the state under § 105-61 are reduced 50%.
(d) The taxes levied by the state under § 105-67 are reduced 50%.
(e) The taxes levied by the state under § 105-79 are reduced 50%.
(f) The taxes levied by the state under § 105-82 are reduced 50%.
(g) The taxes levied by the state under § 105-89 are reduced 75%.
(h) The taxes levied by the state under § 105-97 are reduced 30%.
(i) The taxes levied by the state under § 105-99 are reduced 75%.
(j) The taxes levied by the state under § 105-86 are reduced 50%.

The reductions in taxes herein authorized shall not be applicable to counties, cities and towns. It is the intent of this section that counties, cities and towns may continue to levy privilege taxes within the same limits authorized by the Revenue Act of one thousand nine hundred and thirty-nine, as amended, prior to the enactment of this section.

This section shall be in full force and effect from and after its ratification, but the reductions in license taxes authorized herein shall be effective only from and after June first, one thousand nine hundred and forty-three.

This section shall be in effect until June first, one thousand nine hundred and forty-five. (1943, c. 400, s. 2.)

Art. 3. Schedule C. Franchise Tax.

§ 105-114. Defining taxes in this article.—The taxes levied and assessed in this article or schedule shall be paid as specifically herein provided, and shall be for the privilege of engaging in or carrying on the business or doing the act named; and, if taxpayer be a corporation, shall be a tax also for the continuance of its corporate rights and privileges granted under its charter, if incorporated in this state, or by reason of any act of domestication if incorporated in another state, and such taxes and taxpayers shall be subject to other pertinent regulations mentioned in this chapter. The taxes levied in this article or schedule shall be for the fiscal year of the state in which said taxes become due. (1909, c. 158, s. 201; 1913, c. 400, s. 8.)

Editor’s Note.—The 1943 amendment struck out former provisions of the last sentence relating to lien of taxes. See 11 N. C. Law Rev. 238, for general amount of increase made in these taxes by the 1913 act.

Franchise Tax on Corporation.—The franchise tax imposed upon every corporation doing business in the State is a tax upon the privilege of being a corporation, and its payment does not relieve it, or its lessee, from the payment of a tax imposed upon the privilege of carrying on the particular kind of business for which the corporation was chartered. Cobb v. Commissioners, 122 N. C. 307, 30 S. E. 93.

Whenever a tax is imposed upon a corporation directly by the legislature and is not assessed by assessors, and the amount depends on the amount of business transacted by the corporation, and the extent to which it has exercised the privileges granted in its charter, without reference to the value of its property or the nature of the investments made of it, it is a franchise tax. Burroughs on Tax, 169; With v. Petersburg R. Co., 89 N. C. 301, 330, 330.

Tax on Gross Receipts.—A tax on the gross receipts of an insurance company is a privilege tax. Insurance Co. v. Stedman, 130 N. C. 221, 41 S. E. 279.
§ 105-115. Franchise or privilege tax on railroads.—Every person, firm, or corporation, domestic or foreign, owning and/or operating a railroad in this state shall, in addition to all other taxes levied and assessed in the state, pay annually to the commissioner of revenue a franchise, license, or privilege tax for the privilege of engaging in such railroad business within the state of North Carolina, as follows:

(a) Such person, firm or corporation shall during the month of June each year furnish to the commissioner of revenue a copy of the report and statement required to be made to the state board of assessment by the Machinery Act in effect at the time such report is due, and such other and further information as the commissioner of revenue may require.

(b) The value upon which the tax herein levied shall be assessed by the commissioner of revenue and the measure of the extent to which every such railroad company is carrying on intrastate commerce within this state of North Carolina shall be the value of the total property, tangible and intangible, in this state, for each such railroad company, as assessed for ad valorem taxation during the calendar year in which such report is due.

(c) The franchise or privilege tax which every such railroad company shall pay for the privilege of carrying on or engaging in intrastate commerce within this state shall be seventy-five one-hundredths of one per cent (75/100%) of the value ascertained as above by the commissioner of revenue, and tax shall be due and payable within thirty days after date of notice of such tax.

(d) If any such person, firm, or corporation shall fail, neglect, or refuse to make and deliver the report or statements provided for in this section, the commissioner of revenue shall estimate, from the reports and record on file with the state board of assessment, the value upon which the amount of tax due by such company under this section shall be computed, and shall assess the franchise or privilege tax upon such estimate, and shall collect the same, together with such penalties herein imposed for failure to make the report and statement.

(e) It is the intention of this section to levy upon railroad companies a license, franchise, or privilege tax for the privilege of engaging in intrastate commerce carried on wholly within this state, and not a part of interstate commerce; that the tax provided for in this section is not intended to be a tax for the privilege of engaging in interstate commerce, nor is it intended to be a tax on the business of interstate commerce, nor is it intended to be a tax having any relation to the interstate or foreign business or commerce in which any such railroad company may be engaged in addition to its business in this state.

(f) No county, city or town shall levy a license, franchise, or privilege tax on the business taxed under this section. (1939, c. 158, s. 202.)

Cross References.—As to requirement of uniformity, see N. C. Const., Art. V, § 3, and note to Worth v. Petersburg R. Co., 89 N. C. 301, under § 105-241.

§ 105-116. Franchise or privilege tax on electric light, power, street railway, gas, water, sewerage, and other similar public-service companies not otherwise taxed.—(1) Every person, firm, or corporation, domestic or foreign, other than municipal corporations, engaged in the business of furnishing electricity, electric lights, current, power or gas, or owning and/or operating a water or public sewerage system, or owning and/or operating a street railway, street bus or similar street transportation system for the transportation of freight or passengers for hire, shall, within thirty days after the first day of January, April, July and October of each year, make and deliver to the commissioner of revenue, upon such forms and blanks as required by him, a report verified by the oath of the officer or authorized agent making such report and statement, containing the following information:

(a) The total gross receipts for the three months ending the last day of the month immediately preceding such return from such business within and without this state.

(b) The total gross receipts for the same period from such business within this state.

(c) The total gross receipts from the commodities or services described in this section sold to any other person, firm, or corporation engaged in buying such commodities or services to the public, and actually sold by such vendor to the public for consumption and tax paid to this state by the vendee, together with the name of such vendee, with the amount sold and the price received therefor.

(d) The total amount and price paid for such commodities or services purchased from others engaged in the above named business in this state, and the name or names of the vendor.

(2) From the total gross receipts within this state there shall be deducted the gross receipts reported in subsection (1) (c) of this section: Provided, that this deduction shall not be allowed where the sale of such commodities was made to any person, firm, or corporation or municipality which is exempted by law from the payment of the tax herein imposed upon such commodities when sold or used by it.

(3) On every such person, firm or corporation there is levied an annual franchise or privilege tax of six per cent (6%), payable quarterly, of the total gross receipts derived from such business within this state, after the deductions allowed as herein provided for, which said tax shall be for the privilege of carrying on or engaging in the business named in this state, and shall be paid to the commissioner of revenue at the time of filing the report herein provided for: Provided, the tax upon privately owned water companies shall be four per cent (4%) of the total gross receipts derived from such business within this state: Provided further, the tax on gas companies shall be at the rate of four per cent (4%) upon the first twenty-five thousand dollars ($25,000.00) of the total gross receipts, and the tax on all gross receipts in excess of twenty-five thousand dollars ($25,000.00) shall be at the rate of six per cent (6%).

(4) Any person, firm, or corporation failing to file report and pay tax found to be due in accordance with the provisions of this section at the time herein provided for shall, in addition to all other penalties prescribed by this article, pay an additional tax of ten per cent (10%) and interest at the rate of six per cent (6%) per annum on the total amount of tax due and additional tax incurred, which said additional tax shall in no case
be less than two dollars ($2.00), and shall be added to the tax, together with interest accrued, and shall become an integral part of the tax.

(5) The report herein required of gross receipts within and without the state, shall include the total gross receipts for the period stated of all properties owned and operated by the reporting person, firm, or corporation, domestic or foreign, engaged in such express business wholly within this state during the year ending the thirtieth day of June of the current year, and shall be verified by the oath of the officer or authorized agent making such report, of the total gross receipts of the property operated for the previous calendar quarter year and of the total net income derived from such business during the year ending the thirtieth day of June of the current year.

(6) Companies taxed under this section shall not be required to pay the franchise tax imposed by §§ 105-122 or 105-123 unless the tax levied by §§ 105-122 and 105-123 exceed the tax levied in this section, and no county shall impose a franchise or privilege tax upon the business taxed under this section, and no city or town shall impose a greater privilege or license tax upon such companies than the aggregate privilege or license tax which is now imposed by any such city or town. (1939, c. 158, s. 203.)

§ 105-118. Franchise or privilege tax on Pullman, sleeping, chair, and dining cars.—(1) Every person, firm, or corporation, domestic or foreign, engaged in the business of operating in this state any Pullman, sleeping, chair, and dining cars, shall annually, on or before the first day of August, make and deliver to the commissioner of revenue, at the time of filing the report required under this section, and no city or town shall impose a greater privilege or license tax upon such companies than the aggregate privilege or license tax which is now imposed by any such city or town. (1939, c. 158, s. 204.)

§ 105-119. Franchise or privilege tax on express companies.—(1) Every person, firm, or corporation, domestic or foreign, who or which engages in such express business within this state shall pay to the commissioner of revenue, at the time of filing the report required under this section, and no county shall impose a greater privilege or license tax upon such companies than the aggregate privilege or license tax which is now imposed by any such city or town. (1939, c. 158, s. 203.)

Section Held Inapplicable.—This section, imposing a franchise tax of six per cent of the total gross earnings on businesses therein enumerated, does not apply to the operation of buses for hire within a city, even though operated by purchase or lease, it being the intent and purpose of this section to measure the amount of privilege or franchise tax in each calendar quarter year with reference to the gross receipts of the property operated for the previous calendar quarter year and to fix liability for the payment of the tax on the owner, operator, or lessor on the first day of January, April, July and October of each year.

(2) Companies taxed under this section shall not be required to pay the franchise tax imposed by §§ 105-122 or 105-123 unless the tax levied by §§ 105-122 and 105-123 exceed the tax levied in this section, and no county shall impose a franchise or privilege tax upon the business taxed under this section, and no city or town shall impose a greater privilege or license tax upon such companies than the aggregate privilege or license tax which is now imposed by any such city or town. (1939, c. 158, s. 203.)

§ 105-118. Franchise or privilege tax on express companies.—(1) Every person, firm, or corporation, domestic or foreign, engaged in the business of an express company as defined in this chapter, shall, in addition to a copy of the report required by the Machinery Act then in effect, annually, on or before the first day of August, make and deliver to the commissioner of revenue a report and statement, verified by the oath of the officer or authorized agent making such report or statement, containing the following information as of the thirtieth day of June of the current year:

(a) The average amount of invested capital employed within and without the state in such business during the year ending the thirtieth day of June of the current year.

(b) The total net income earned on such invested capital from such business during the year ending the thirtieth day of June of the current year.

(c) The total number of miles of railroad lines or other common carriers over which such express companies operate in this state during the year ending the thirtieth day of June of the current year.

(2) Every such person, firm, or corporation, domestic or foreign, engaged in such express business within this state shall pay to the commissioner of revenue, at the time of filing the report required in this section, the following annual franchise or privilege tax for the privilege of engaging in such express business within this state:

Where the net income of the average capital invested during the year ending the thirtieth day of June of the current year is six per cent (6%) or less, fifteen dollars ($15.00) per mile of railroad lines over which operated.

More than six per cent (6%) and less than eight per cent (8%), twenty-one dollars ($21.00) per mile of railroad lines over which operated.

Eight per cent (8%) and over, twenty-five dollars ($25.00) per mile of railroad lines over which operated.

(3) Every such person, firm, or corporation, domestic or foreign, who or which engages in such business without having had previous receipts upon which to levy the franchise or privilege tax, shall report to the commissioner at the time of beginning business in this state and pay for such privilege of engaging in business in this state a tax of seven dollars and fifty cents ($7.50) per mile of the railroad lines over which operated or proposed to operate.

(4) Counties shall not levy a franchise, privilege or license tax on the business taxed under this section; and municipalities may levy an annual franchise, privilege, or license tax on such express companies for the privilege of doing business within the municipal limits as follows:

Municipalities of less than 500 population... $ 5.00
Municipalities of 500 and less than 1,000 population ........................... 10.00
Municipalities of 1,000 and less than 5,000 population ........................... 20.00
Municipalities of 5,000 and less than 10,000 population ........................... 30.00
Municipalities of 10,000 and less than 20,000 population ........................... 50.00
Municipalities of 20,000 and over ..................... 75.00
(1939, c. 158, s. 203.)

Cross References.—As to requirement of uniformity, see N. C. Const., Art. V, § 3, and note to Worth v. Petersburg R. Co., 89 N. C. 301, under § 105-341.

Constitutionality.—A tax upon express companies of $15.00
per mile of track over which they operate in this State, when the net income is six per cent or less, levied under the provisions of the former statute, was held valid under the provisions of our State Constitution, Art. V, sec. 3. Railway Express Agency v. Maxwell, 199 N. C. 637, 155 S. E. 553.

When a tax levied on an express company under the provisions of the statute is $15.00 per mile of track over which it operates in this State, amounting to slightly in excess of 12 per cent of its gross revenue exclusively derived from interstate carriage, and it is shown that the carrier has not received any large gross receipts from interstate business, it will not be held as a matter of law that the tax is unconstitutional as being confiscatory. Railway Express Agency v. Maxwell, 199 N. C. 637, 155 S. E. 553.

Question of Earnings within and without State Immaterial.—Where a statute imposes a tax upon express companies based upon the mileage of track in this State over which they operate, levying a tax of $15.00 per mile when the net income of the company is six per cent or less, $18.00 when the net income does not exceed eight per cent, and $21.00 per mile when the net income exceeds eight per cent, and the State levies the minimum tax on an express company, which sues to recover the amount so paid, the question of the ratio of the company's net earnings in this and other States, and the amount of the net income are immaterial to the conclusion as to whether the tax is valid, the tax being constant regardless of income or the ratio between interstate and intrastate business, and the validity of the statute hinges on whether the tax is not directly presented for decision. Railway Express Agency v. Maxwell, 199 N. C. 637, 638, 155 S. E. 553.

§ 105-119. Franchise or privilege tax on telegraph companies.—(1) Every person, firm or corporation, domestic or foreign, engaged in operating the apparatus necessary for communication by telegraph between points within this state, shall annually, on or before the first day of August, make and deliver to the commissioner of revenue, upon such forms and in such manner as required by him, a report verified by the oath of the officer or authorized agent making such report and statement, containing the following information:

(a) The total gross receipts from business within and without this state for the entire calendar year next preceding due date on such return.

(b) The total gross receipts for the same period from business within this state.

(2) On every such person, firm or corporation there is hereby levied an annual franchise or privilege tax of six per cent (6%) of the total gross receipts derived from business within this state. Such gross receipts shall include all charges for services, all rentals, fees, and all other similar charges from business which both originate and terminate in the state of North Carolina, whether such business in the course of transmission goes outside this state or not. The tax herein levied shall be for the privilege of carrying on or engaging in the business named in this state, and shall be paid to the commissioner of revenue at the time of filing the report herein provided for: Provided, that the tax on the first one thousand dollars ($1,000.00) of gross receipts of any such telegraph company shall be at the rate of four per cent (4%), and all gross receipts in excess of said first one thousand dollars ($1,000.00) shall be taxed at the rate of six per cent (6%).

(3) The report herein required shall include the total gross receipts for the period stated of all properties owned, leased, controlled and/or over which operated by such person, firm or corporation in this state.

(4) Any person, firm or corporation failing to file report and pay tax found to be due in accordance with the provisions of this section at the time herein provided for shall, in addition to all other penalties prescribed in this article, pay an additional tax of ten per cent (10%) and interest at the rate of six per cent (6%) per annum on the total amount of tax due and additional tax incurred, which said additional tax shall in no case be less than two dollars ($2.00), and shall be added to the tax, together with interest accrued, and shall become an integral part of the tax.

(5) (a) Nothing in this section shall be construed to authorize the imposition of any tax upon interstate commerce.

(b) Counties shall not levy a franchise, privilege, or license tax on the business taxable under this section, and municipalities may levy the following license tax:

Less than 5,000 population .................. $10.00
5,000 and less than 10,000 population .... 15.00
10,000 and less than 20,000 population ... 20.00
20,000 population and over ................ 50.00

§ 105-120. Franchise or privilege tax on telephone companies.—(1) Every person, firm or corporation, domestic or foreign, owning and/or operating a telephone business for the transmission of messages and/or conversations to, from, through, in or across this state, shall, within thirty days after the first day of January, April, July and October of each year, make and deliver to the commissioner of revenue a quarterly return, verified by the oath of the officer or authorized agent making such return, showing the total amount of gross receipts of such telephone company for the three months ending the last day of the month immediately preceding such return, and pay, at the time of making such return, the franchise, privilege or license tax herein imposed.

(2) An annual franchise or privilege tax of six per cent (6%), payable quarterly, on the gross receipts of such telephone company, is herein imposed for the privilege of engaging in such business within this state. Such gross receipts shall include all rentals, other similar charges, and all tolls received from business which both originates and terminates in the state of North Carolina, whether such business in the course of transmission goes outside of this state or not: Provided, where any city or town in the state has heretofore sold at public auction to the highest bidder the right, license and/or privilege of engaging in such business in such city or town, based upon a percentage of gross revenue of such telephone company, and is now collecting and receiving therefor a revenue tax not exceeding one per cent of such revenues, the amount so paid by such operating company, upon being certified by the treasurer of such municipality to the commissioner of revenue, shall be from time to time credited by the commissioner of revenue to such telephone company upon the tax imposed by the state under this section of this chapter.

(3) Any such person, firm or corporation, domestic or foreign, who or which fails, neglects, or refuses to make the return, and/or pay the tax at the time provided for in this section, shall pay an additional tax of ten per cent (10%) and interest at the rate of six per cent (6%) per annum on the total amount of tax due and additional tax incurred, which said additional tax shall not be less than two dollars ($2.00) in any case, and shall be added to the tax, together with the interest ac-
§ 105-121. Franchise or privilege tax on insurance companies.—Every person, firm, or corporation, domestic or foreign, which contracts on his, their, or its account to issue any policies for or agreements for life, fire, marine, surety, guaranty, fidelity, employers' liability, liability, credit, health, accident, livestock, plate glass, tornado, automobile, automatic sprinkler, burglary, steam boiler, and all other forms of insurance shall apply for and obtain from the insurance commissioner a state license for the privilege of engaging in such business within this state and shall pay for such state license the following tax:

1. The annual license or privilege tax, due and payable on or before the first day of April of each year, shall be for each such license issued to:

   - An insurance rate-making company or association $200.00
   - A life insurance company or association 250.00
   - A fire insurance company or association of companies operating a separate or distinct plant of agencies 200.00
   - An accident or health insurance company or association 200.00
   - A marine insurance company or association 200.00
   - A fidelity or surety company or association 200.00
   - A plate-glass insurance company or association 200.00
   - A boiler insurance company or association 200.00
   - A foreign mutual insurance company or association 200.00
   - A domestic farmers' mutual insurance company or association 200.00
   - A fraternal order 10.00
   - A bond, investment, dividend, guaranty, registry, title guaranty, credit, fidelity, liability, or debenture company or association 25.00
   - All other insurance companies or associations except domestic mutual burial associations 200.00

   When the paid-in capital stock and/or surplus of an insurance company does not exceed one hundred thousand dollars ($100,000.00), the license tax levied in subsection one shall be one-half the amount named.

   All such license fees shall be subject to the provisions of § 58-64 as to additional classes of business.

2. Every such person, firm, or corporation, domestic or foreign, engaged in the business herebefore described in this section, shall by its general agent, president, or secretary, within the first fifteen days of February and August of each year, file with the insurance commissioner of this state a full, accurate, and correct report and statement, verified by the oath of such general agent or president, secretary, or some officer at the home or head office of the company or association in this country, of the total gross premium receipts including premiums or deposits on annuity contracts derived from such insurance business from the residents of this state, or on property located therein, during the preceding six months of the previous calendar year, and at the time of making such report and statement shall, except as hereinafter provided, pay to the insurance commissioner, in addition to other license taxes imposed in this section, a license or privilege tax for the privilege of engaging in such business in this state, a license tax of two and one-half per cent (2½%) upon the amount of such gross premium receipts, with no deduction for dividends, whether returned in cash or allowed in payment or reduction of premiums or for additional insurance, and without any deduction except for return premiums or return assessments. The rate of tax on premiums, thereby collected, and shall become an integral part of the tax.

4. Nothing in this section shall be construed to authorize the imposition of any tax upon interstate commerce.

5. Counties, cities and towns shall not levy any franchise, license, or privilege tax on the business taxed under this section. (1939, c. 158, s. 207.)
($10.00), to be paid to the insurance commissioner as other license fees and taxes: Provided, agents for farm mutual fire insurance companies shall not be required to take an examination and pay the examination fee.

In the event a license issued under this subsection is lost or destroyed, the insurance commissioner, for a fee of fifty cents ($0.50) may certify to its issuance, giving number, date, and form, which may be used by the original party named thereon in lieu of the said original license. There shall be no charge for the seal affixed to such certificate.

Every corporation, firm, or corporation, domestic or foreign, exchanging reciprocal or inter-insurance contracts as provided herein, shall pay through their attorneys an annual license fee, due and payable on the first day of April of each year, of two hundred dollars ($200.00) and two and one-half per cent (2 1/2%) of the gross premium deposits, and also all other regular fees prescribed by law, to be reported, assessed, and paid as other gross premium taxes provided for in this section: Provided, the tax on workmen's compensation insurance premiums shall be the same as that fixed in subsection two of this section.

(3) Companies paying the tax levied in this section shall not be liable for franchise tax on their capital stock, and no county, city, or town shall be allowed to impose any additional tax, license, or fee, other than ad valorem taxes, upon any insurance company, association or agent paying the tax levied in this section. The license fees and taxes imposed in this section shall be paid to the insurance commissioner. (1939, c. 158, s. 208; 1941, c. 50, s. 4; 1943, c. 60, s. 1; 1943, c. 400, s. 3.)

Editor's Note.—The 1941 amendment reduced the license tax on insurance rate-making companies or associations from $550 to $300. For comment on this amendment, see 19 N. C. Law Rev. 529.

The first 1941 amendment struck out a former provision of subsection (1) relating to mutual burial associations. The second 1943 amendment omitted the word "life" formerly appearing before the word "insurance" in line two of the last paragraph of subsection (1). It also substituted the first proviso of subsection (2) that reads "fifteen per centum" for the word "one-fifth."

Constitutionality.—Foreign corporations do business here by being domesticated under the laws of this state, except as otherwise provided in this article or schedule, shall, on or before the thirty-first day of July of each year, make and deliver to the commissioner of revenue in such form as he may prescribe a full, accurate and complete report and statement verifiable by the oath of its duly authorized officers, containing such facts and information as may be required by the commissioner of revenue as shown by the books and records of the corporation as at the close of its last calendar or fiscal year next preceding July thirty-first of the year in which report is due.

(2) Every such corporation taxed under this section shall determine the total amount of its issued and outstanding capital stock, surplus and undivided profits; no reservation or allocation from surplus or undivided profits shall be allowed other than for definite and accrued legal liabilities, except as herein provided; taxes accrued, dividends declared and reserves for depreciation of tangible assets as permitted for income tax purposes shall be treated as deductible liabilities. Treasury stock shall not be considered in computing the capital stock, surplus and undivided profits as the basis for franchise tax, but shall be excluded proportionately from said capital stock, surplus and undivided profits as the case may be upon the basis and to the extent of the cost thereof. The capital stock for the purposes of this section shall be deemed to be inadequate to the extent that additional loans, credits, goods, supplies or other capital of whatsoever nature is furnished by the parent or affiliated corporation.

Every corporation doing business in this state
which is a subsidiary of another corporation shall add to its capital stock, surplus and undivided profits all indebtedness owed to or endorsed or guaranteed by the parent corporation as a part of the capital used in its business in this state, and as a part of the basis for franchise tax under this article. The term "indebtedness" used in this paragraph shall include all loans, credits, goods, supplies or other capital of whatsoever nature furnished by the parent corporation, or by any subsidiary of the parent corporation. The term "subsidiary corporation" as used in this paragraph shall include any subsidiary of the parent corporation. If any part of the capital used by the parent corporation is borrowed capital, the subsidiary may deduct from its indebtedness to the parent corporation such proportion of its indebtedness as the indebtedness of the parent corporation is to the total assets of such corporation.

(b) After ascertaining and determining the amount of its capital stock, surplus and undivided profits, as herein provided, every such corporation permitted to do business in this state shall allocate to such business in this state a proportion of the total amount of its capital stock, surplus and undivided profits as herein defined, according to the following rules:

(A) If the principal business of a company in this state is manufacturing, or if it is in any form of collecting, buying, assembling, or processing goods and materials within this state the total amount of capital stock, surplus and undivided profits of such corporation shall be apportioned to North Carolina on the basis of the ratio obtained by taking the arithmetical average of the following two ratios:

(a) The ratio of the book value of its real estate and tangible personal property in this state on the date of the close of the calendar or fiscal year of such corporation in the income year to the book value of its entire real estate and tangible personal property then owned by it, with no deductions on account of encumbrances thereon.

(b) The ratio of the total cost of all goods, materials, and supplies used in manufacturing, assembling, or processing within and without the state. The term "cost of manufacturing, collecting, assembling, or processing within and without this state" as used herein shall be interpreted in a manner to conform as nearly as may be to the best accounting practice in the trade or business. Unless in the opinion of the commissioner of revenue the peculiar circumstances in any case justify a different basis, this term shall be generally interpreted to include as elements of cost within and without the state:

(1) The total cost of manufacturing, collecting, buying, assembling, or processing within and without the state of such corporation in the income year, to the book value of its entire real estate and tangible personal property then owned by it, with no deductions on account of encumbrances thereon.

(2) The total cost of all goods, materials, and supplies used in manufacturing, assembling, or processing, regardless of where purchased.

(3) The total wages and salaries paid or accrued during the income year in such manufacturing, assembling, or processing activities.

(c) The total overhead or manufacturing burden properly assignable according to good accounting practice to such manufacturing, assembling, or processing activities, or according to generally accepted business practice, or according to the best accounting practice in the trade or business. In case the income year does not coincide with the calendar year of the corporation, the amount shall be determined by dividing the total amount of such expenses for the income year by the number of days in such income year.

(d) The term "book value" as used herein shall be defined to mean original cost plus additions and improvements less reserve for depreciation on the date of the close of the calendar or fiscal year of such company, unless in the opinion of the commissioner of revenue the peculiar circumstances in any case justify a different basis.

(e) The words "tangible personal property" shall be defined to mean corporeal personal property such as machinery, tools, implements, goods, wares and merchandise, and shall not be taken to mean cash on hand or in bank, shares of stock, bonds, notes, accounts receivable, credits, special privileges, franchises, good will, or evidence of an interest in property and evidences of debt.

(f) If the term "book value" as used herein shall be defined to mean original cost plus additions and improvements less reserve for depreciation on the date of the close of the calendar or fiscal year of such company, unless in the opinion of the commissioner of revenue the peculiar circumstances in any case justify a different basis.

(g) The words "tangible personal property" shall be taken to mean corporeal personal property such as machinery, tools, implements, goods, wares and merchandise, and shall not be taken to mean cash on hand or in bank, shares of stock, bonds, notes, accounts receivable, credits, special privileges, franchises, good will, or evidence of an interest in property and evidences of debt.
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(D) If any corporation believes that the method of allocation or apportionment hereinbefore described as administered by the commissioner of revenue has operated or will so operate as to subject it to taxation on a greater portion of its capital stock, surplus, and undivided profits than is reasonably attributable to business within the state, it shall be entitled to file with the commissioner a petition setting forth the facts upon which its belief is based and its argument with respect to the application of the allocation formula. This petition shall be filed in such form and within such time as the commissioner may prescribe. If, after a consideration of the matters involved, it shall be found by the commissioner upon evidence offered which is clear, cogent and convincing that the application of the allocation formula subjects the corporation to taxation on a greater portion of its capital stock, surplus and undivided profits than is reasonably attributable to business within this state, the commissioner shall be authorized to add to the factors of the applicable allocation formula, or substitute for one of the factors of the applicable allocation formula, depending upon whether such addition or such substitution in the opinion of the commissioner more accurately reflects the capital stock, surplus, and undivided profits attributable to this state, the following factor:

The ratio of the expenditure of the wages, salaries, commissions, or other compensation of whatsoever kind to its officers or employees, assignable to this state as hereinafter provided, to the total expenditure of the corporation for wages, salaries, commissions, or other compensation of whatsoever kind to its officers or employees, assignable to this state of the expenditure of the corporation for wages, salaries, commissions, or other compensation of whatsoever kind to all its officers or employees. The amount assignable to this state of the expenditure of the corporation for wages, salaries, commissions or other compensation to its officers or employees shall be such expenditure for the taxable year in connection with its business in this state and liable for annual franchise tax under the provisions of this section.

(4) After determining the proportion of its total capital stock, surplus and undivided profits as set out in subsection three of this section, which amount so determined shall in no case be less than the total assessed value (including total gross valuation returned for taxation of intangible personal property) of all the real and personal property in this state of each such corporation for the year in which report is due, a franchise or privilege tax, which is hereby levied, at the rate of one dollar and seventy-five cents ($1.75) per one thousand dollars ($1,000.00) of the total amount of capital stock, surplus and undivided profits as herein provided. The tax imposed in this section shall in no case be less than ten dollars ($10.00) and shall be for the privilege of carrying on, doing business, and/or the continuance of articles of incorporation or domestication of each such corporation in this state: Provided, that the basis for the franchise tax on all corporations, eighty per cent (80%) of whose outstanding capital stock is owned by persons or corporations to whom or to which such stock was issued prior to January first, one thousand nine hundred thirty-five, in part payment or settlement of their respective deposits in any closed bank of the state of North Carolina, shall be the total assessed value of the real and tangible personal property of such corporation in this state for the year in which report and statement is due under the provisions of this section. The term "total actual investment in tangible property" as used in this section shall be construed to mean the total original purchase price or consideration to the reporting taxpayer of its tangible properties, including real estate, in this state plus additions and improvements thereto less reserve for depreciation as permitted for income tax purposes, and also less any indebtedness incurred and existing by virtue of the purchase of any real estate and any permanent improvements made thereon.

(5) The report, statement and tax required by this section shall be in addition to all other reports required or taxes levied and assessed in this state.

 Counties, cities and towns shall not levy a franchise tax on corporations taxed under this section. (1939, c. 158, s. 210; 1941, c. 50, s. 4; 1943, c. 400, s. 3.)

Editor's Note.—The 1941 amendment inserted the last sentence of subdivision (2). It also made changes in subsection (C) of subdivision (3) and designated a following paragraph under said subdivision as (D). The 1943 amendment rewrote portions of subdivision (2). It also inserted subdivision (D) of subdivision (3) and changed former subdivision "(D)" to "(E)."

Tax is on Privilege of Existence. By the express terms of P. L. 1931, ch. 427, § 210, which was superseded by this section, the corporation was liable for the annual franchise tax for each year during which it enjoyed the privilege of the continuance of its charter. It was immaterial whether or not the corporation exercised its privilege of doing or carrying on the business authorized by its charter or certificate of incorporation; it was liable so long as it enjoyed the privilege granted by the state of "being" a corporation. Stagg v. Nessen Co., 208 N. C. 285, 180 S. E. 658. [ 1034 ]
§ 105-123. New corporations.—(1) No corpo-
ration, domestic or foreign, shall be permitted
to do business in this state without paying the
franchise tax levied in this article or schedule.
When such domestic corporation is incorporated
under laws of this state or such foreign corpora-
tion is domesticated in this state, and has not
heretofore done business in the state, upon which
a report might be filed under § 105-122 notice in
writing thereof shall be given to the commissioner
of revenue by such corporation, and it shall be
competent for the commissioner of revenue and
he is hereby authorized to obtain such information
concerning the basis for the levy of the tax from
such other information he can obtain and to that
end may require of such corporation to furnish
him such a report as may clearly reflect and disclose
the amount of its issued and outstanding capital stock,
surplus and undivided profits as set out in § 105-122,
and information as to such other factors as may be necessary to determine the basis
of the tax. When this has been determined, in
accordance with the provisions of § 105-123 as far
as the same may be applicable, and upon the in-
formation which he has secured, the commissioner
of revenue shall thereupon determine the amount of
the franchise tax to be paid by such corporation,
and said tax shall be due and payable within thirty
days from date of notice thereof from the
commissioner of revenue, which tax, in no event,
shall be less than a ratable proportion of the tax
for the franchise privilege extended for one year
on the determined basis, nor less than the mini-
imum tax of ten dollars ($10.00); the tax levied in
this section shall be for the period from date of
incorporation or domestication to June thirtieth
next following.

(2) Any corporation failing to notify the com-
missioner of revenue as provided for in subsection
(1) of this section within sixty days after date of
the incorporation or domestication of such corpo-
ratin in this state shall be subject to all penalties
and remedies imposed for failure to file any report
required under this article or schedule.

(3) The provisions of this section shall apply
only to corporations newly incorporated or newly
domesticated in this state. (1939, c. 158, s. 211.)

§ 105-124. Review of returns—additional taxes.
Upon receipt of any report, statement and
tax as provided by this article or schedule, the
commissioner of revenue shall cause same to be
reviewed and examined for the purpose of as-
certaining if same constitute a true and correct
return as required by this article or schedule. If
the commissioner of revenue discovers from the
examination of any return, or otherwise, that the
franchise or privilege tax of any taxpayer has not
been correctly determined, computed and/or paid,
he may at any time within three years after the
time when the return was due, give notice in
writing, to the taxpayer of such deficiency plus
interest at the rate of six per cent (6%) per an-
num from date when return was due, and any
over-payment of the tax shall be returned to the
taxpayer within thirty days after it is ascertained.
In the case of any taxpayer who has failed to file
any return or statement required under this arti-
cle or schedule, the limitation of three years
shall not apply and the commissioner of revenue
shall, from facts within his knowledge, prepare
tentative returns for such delinquent taxpayer,
and shall assess the taxes, penalties and interest
upon these findings; this provision shall not be
construed to relieve said taxpayer from liability
for a return or from any penalties and remedies
imposed for failure to file proper return. Any
taxpayer feeling aggrieved by such proposed as-
essment shall be entitled to a hearing before the
commissioner of revenue, if within thirty days
after date of notice of such proposed assessment,
the taxpayer shall apply in writing, explaining in
detail his objections to same. If no request for such hearing is made, such proposed
assessment shall be final and conclusive. If the
request for hearing is made, the taxpayer shall be
heard by the commissioner of revenue, and after
such hearing the commissioner of revenue shall
render his decision. The taxpayer shall be ad-
vised of his decision by mail, and such amount
shall be due and payable within ten days after
date of notice thereof. (1939, c. 158, s. 212.)

§ 105-125. Corporations not mentioned.—None
of the taxes levied in §§ 105-122 and 105-123 shall apply to religious, fraternal, benevolent, or educa-
tional corporations not operating for a profit; nor
to banking and insurance companies; nor to busi-
ness leagues, boards of trade, clubs organized and
operated exclusively for pleasure, recreation and
other non-profitable purposes, civic leagues op-
erated exclusively for the promotion of social wel-
fare, or chambers of commerce and merchants
associations. Provided, that no part of the net
earnings of which inures to the benefit
of any private stockholder, individual, or other
corporations:
Provided, that each such corporation must, up-
on request by the commissioner of revenue, estab-
lish in writing its claim for exemption from said
provisions. The provisions of §§ 105-122 and
105-123 shall apply to electric light, power,
street railway, gas, water, Pullman, sleeping and
dining car, express, telegraph, telephone, motor
bus, and truck corporations to the extent and only
to the extent that the franchise tax levied in
§§ 105-122 and 105-123 exceed the franchise taxes
levied in other sections of this article or schedule.
The exemptions in this section shall apply only
to those corporations specifically mentioned, and
no other. (1939, c. 158, s. 213.)

§ 105-126. Penalties for non-payment or fail-
ure to file report.—(1) Any person, firm, or cor-
poration, domestic or foreign, failing to pay the
license, privilege, or franchise tax levied and as-
sessed under this article or schedule when due
and payable shall, in addition to all other penalties
prescribed in this article, pay an additional tax of
10 per cent (10%) and interest at the rate of six
per cent (6%) per annum on the total amount of
tax due and additional tax incurred, which said
additional tax shall not be less than two dollars
($2.00) in any case, and shall be added to the tax,
together with the interest accrued, and shall be-
come an integral part of the tax.

(2) Any person, firm, or corporation failing to
file the report required in this article or schedule
on or before the date specified shall pay a pen-
alty of ten per cent (10%) of the tax found to be
due, which penalty shall in no case be less than
five dollars ($5.00). (1939, c. 158, s. 214.)
§ 105-127. When franchise or privilege taxes payable.—(1) Every corporation, domestic or foreign, from which a report is required by law to be made to the commissioner of revenue shall, unless otherwise provided, pay to said commissioner annually the franchise tax as required by §§ 105-122 and 105-123.
(2) It shall be the duty of the commissioner of revenue to mail to the registered address, last listed with the commissioner of revenue, of every such corporation, report forms to be used in complying with the provisions of this article or schedule, which forms shall contain a copy of so much of this and other sections of this article as relates to penalties for failure to pay said taxes.
(3) It shall be the duty of the treasurer or other officer having charge of any such corporation, domestic or foreign, upon which a tax is herein imposed, to transmit the amount of the tax due to the commissioner of revenue within the time provided by law for payment of same.
(4) Individual stockholders in any corporation, joint stock association, limited partnership, or company paying a tax on its entire capital stock shall not be required to list or pay ad valorem taxes on the shares of stock owned by them.
(5) Corporations in the state legally holding shares of stock in other corporations, upon which the tax has been paid to the state by the corporation issuing the same, shall not be required to list or pay an ad valorem tax on said shares of stock.

§ 105-128. Power of attorney.—The commissioner of revenue shall have the authority to require a proper power of attorney of each and every agent for any taxpayer under this article.

§ 105-129. Extension of time for filing returns; fraudulent return made misdemeanor.—(1) The return required by this article or schedule shall be due on or before the dates specified unless written application for extension of time in which to file, containing reasons therefor, is made to the commissioner of revenue on or before due date of such return. The commissioner of revenue may extend the time for filing any return under this article or schedule, provided interest at the rate of six per cent (6%) per annum from date return is due is paid upon the total amount of tax due.
(2) The provisions of this article with respect to revision and appeal shall apply to the tax so assessed. The limitation of three years to the assessment of such tax or additional tax shall not apply to the assessment of additional taxes upon fraudulent return. Any officer or agent of a corporation who shall knowingly make a fraudulent return under this article, or schedule shall be guilty of a misdemeanor and shall be fined not less than one hundred dollars ($100.00) nor more than one thousand dollars ($1,000.00) and/or imprisoned at the discretion of the court.

Art. 4. Schedule D. Income Tax.

§ 105-130. Short title.—This article shall be known and may be cited as the income tax article of the revenue act. (1939, c. 158, s. 301.)

§ 105-131. Purpose.—The general purpose of this article is to impose a tax for the use of the state government upon the net income in excess of the exemption herein allowed, for the calendar year one thousand nine hundred and thirty-nine and each year thereafter collectible in the year one thousand nine hundred and forty and annually thereafter:
(a) Of every resident of the state.
(b) Of every domestic corporation.
(c) Of every foreign corporation and of every non-resident individual having a business or agency in this state or income from property owned, and from every business, trade, profession or occupation carried on in this state.
(d) The tax imposed upon the net income of corporations in this article is in addition to all other taxes imposed under this act. (1939, c. 158, s. 301.)

§ 105-132. Definitions. — For the purpose of this article, and unless otherwise required by the context:
1. The word "taxpayer" includes any individual, corporation, or fiduciary subject to the tax imposed by this article.
2. The word "individual" means a natural person.
3. A "head of a household" is an individual who actually maintains and supports in one household in this state one or more individuals who are closely related by blood relationship, relationship by marriage, or by adoption, and whose right to exercise family control and provide for these dependent individuals is based on some moral or legal obligation.
4. The word "fiduciary" means a guardian, trustee, executor, administrator, receiver, conservator, or any person, whether individual or corporation, acting in any fiduciary capacity for any person, estate or trust.
5. The word "person" includes individuals, fiduciaries, partnerships.
6. The word "corporation" includes joint stock companies or associations and insurance companies.
7. The words "domestic corporation" mean any corporation organized under the laws of this state.
8. The words "foreign corporation" mean any corporation other than a domestic corporation.
9. The words "tax year" mean the calendar year in which the tax is payable.
10. The words "income year" mean the calendar year or the fiscal year upon the basis of which the net income is computed under this article; if no fiscal year has been established, they mean the calendar year.
11. The words "fiscal year" mean an income year, ending on the last day of any month other than December.
12. The word "paid", for the purposes of the deductions under this article, means "paid or accrued" and the words "paid or accrued" shall be construed according to the method of accounting upon the basis of which the net income is computed under this article. The word "received", for the purpose of the computation of the net income under this article, means "received or accrued", and the words "received or accrued" shall be construed according to the method of accounting upon the basis of which the net income is computed under this article.
The word "resident" applies only to individuals and includes, for the purpose of determining liability for the tax imposed with reference to the income of any income year, all individuals who, at any time during such income year, are domiciled in this state, or who, whether regarding their domicile as in this state or not, reside within this state for other than a temporary or transitory purpose. In the absence of convincing proof to the contrary, any individual who is present within the state for more than six months during such income year shall be deemed to be a resident of the state; but absence from the state for more than six months shall raise no presumption that the individual is not a resident of the state. In cases in which it is demonstrated to the satisfaction of the commissioner of revenue that an individual was a resident of this state for only part of the income year, having moved into or removed from the state during such year, such individual shall, as to income received by him during the period of his residence, report for taxation all income required to be so reported by residents and shall, as to income received by him during the remainder of such year, report for taxation all income required to be so reported by nonresidents: Provided that in the case of an individual removing from the state during such year, he shall not be regarded as having become a nonresident until he shall have both established a definite residence elsewhere and abandoned any domicile he may have acquired in this state.

The fact that an individual is a nonresident of the state at the time the tax becomes due and payable shall not affect his liability for the tax.

The words "foreign country" mean any jurisdiction other than the one embraced within the United States. The words "United States", when used in a geographical sense, include the states, and territories of Alaska and Hawaii, the District of Columbia, and the possessions of the United States. (1939, c. 155, s. 302; 1941, c. 50, s. 5.)

Editor's Note.—The 1941 amendment substituted subsection (13) for the former subsection 13. For comment on this amendment, see 19 N. C. Law Rev. 350. See 17 N. C. Law Rev. 362, for comment on definition of "head of household."

Salary of Federal Officer Not Taxable. A state cannot tax the salary of a federal officer, nor of a state officer whose office is created by the constitution. Purnell v. Page, 133 N. C. 125, 45 S. E. 534.

Imposition of Income Tax.

§ 105-133. Individuals.—A tax is hereby imposed upon every resident of the state, which tax shall be levied, collected and paid annually, with respect to the net income of the taxpayer as hereinafter defined, and upon income earned within the state of every non-resident having a business or trade or business. Unless in the opinion of the commissioner of revenue the peculiar circumstances in any case justify a different basis, this term shall be generally interpreted to include as elements of cost within and without this state the following:

(a) The ratio of the book value of its real estate and tangible personal property in this state to the total cost of manufacturing, collecting, buying, assembling, or processing within this state during such year.

(b) The ratio of the total cost of manufacturing, collecting, buying, assembling, or processing within this state during such year to the total cost of manufacturing, collecting, buying, assembling, or processing within and without this state. The term "cost of manufacturing, collecting, buying, assembling, or processing within and without this state", as used herein, shall be interpreted in a manner to conform as nearly as may be to the best accounting practice in the trade or business. Unless in the opinion of the commissioner of revenue the peculiar circumstances in any case justify a different basis, this term shall be generally interpreted to include as elements of cost within and without this state the following:

(c) The total cost of all goods, materials, and supplies used in manufacturing, assembling, or processing, regardless of where purchased.

(d) The total wages and salaries paid or accrued during the income year in such manufacturing, assembling or processing activities.

(e) The total overhead or manufacturing burden properly assignable according to good accounting practice to such manufacturing, assembling or processing activities, not including, however, property, privilege, stamp, or other taxes.

(f) The term "book value" as used herein shall be defined to mean original cost plus additions and improvements less reserve for depreciation on the date of the close of the calendar or fiscal year of such company, unless in the opinion of the commissioner of revenue the peculiar circumstances in any case justify a different basis.

(g) The words "tangible personal property" shall be taken to mean corporeal personal property such as machinery, tools, implements, goods, wares and merchandise, and shall not be taken to mean cash on hand or in bank, shares of stock,

On the excess over ten thousand dollars, seven per cent (7%). (1939, c. 158, s. 310.)

§ 105-134. Corporations.

I. Domestic Corporations.—Every corporation organized under the laws of this state shall pay annually an income tax equivalent to six per cent on the entire net income, as herein defined, received by such corporation during the income year.

II. Foreign Corporations.—Every foreign corporation doing business in this state shall pay annually an income tax equivalent to six per cent of a proportion of its entire net income, to be determined according to the following rules:

1. If the principal business of a company in this state is manufacturing, or if it is any form of collecting, buying, assembling, or processing goods and materials within this state, the entire net income of such corporation shall be apportioned by North Carolina on the basis of the ratio obtained by taking the arithmetical average of the following two ratios:

(a) The ratio of the book value of its real estate and tangible personal property in this state to the total cost of manufacturing, collecting, buying, assembling, or processing within this state during the income year.

(b) The ratio of the total cost of manufacturing, collecting, buying, assembling, or processing within this state during the income year to the total cost of manufacturing, collecting, buying, assembling, or processing within and without this state.

2. If the principal business of a company in this state is not manufacturing, or if it is any form of collecting, buying, assembling, or processing goods and materials anywhere else, it shall have both established a definite residence elsewhere and abandoned any domicile he may have acquired in this state.

The fact that an individual is a nonresident of the state at the time the tax becomes due and payable shall not affect his liability for the tax.

The words "foreign country" mean any jurisdiction other than the one embraced within the United States. The words "United States", when used in a geographical sense, include the states, and territories of Alaska and Hawaii, the District of Columbia, and the possessions of the United States. (1939, c. 155, s. 302; 1941, c. 50, s. 5.)

Editor's Note.—The 1941 amendment substituted subsection (13) for the former subsection 13. For comment on this amendment, see 19 N. C. Law Rev. 350. See 17 N. C. Law Rev. 362, for comment on definition of "head of household."

Salary of Federal Officer Not Taxable. A state cannot tax the salary of a federal officer, nor of a state officer whose office is created by the constitution. Purnell v. Page, 133 N. C. 125, 45 S. E. 534.

Imposition of Income Tax.

§ 105-133. Individuals.—A tax is hereby imposed upon every resident of the state, which tax shall be levied, collected and paid annually, with respect to the net income of the taxpayer as hereinafter defined, and upon income earned within the state of every non-resident having a business or trade or business. Unless in the opinion of the commissioner of revenue the peculiar circumstances in any case justify a different basis, this term shall be generally interpreted to include as elements of cost within and without this state the following:

(a) The ratio of the book value of its real estate and tangible personal property in this state to the total cost of manufacturing, collecting, buying, assembling, or processing within this state during the income year.

(b) The ratio of the total cost of manufacturing, collecting, buying, assembling, or processing within this state during the income year to the total cost of manufacturing, collecting, buying, assembling, or processing within and without this state. The term "cost of manufacturing, collecting, buying, assembling, or processing within and without this state", as used herein, shall be interpreted in a manner to conform as nearly as may be to the best accounting practice in the trade or business. Unless in the opinion of the commissioner of revenue the peculiar circumstances in any case justify a different basis, this term shall be generally interpreted to include as elements of cost within and without this state the following:

(c) The total cost of all goods, materials, and supplies used in manufacturing, assembling, or processing, regardless of where purchased.

(d) The total wages and salaries paid or accrued during the income year in such manufacturing, assembling or processing activities.

(e) The total overhead or manufacturing burden properly assignable according to good accounting practice to such manufacturing, assembling or processing activities, not including, however, property, privilege, stamp, or other taxes.

(f) The term "book value" as used herein shall be defined to mean original cost plus additions and improvements less reserve for depreciation on the date of the close of the calendar or fiscal year of such company, unless in the opinion of the commissioner of revenue the peculiar circumstances in any case justify a different basis.

(g) The words "tangible personal property" shall be taken to mean corporeal personal property such as machinery, tools, implements, goods, wares and merchandise, and shall not be taken to mean cash on hand or in bank, shares of stock,
bonds, notes, accounts receivable, credits, special privileges, franchises, good will, or evidence of an interest in property and evidences of debt.

(h) The word "manufacturing" shall be defined as mining and all processes of fabricating or of curing raw materials.

2. If the principal business of a company in this state is selling, distributing, or dealing in tangible personal property within this state, the entire net income of such company shall be apportioned to North Carolina on the basis of the ratio obtained by dividing the total income of such corporation for such year by the income from sales or rentals of tangible properties.

(a) The ratio of the book value of its real estate and tangible personal property in this state on the date of the close of the calendar or fiscal year of such company in the income year is to the book value of its entire real estate and tangible property then owned by it, with no deduction on account of encumbrances thereon.

(b) The ratio of the total sales made through or by offices, agencies, or branches located in North Carolina during the income year to the total sales made everywhere during said income year.

(c) The word "sales" as used in this section shall be defined as sale or rental of real estate and sale or rental of tangible properties.

(d) The term "book value" as used herein shall be defined to mean original cost plus additions and improvements less reserve for depreciation on the date of the close of the calendar or fiscal year of such company, unless in the opinion of the commissioner of revenue the peculiar circumstances in any case justify a different basis.

(e) The words "tangible personal property" shall be taken to mean corporeal personal property such as machinery, tools, implements, goods, wares and merchandise, and shall not be taken to mean cash on hand or in bank, shares of stock, bonds, notes, accounts receivable, credits, special privileges, franchises, good will, or evidence of an interest in property and evidences of debt.

(f) Foreign insurance companies doing business in this state and returning premium receipts to the insurance commissioner, and paying the tax upon such premium receipts as provided in § 105-121 shall be exempt from this tax on income in so far as the income is derived from their insurance business. However, in case of a foreign insurance company owning real estate in this state from which rents are received it is required to file an income tax return reporting income received from such real estate in this state and take credit for actual expenses incurred in connection therewith.

3. If the principal business in this state of a corporation is other than that described in subsection 1 or subsection 2 of subdivision II of this section, then the total income of such corporation shall be apportioned to North Carolina on the basis of the ratio of its gross receipts in this state during the income year to its gross receipts for such year within and without the state.

(a) The words "gross receipts" as used in this subsection shall be taken to mean and include the entire receipts for business done by such company.

4. If any corporation believes that the method of allocation or apportionment hereinbefore described as administered by the commissioner of revenue has operated or will so operate as to subject it to taxation on a greater portion of its net income than is reasonably attributable to business or earnings within the state, it shall be entitled to file with the commissioner a petition setting forth the facts upon which its belief is based and its argument with respect to the application of the allocation formula. This petition shall be filed in such form and within such time as the commissioner may prescribe. If, after a consideration of the matters involved, it shall be found by the commissioner upon evidence offered which is clear, cogent and convincing that the application of the allocation formula subjects the corporation to taxation on a greater portion of its net income than is reasonably attributable to business or earnings within this state, the commissioner shall be authorized to add to the factors of the applicable allocation formula, or substitute for one of the factors of the applicable allocation formula, depending upon whether such addition or such substitution in the opinion of the commissioner more accurately reflects the income attributable to this state, the following factor:

The ratio of the expenditure of the wages, salaries, commissions or other compensation of whatsoever kind to its officers or employees, assignable to this state as hereinafter provided, to the total expenditure of the corporation for wages, salaries, commissions, or other compensation of whatsoever kind to all its officers or employees. The amount assignable to this state of the expenditure of the corporation for wages, salaries, commissions or other compensation to its officers or employees shall be such expenditure for the taxable year as represents the compensation of officers or employees not chiefly situated at, connected with or sent out from premises for the transaction of business owned or rented by the corporation outside the state.

The relief herein authorized shall be granted by the commissioner only in cases of clear, cogent, and convincing proof that the petitioning taxpayer is entitled thereto. There shall be a presumption that the allocation formulae prescribed in subdivisions one (1), two (2), and three (3) of Part II of this section reasonably attribute to North Carolina the proportion of the corporation's income earned in this state, and the burden shall rest upon the corporation to show the contrary. No corporation shall use this alternative factor in making a report or return of its income to this state except upon order in writing of the commissioner, and any return in which the alternative factor is used without the permission of the commissioner shall not be a lawful return. (1939, c. 158, s. 311; 1941, c. 50, s. 5; 1943, c. 400, s. 4.)

Editor's Note.—The 1941 amendment changed subsection 1 of subdivision II.

The 1943 amendment added subsection 4.

For an excellent note on constitutionality of income allocation formulae as applied to corporations, see 5 N. C. Law Rev. 470.

For case construing the early income tax laws, see Hans Rees' Sons v. North Carolina, 283 U. S. 123, 51 S. Ct. 385, 75 L. Ed. 859.

Corporation Must Show Allocation Unconstitutional.—Where the commissioner of revenue has assessed an income tax against a foreign corporation operating a manufacturing plant in this state under the provisions of this section, without regard to its intangible property, the commissioner's assessment will be un-
held by the courts upon appeal where the corporation has failed to show that such method of allocation is unconstitutional in its application to the corporation. State v. Kent-Coffey Mfg. Co., 204 N. C. 365, 168 S. E. 397.

§ 105-135. Income from stock in foreign corporations.—Income from stock in foreign corporations, in cash dividends, received by individuals, fiduciaries, partnerships (to be reported by partners on their individual returns) or corporations, resident in this state, or by non-resident fiduciary if held for a resident of this state, shall be reported and taxed as other income taxable under this article. Every individual, fiduciary, partnership, or corporation owning such shares of stock, and receiving dividends from same, shall report such income to the commissioner of revenue, at the time required by this article for reporting other income, and shall pay the tax herein imposed at the same time and in the same way as tax upon other income is payable. With respect to corporations paying a tax in this state on a proportionate part of their total income, the holder of shares of stock in such corporation shall pay on the total dividends received an amount equaling the percentage of the corporation's income on which it has not paid an income tax to the state of North Carolina for the year in which said dividends are received by the taxpayer. (1939, c. 158, s. 3111 1/2.)

Stock Received as Dividend Taxable.—Where plaintiff, owning stock in a foreign investment corporation, received as a dividend on such stock, stock of another foreign corporation, the stock received as a dividend was taken from the surplus of the investment corporation and was equivalent to a cash dividend, and was taxable as income from stock in a foreign corporation. Maxwell v. Tull, 216 N. C. 500, 5 S. E. (2d) 546.

§ 105-136. Railroads and public-service corporations.—The basis of ascertaining the net income of every corporation engaged in the business of operating a steam, electric railroad, express service, telephone or telegraph business, or other form of public service, when such company is required by the interstate commerce commission to keep records according to its standard classification of accounts, shall be the "net revenue from operations" of such corporation as shown by their records, kept in accordance with that standard classification of accounts when their business is wholly within this state, and when their business is in part within and in part without the state, their net income within this state shall be ascertained by taking their gross "operating revenues" within this state, including in their gross "operating revenues" within this state the equal mileage proportion within this state of their interstate business, and deducting from their gross "operating revenues" the proportionate average of "operating expenses" or "operating ratio" for their whole business, as shown by the interstate commerce commission standard classification of accounts.

Provided, that if the standard classification of operating expenses prescribed by the interstate commerce commission for railroads differs from the standard classification of operating expenses prescribed by the interstate commerce commission for other public-service corporations, such other public-service corporations shall be entitled to the same operating expenses as prescribed for railroads. From the net operating income thus ascertained shall be deducted "uncollectible revenue" and taxes paid in this state for the income year other than income taxes, and the balance shall be deemed to be their net income taxable under this article. That in determining the taxable income of a corporation engaged in the business of operating a railroad under this section, in the case of a railroad located entirely within this state, the net operating income shall be increased or decreased to the extent of any credit or debit balance received or paid, as the case may be, on account of car or locomotive hire; and when any railroad is located partly within and partly without this state, the said net operating income shall be increased or decreased to the extent of an equal mileage proportion within this state of any credit or debit balance received or paid, as the case may be, on account of car or locomotive hire.

For the purposes of this section the words "interstate business" shall mean, as to transportation companies, operating revenue earned within the state by reason of the interstate transportation of persons or property into, out of, or through this state, and as to transmission companies the interstate transmission of messages into, out of, or through the state.

The words "equal mileage proportion within the state" shall mean the proportion of revenue received by the company operating in this state from interstate business as defined in the preceding paragraph, which the distance of movement over lines in this state bears to the total distance of movement over lines of the company receiving such revenue. If the commissioner of revenue shall find, with respect to any particular company, that its accounting records are not kept so as to reflect with exact accuracy such division of revenue by state lines as to each transaction involving interstate revenue, the commissioner of revenue may adopt such regulations, based upon averages, as will approximate with reasonable accuracy the proportion of interstate revenue actually earned upon lines in this state.

The words "proportionate average of 'operating expenses' or 'operating ratio'" shall mean the proportion of gross revenue of a company, on its whole business absorbed in operating expenses, as defined in the interstate commerce commission classification of accounts.

In determining the taxable income of a railroad company operating two or more lines of railroad not physically connected, and when one of such railroad lines is located wholly within this state, the actual earnings and expenses of such line in this state, in so far as they may be severable, shall be used in determining net income taxable in this state.

With respect to leased lines operated in this state where the operating company pays a tax on the income earned on such leased lines, without deduction for lease rental, and on a sum properly allocable to such leased lines equal to the amount of lease rental paid, such lease rental shall not be taxable income against the lessor; provided that the stockholders of any such lessor corporation who receive dividends on their stock in such corporation shall be entitled to such income tax exemption with respect to such dividends as they would have had if the lessor corporation had paid an income tax on such exempted lease rental.

All other public service corporations shall file
under § 105-124. (1939, c. 158, s. 312; 1941, c. 50, s. 5.)

Editor's Note.—The 1941 amendment added the proviso to the next to the last paragraph of this section.

Commissioner of Revenue Must Follow Formula Provided by Section.—In ascertaining income taxes against a corporation the Commissioner of Revenue must follow this section, leaving the question of whether the result is arbitrary or unwarrented to the determination of the courts upon appeal from the corporation. Maxwell v. Norfolk, etc., Ry. Co., 208 N. C. 397, 181 S. E. 248.

And Burden of Proving Use of Formula Wrong is on Claimant.—The burden of proving that the use of the formula provided by this section is not void upon its face, but may be unworkable or unfair when applied to a particular railway in particular conditions, Norfolk, etc., Ry. Co. v. North Carolina, 297 U. S. 56, 56 S. Ct. 625, 80 L. Ed. 977. See also, Maxwell v. Norfolk, etc., Ry. Co., 208 N. C. 397, 181 S. E. 248.

§ 105-137. Taxable year. — The tax imposed by this article for the year one thousand nine hundred and thirty-nine shall be assessed, collected, and paid in the year following the year for which the assessment is made. (1939, c. 158, s. 313.)

§ 105-138. Conditional and other exemptions. — The following organizations shall be exempt from taxation under this article:

1. Fraternal beneficiary societies, orders or associations.
   (a) Operating under the lodge system or for the exclusive benefit of the members of a fraternity itself operating under the lodge system, and
   (b) Providing for the payment of life, sick, accident, or other benefits to the members of such society, order or association, or their dependents.
2. Building and loan associations and cooperative banks without capital stock, organized and operated for mutual purposes and without profit.
3. Cemetery corporations and corporations organized for religious, charitable, scientific, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual.
4. Business leagues, chambers of commerce, merchants' associations, or boards of trade not organized for profit, and no part of the net earnings of which inures to the benefit of any private stockholder or individual.
5. Civic leagues or organizations not organized for profit, but operated exclusively for the promotion of social welfare.
6. Clubs organized and operated exclusively for pleasure, recreation, and other non-profitable purposes, no part of the net earnings of which inures to the benefit of any private stockholder or member.
7. Farmers' or other mutual hail, cyclone, or fire insurance companies, mutual ditch or irrigation companies, mutual or cooperative telephone companies, or like organizations of a purely local character the income of which consists solely of assessments, dues and fees collected from members for the sole purpose of meeting expenses.
8. Farmers', fruit growers', or like organizations organized and operated as sales agents for the purpose of marketing the products of members and turning back to them the proceeds of sales, less the necessary selling expenses, on the basis of the quantity of product furnished by them.
9. Mutual associations formed under §§ 54-111 to 54-128, formed to conduct agricultural business on the mutual plan; or to marketing associations organized under §§ 54-129 to 54-158. (1939, c. 158, s. 314.)

§ 105-139. Fiduciaries.—The tax imposed by this article shall be imposed upon resident fiduciaries having in charge funds or property for the benefit of a resident of this state, and/or income earned in this state for the benefit of a non-resident, and upon a non-resident fiduciary having in charge funds or property for the benefit of a resident of this state, which tax shall be levied, collected and paid annually with respect to:

(a) That part of the net income of estates or trusts which has not become distributable during the income year.
(b) The net income received during the income year by deceased individuals who, at the time of death, were residents and who have died during the tax year or the income year without having made a return.
(c) The entire net income of resident, insolvent, or incompetent individuals, whether or not any portion thereof is held for the future use of the beneficiaries, where the fiduciary has complete charge of such net income.
(d) The tax imposed upon a fiduciary by this article shall be a charge against the estate or trust. (1939, c. 158, s. 315.)

§ 105-140. Net income defined. — The words "net income" mean the gross income of a taxpayer, less the deductions allowed by this article. (1939, c. 158, s. 316.)

§ 105-141. Gross income defined.—1. The words "gross income" mean the income of a taxpayer derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, business, commerce or sales, or dealings in property, whether real or personal, located in this or any other state or any other place, growing out of the ownership or use of or interest in such property, also from interest, rent, dividends, securities, or the transactions of any business carried on for gain or profit, or gains or profits, and income derived from any source whatever and in whatever form paid. The amount of all such items shall be included in the gross income of the income year in which received by the taxpayer, unless, under the methods of accounting permitted under this article, any such amounts are to be properly accounted for as of a different period. The term "gross income" as used in this article shall include the salaries of all constitutional state officials taking office after the date of the enactment of this article by election, re-election or appointment, and all acts fixing the compensation of such constitutional state officials are hereby amended accordingly. The words "business income" and the words "business, trade, profession, or occupation," and the words "salaries, wages or compensation for personal services," as used in
§ 105-142. Basis of return of net income.—1. The net income of a taxpayer shall be computed in accordance with the method of accounting regularly employed in keeping the books of such taxpayer, but such method of accounting must be consistent with respect to both income and deductions, but if in any case such method does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the taxpayer does clearly reflect the income, but shall follow as nearly as practicable the federal practice, unless contrary to the context and intent of this article.

2. A taxpayer may, with the approval of the commissioner of revenue, and under such regulations as he may prescribe, change the income year from fiscal year to calendar year or otherwise, in which case his net income shall be computed upon the basis of such new income year: Provided, that such approval must be obtained from the commissioner at least thirty days prior to the end of such income year.

3. An individual carrying on business in partnership shall be liable for income tax only in his individual capacity, and shall include in his gross income, whether distributed or not, his distributive share of the net income of the partnership and dividends from foreign corporations for each income year. If an established business in this state is owned by a nonresident individual or by a partnership having one or more nonresident members, the manager of the business in this state shall re-
port the earnings of such business in this state, and the distributive share of the income of each nonresident owner or partner and pay the tax as levied on individuals in this article for each such nonresident owner or partner. The exemption or other deductions allowed individuals in this article may be deducted on a pro rata basis if the nonresident owner or partner furnishes to the manager of such business in this state complete information as to the total net income and total deductions allowable under this article to residents of this state, so that the same may be prorated in proportion to the income and deductions in this state and in the state of residence. The individual or partnership business carried on in this state may deduct the payment required to be made for such nonresident individual or partner or partners from their distributive share of the profits of such business in this state.

4. Every individual taxable under this article who is a beneficiary of an estate or trust shall include in his gross income the distributive share of the net income of the estate or trust received by him or distributable to him during the income year. Unless otherwise provided in the law, the will, the deed, or other instrument creating the estate, trust, or fiduciary relation, the net income shall be deemed to be distributed or distributable to the beneficiaries (including the fiduciary as a beneficiary, in the case of income accumulated for future distribution), ratable in proportion to their respective interest. (1939, c. 158, s. 318; 1943, c. 400, s. 4.)

Editor's Note.—The 1943 amendment added that part of subsection 3 beginning with the second sentence.

§ 105-143. Subsidiary corporations. — The net income of a corporation doing business in this state which is a subsidiary or affiliate of another corporation shall be determined by eliminating all payments to or charges by the parent corporation or other subsidiaries or affiliates of the parent corporation in excess of fair compensation for all services performed for or commodities or property sold, transferred, leased, or licensed to the parent or to its other subsidiary or affiliated corporations by the corporation doing business in this state. If the commissioner of revenue shall find as a fact that a report by such subsidiary or affiliated corporation does not disclose the true earnings of such corporation on its business carried on in this state, the commissioner may require that such subsidiary or affiliated corporation file a consolidated return of the entire operations of such parent corporation and of its subsidiaries and affiliates, including its own operations and income, and may determine the true amount of net income earned by such subsidiary or affiliated corporation in this state by taking the factor of investment in real estate and tangible personal property in this state and volume of business in this state and by relating these factors to the total investment of the parent corporation and its subsidiaries and affiliated corporations in real estate and tangible personal property in and out of this state and their total volume of business in and out of this state. The authority hereby given to require consolidated returns as aforesaid and to ascertain the true amount of income earned in this state on the basis herein prescribed may also be used by the commissioner as the basis of ascertaining the true net income earned in this state during the calendar year one thousand nine hundred and forty and for the three calendar years preceding thereto. For the purposes of this section, a corporation shall be deemed a subsidiary of another corporation when, directly or indirectly, it is subject to control by such other corporation by stock ownership, interlocking directors, or by any other means whatsoever exercised by the same or associated financial interests, whether such control is direct or through one or more subsidiary, affiliated, or controlled corporations, and a corporation shall be deemed an affiliate of another corporation when both are directly or indirectly controlled by the same parent corporation or by the same or associated financial interests by stock ownership, interlocking directors, or by any other means whatsoever, whether such control be direct or through one or more subsidiary, affiliated or controlled corporations. Upon such finding by the commissioner, the consolidated returns authorized by this section may be required whether the parent or controlling corporation or interest or its subsidiaries or affiliates are or are not doing business in this state. The provisions of this section do not apply to corporations subject to regulation by a regulatory body of this state which are required to maintain accounts in such manner as to reflect separately the business done in this state and file a report thereof with such regulatory body. This section shall not apply unless the commissioner further finds that the business in this state is handled or effected in such manner as to distort or not reflect the true income earned in this state and finds in addition to or other than any of the following facts: (a) that the several corporations are owned or controlled by the same financial interests or (b) that they are members of a group of corporations associated together in carrying on a unitary business or are branches or parts of a unitary business or are engaged in different phases of the same general business or industry. If such consolidated return is required and is not filed within sixty days after demand, said subsidiary or affiliated corporation shall be subject to the penalty provided in this act for failure to file returns and in addition shall be subject to the penalty provided in § 105-230, and in such event the provisions of subsection 5 of § 105-161 shall apply.

Every subsidiary of a parent corporation doing business in this state shall not be allowed to deduct interest on indebtedness owed to or endorsed or guaranteed by the parent corporation and used by the subsidiary in carrying on its business in this state. The term "indebtedness" used in this paragraph shall include all loans, credits, goods, supplies or other capital of whatsoever nature furnished by the parent corporation, or by any subsidiary of the parent corporation. The term "subsidiary corporation" as used in this paragraph shall mean any corporation, a majority of stock in which is owned by a parent corporation. The term "parent corporation" shall include any subsidiary of the parent corporation. If any part of the capital used by the parent corporation is borrowed capital, the subsidiary may deduct from its gross income interest paid to the parent corporation in such proportion as the borrowed capital of the parent corporation is to the total assets of such parent corporation. The term "borrowed
capital" used in this paragraph shall include all loans and credits obtained by the parent corporation and also all goods, supplies or other capital of whatever nature borrowed by the parent corporation.

Such subsidiary or affiliated corporation shall incorporate in its returns required under this section and article such information as the commissioner may reasonably require for the determination of the net income taxable under this article, and shall furnish such additional information as the commissioner may reasonably require. If the return does not contain the information therein required or such additional information is not furnished within thirty days after demand, the corporation shall be subject to a penalty of one hundred dollars a day for each day's omission, in addition to the penalty provided in § 105-330.

If the commissioner finds that the determination of the income of a subsidiary or affiliated corporation under a consolidated return as herein provided will produce a greater or lesser figure than the amount of income earned in this state, he may readjust the determination by reasonable methods of computation to make it conform to the amount of income earned in this state; and if the corporation contends the figure produced is greater than the earnings in this state, it shall, within thirty days after notice of such determination, file with the commissioner a statement of its objections and of an alternative method of determination with such detail and proof as the commissioner may require, and the commissioner shall consider the same in determining the income earned in this state. In making such determination the findings and conclusions of the commissioner shall be presumed to be correct and shall not be set aside unless shown to be plainly wrong.

Editor's Note.—The 1941 amendment substituted the word "or" for the word "of" in the third line of the last sentence.

§ 105-145. Exchanges of property.—1. When property is exchanged for other property of like kind, the property received in exchange shall be considered as a conversion of assets from one form to another, from which no gain or loss shall be deemed to arise.

2. In the case of the organization of a corporation, the stock or securities received shall be considered to take the place of property transferred therefor, and no gain or loss shall be deemed to arise therefrom.

3. (a) No gain or loss shall be recognized if stock or securities in a corporation a party to a reorganization are, in pursuance of the plan of reorganization, exchanged solely for stock or securities in such corporation or in another corporation a party to the reorganization.

(b) No gain or loss shall be recognized if a corporation a party to a reorganization exchanges property, in pursuance of the plan of reorganization, solely for stock or securities in another corporation a party to the reorganization.

(c) As used in this section, the term "reorganization" includes a statutory merger or consolidation, a transfer by a corporation of all or a part of its assets to another corporation, if immediately after the transfer the transferor or its shareholders, or both, are in control of the corporation to which the assets are transferred, or a recapitalization, or a mere change in identity, form, or place of organization, however effected.

(d) As used in this section, the term "a party to a reorganization" includes the corporation resulting from a reorganization and includes both corporations in the case of a reorganization resulting from the acquisition by one corporation of stock or properties of another, and the term "control" means the ownership of stock possessing at least eighty (80) per cent of the total combined voting power of all classes of stock entitled to vote and at least eighty (80) per cent of the total number of shares of all other classes of stock of the corporation.

The basis of property received by a corporation upon a distribution in complete liquidation of another corporation within the meaning of § 105-144 shall be the same as it would be in the hands of the transferor. (1939, c. 158, s. 320; 1943, c. 400, s. 4.)

Editor's Note.—The 1943 amendment rewrote subsection 3.

§ 105-146. Inventory.—Whenever, in the opinion of the commissioner of revenue, it is necessary, in order clearly to determine the income of any taxpayer, inventories shall be taken by such taxpayer upon such basis as the commissioner of revenue may prescribe, conforming as nearly as may be to the best accounting practice in the trade
§ 105-147. Deductions.—In computing net income there shall be allowed as deductions the following items:

1. All the ordinary and necessary expenses paid during the income year in carrying on any trade or business, including:
   (a) As to individuals, reasonable wages of employees for services rendered in producing such income.
   (b) As to partnerships, reasonable wages of employees and a reasonable allowance for co-partners or members of a firm, for services actually rendered in producing such income, the amount of such salary allowance to be included in the personal return of the co-partner receiving same.
   (c) As to corporations, wages of employees and salaries of officers, if reasonable in amount, for services actually rendered in producing such income.

2. Rentals or other payments required to be made as a condition of the continued use or possession for the purpose of the trade or property to which the taxpayer has not taken or is not taking title, or in which he has no equity.

3. Unearned discount and all interest paid during the income year on indebtedness except interest paid or accrued in connection with the ownership of real or personal property the current income from which is not taxable under this article, and except interest paid by a subsidiary to a parent corporation as defined in § 105-143. Interest on indebtedness incurred for the purchase of stock of corporations paying a tax on their entire net income under this article shall be deductible, and a ratable proportion of such interest with respect to corporations paying a tax on a proportion of their net income.

4. Taxes paid or accrued during the income year, except income taxes, gift taxes, taxes levied under § 102-135, inheritance and estate taxes, and taxes assessed for local benefit of a kind tending to increase the value of the property assessed. No deduction shall be allowed under this section for gasoline tax, sales tax, automobile license or registration fee by individuals not engaged in trade or business, nor shall deduction be allowed for taxes paid or accrued in connection with the ownership of property, the current income from which is not taxable under this article. All payments made by an employer into a federal fund as provided by the provisions of Title VIII and Title IX of the Federal Social Security Act, and all payments made by an employer as provided by a state unemployment compensation law: Provided, that none of the foregoing provisions shall apply to that part of such payments required to be deducted by an employer from the earnings of an employee. "Income taxes" which are not allowed to be deducted under this section shall be construed to include taxes that are in fact based upon net income, although such taxes may be levied in another state as franchise or excise taxes. The exclusion or deduction of income taxes in another state shall in each case depend upon whether the tax was in fact a tax upon net income by whatever name called.

5. Dividends from stock in any corporation, the income of which shall have been assessed, and the tax on such income paid by the corporation under the provisions of this article: Provided, that when only part of the income of any corporation shall have been assessed under this article, whether paid directly to the taxpayer or paid to the taxpayer by a trustee of a distributable trust, only a corresponding part of the dividends received therefrom shall be deducted.

5½. Interest received by a parent corporation on indebtedness owed to it by a subsidiary corporation doing business in North Carolina, which, in the determination of the taxable net income of such subsidiary corporation was not allowed as a deduction from gross income under the provisions of § 105-143.

6. Losses actually sustained during the income year of property used in trade or business or of property not connected with trade or business, if arising from fire, storm, shipwreck, or other casualties or theft and if not compensated for by insurance or otherwise. No deduction shall be allowed under this subsection for losses arising from personal loans or endorsements or other transactions of a personal nature not entered into for profit. A taxpayer shall be allowed to deduct losses in connection with the sale of securities only to the extent of the security gains during the income year, unless such losses resulted from the sale of stocks or bonds held by the taxpayer for a period of two years or more prior to the sale of such stocks or bonds. Losses may be carried forward by the taxpayer for two succeeding tax years as a credit against income received in either of the two succeeding years subject to the following limitations: First, no carry-over loss shall accrue from any tax year except to the extent that the loss of such year shall exceed any income not taxable under this article received in the same year; Second, the carry-over loss from any prior year or years may be deducted from the taxable income of any tax year only to the extent that such carry-over loss shall exceed any nontaxable income received in such tax year; and Third, any loss carry-over from the sale of securities may be deducted only from gains from the sale of securities in the two succeeding years. The deduction authorized herein shall be permitted in determining any income tax which shall become due and payable on or after January first, one thousand nine hundred and forty-four.

7. Debts ascertained to be worthless and actually charged off within the income year, if connected with business and, if the amount has previously been included in gross income in a return under this article.

8. A reasonable allowance for depreciation and obsolescence of property used in the trade or business shall be measured by the estimated life of such property; and in case of mines, oil and gas wells, other natural deposits and timber, a reasonable allowance for depletion. The cost of property acquired since January first, one thousand nine hundred and twenty-one, plus additions and improvements, shall be the basis for determining the amount of depreciation, and if acquired prior to that date the book value as of
that date of the property shall be the cost basis for determining depreciation.

In cases of mines, oil and gas wells, and other natural deposits, the cost of development not otherwise deducted will be allowed as depletion, and in the case of leases, the deduction allowed may be equitably apportioned between the lessor and lessee.

In case the federal government determines depreciation or depletion of property for income tax purposes upon the basis of book value instead of original cost, the depreciation allowed under this article shall be upon the same basis.

9. Contributions or gifts made by individuals, firms, partnerships and corporations within the income year to corporations, trusts, community chests, funds, foundations or associations organized and operated exclusively for religious, charitable, literary, scientific, or educational purposes or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual: Provided, that in the case of such contributions or gifts by corporations and partnerships, the amount allowed as a deduction hereunder shall be limited to an amount not in excess of five (5%) per centum of the corporation's or partnership's net income, as computed without the benefit of this subdivision; and provided that in the case of such contributions or gifts by individuals, the amount allowed as a deduction shall be limited to an amount not in excess of ten (10%) per centum of the individual's net income, as computed without the benefit of this section.

10. Resident individuals and domestic corporations having an established business in another state, or investment in property in another state, may deduct the net income from such business or investment if such business or investment is in a state that levies a tax upon such net income. The deduction herein authorized shall not include income received by residents of this state and domestic corporations from personal services (except as provided in § 105-151), stocks, bonds, notes, mortgages, securities, or bank or other deposits or credits, nor in any case shall it operate to reduce the taxable income actually earned in this state.

Properly allocable as income earned in this state: Provided, however, that resident individuals or domestic corporations who or which have an established business or investment in another state which does not levy an income tax shall treat any gain or loss from such business or investment as though it occurred from a business or investment in North Carolina.

The provision in this subsection for deductions of income that is earned and taxed in another state as net income shall be construed to include income that is earned and taxed in another state, although such tax may be levied in another state as franchise or excise taxes. The deduction of income earned and taxed in another state shall depend upon whether the tax was in fact a tax upon net income by whatever name called.

11. In the case of a non-resident individual, the deductions allowed in this section shall be allowed only if and to the extent that they are connected with income arising from sources within the state; and the proper apportionment and allocation of the deductions with respect to sources of income within and without the state shall be determined under rules and regulations prescribed by the commissioner of revenue.

12. In computing net income no deduction shall be allowed under this section relating to salaries, wages, or other expenses, rentals or other similar payments, interest or taxes, if (1) the same are not actually paid within the taxable year or within two and one-half (2½) months after the close thereof; and (2) if, by reason of the method of accounting of the person or corporation to whom the payment is to be made, the amount thereof is not, unless actually paid, includible in the gross income of such person or corporation for the taxable year in which or with which the taxable year of the taxpayer ends. (1939, c. 158, s. 322; 1941, c. 50, s. 5; 1943, c. 400, s. 4; 1943, c. 668.)

Editor's Note.—The 1941 amendment substituted the second sentence of subsection 10 for the former two last sentences.

The first 1943 amendment added the second exception in the first sentence of subsection 3, and the last two sentences of subsections 4 and 6. It inserted subsection 5½, rewrote subsection 9 and added the proviso and the second paragraph of subsection 10. The second 1943 amendment also rewrote subsection 9 effective as of Jan. 1, 1943.

For comment on subdivision 12, see 17 N. C. Law Rev. 381.

§ 105-148. Items not deductible.—In computing net income no deduction shall in any case be allowed in respect of:

(a) Personal, living, or family expenses.

(b) Any amount paid out for new buildings or for permanent improvements or betterments, made to increase the value of any property or estate.

(c) Premiums paid on any life insurance policy.

(d) Income, excess profits and gift taxes, including federal tax on undistributed earnings.

(e) Social Security and unemployment tax paid by employee.

(f) Contributions to individuals.

(g) Commutation expenses.

(1939, c. 158, s. 323; 1941, c. 50, s. 5; 1943, c. 400, s. 4.)

Editor's Note.—The 1941 amendment added former subsection (i) at the end of this section.

The 1943 amendment omitted provisions relating to contributions or gifts by corporations and partnerships, and provided that it should be effective as of Jan. 1, 1943.

§ 105-149. Exemptions. — 1. There shall be deducted from the net income the following exemptions:

(a) In the case of a single individual, a personal exemption of one thousand dollars ($1,000.00).

(b) In the case of a married man with a wife living with him, two thousand dollars ($2,000.00), or in the case of a person who is the head of a household and maintains the same and therein supports one or more dependent relatives, under eighteen years of age, or, if over eighteen years of age, incapable of self-support because mentally or physically defective, two thousand dollars ($2,000.00).

(c) A married woman having a separate and independent income, one thousand dollars ($1,000.00).

(d) In the case of a widow or widower having minor child or children, natural or adopted, two thousand dollars ($2,000.00).

(e) Two hundred dollars ($200.00) for each individual (other than husband and wife) dependent
upon and receiving his chief support from the taxpayer, if such dependent individual is under eighteen years of age or is incapable of self-support because mentally or physically defective. Exceptions for the children of taxpayers shall be allowed under this subsection only to the person entitled to the $2,000.00 exemption provided in subsection (b) of this subdivision.

(f) In the case of a fiduciary filing a return for that part of the net income of estates or trusts which has not become distributable during the income year one thousand dollars ($1,000.00).

In the case of a fiduciary filing a return for the net income received during the income year of a deceased resident or nonresident individual who has died during the tax year or income year without having made a return, two thousand dollars ($2,000.00) if the individual was a married man, and one thousand dollars ($1,000.00) if the individual was single or a married woman not qualifying as "head of a household."

In the case of a fiduciary filing a return for an insolvent or incompetent individual resident or non-resident where the fiduciary has complete charge of such net income the same exemption to which the beneficiary would be entitled.

2. The exemptions allowed by this section shall not apply to a resident of this state having income from a business or agency in another state, or with respect to non-resident having a taxable income in this state unless the entire income of such resident or non-resident individual is shown in the return of such resident or non-resident; and if the entire income is so shown, the exemption shall be prorated in the proportion of the income of this state to the total income.

3. The status on the last day of the income year shall determine the right to the exemptions provided in this section. Provided, that a taxpayer shall be entitled to such exemption for husband or wife or dependents who have died during the income year. (1939, c. 158, s. 325; 1941, c. 50, s. 5; 1943, c. 400, s. 4.)

Editor's Note.—The 1941 amendments substituted paragraph one in lieu of the former section.

The 1943 amendment added paragraph 2.

§ 105-152. Returns.—1. The following persons shall file with the commissioner of revenue a income tax return under affirmation, showing there in specifically the items of gross income and the deductions allowed by this article, and such other facts as the commissioner may require for the purpose of making any computation required by this article:

(a) Every resident and nonresident who is a single person and who has a net income during the income year of over one thousand dollars ($1000.00) which is taxable in this state.

(b) Every resident or nonresident who is married but is not living with his or her wife or husband, and who has a net income during the income year of over one thousand dollars ($1000.00) which is taxable in this state.

(c) Any resident or nonresident married woman, whether or not she is living with her husband, who has a net income during the income year of over one thousand dollars ($1000.00) which is taxable in this state.

(d) Every resident or nonresident who is married and is living with his wife, and who has a net income during the income year of over two thousand dollars ($2000.00), which is taxable in this state.

(e) Every resident or nonresident who is "head of a household" as defined in § 105-149 (1) (b) and who has a net income during the income year of over two thousand dollars ($2000.00) which is taxable in this state.

(f) Every resident of this state having a gross income from a business, agency or profession in excess of five thousand dollars ($5000.00).

(g) Every nonresident having a gross income from a business, agency or profession within this state in excess of five thousand dollars ($5000.00).
(h) Every resident or nonresident who is a widow or widower, having minor child or children, natural or adopted, and who has a net income during the income year of over two thousand dollars ($2000.00) which is taxable in this state.

(i) Every resident or nonresident who has an income during the income year from sources both within and without this state in excess of the pro-rated exemption provided for by § 105-149 (2).

(j) Every partnership having a place of business in the state as provided in § 105-154.

(k) Every corporation doing business in this state.

(l) Any person or corporation whom the commissioner believes to be liable for a tax under this article, when so notified by the commissioner and requested to file a return.

2. If the taxpayer is unable to make his own return, the return shall be made by a duly authorized agent or by a guardian or other person charged with the care of the person or property of such taxpayer.

3. The return by a corporation shall be sworn to by the president, vice-president, or other principal officer, and by the treasurer or assistant treasurer.

4. The return of an individual, who, while living, received income in excess of the exemption during the income year, and who has died before making the return, shall be made in his name and behalf by the administrator, or executor of the estate, and the tax shall be levied upon and collected from his estate.

5. When the commissioner of revenue has reason to believe that any taxpayer so conducts the trade or business as either directly or indirectly to distort his true net income and the net income properly attributable to the state, whether by the arbitrary shifting of income, through price fixing, charges for service, or otherwise, whereby the net income is arbitrarily assigned to one or another unit in a group of taxpayers carrying on business under a substantially common control, he may require such facts as he deems necessary for the proper computation of the entire net income and the net income properly attributable to the state, and in determining same the commissioner of revenue shall have regard to the fair profit which would normally arise from the conduct of the trade or business.

6. When any corporation liable to taxation under this article conducts its business in such a manner as either directly or indirectly to benefit the members or stockholders thereof or any person interested in such business by selling its products or goods or commodities in which it deals at less than the fair price which might be obtained therefore, or where a corporation, a substantial portion of whose capital stock is owned either directly or indirectly by another corporation, acquires and disposes of the products of the corporation so owning a substantial portion of its stock in such a manner as to create a loss or improper net income for either of said corporations, the commissioner of revenue may determine the amount of taxable income of either or any such corporations for the calendar or fiscal year, having due regard to the reasonable profits which, but for such arrangement or understanding, might or could have been obtained by the corporation or corporations liable to taxation under this article from dealing in such products, goods or commodities. (1939, c. 158, s. 326; 1941, c. 50, s. 5; 1943, c. 400, s. 4.)

Editor's Note.—The 1941 amendment struck out former subsection 5, relating to required return and settlement of tax by corporation before dissolution, and renumbered former subsections 6 and 7 to appear as 5 and 6 respectively. The 1943 amendment rewrote subsection 1.

§ 105-153. Fiduciary returns.—1. Every fiduciary subject to taxation under the provisions of this article, as provided in § 105-159, shall make a return under oath for the individual, estate or trust for whom or for which he acts, if the net income thereof exceeds the personal exemptions.

3. The return made by a fiduciary shall state specifically the items of gross income and the deductions and exemptions allowed by this article, and such other facts as the commissioner of revenue may prescribe.

3. Fiduciaries required to make returns under this article shall be subject to all the provisions of this article which apply to individuals. (1939, c. 158, s. 327.)

§ 105-154. Information at the source.—1. Every individual, partnership, corporation, joint-stock company or association, or insurance company, being a resident or having a place of business in this state, in whatever capacity acting, including lessors or mortgagees of real or personal property, fiduciaries, employers, and all officers and employees of the state or of any political subdivision of the state, having the control, receipt, custody, disposal, or payment of interest (other than interest coupons payable to bearer), rent, salaries, wages, premiums, annuities, compensations, remunerations, emoluments or other fixed or determinable annual or periodical gains, profits, and incomes above exemptions allowed in this article, paid or payable during any year to any taxpayer, shall make complete return thereof to the commissioner of revenue under such regulations and in such form and manner and to such extent as may be prescribed by him.

2. Every partnership having a place of business in the state shall make a return, stating specifically the items of its gross income and the deductions allowed by this article, and shall include in the return the names and addresses of the individuals who would be entitled to share in the net income if distributable, and the amount of the distributive share of each individual, together with the distributive shares of corporation dividends. The return shall be sworn to by one of the partners.

3. Every corporation doing business or having a place of business in this state shall file with the commissioner of revenue, on such form and in such manner as he may prescribe, the names and addresses of all taxpayers, residents of North Carolina, to whom dividends have been paid and
§ 105-155. Time and place of filing returns.
—Returns shall be in such form as the commissioner of revenue may from time to time prescribe, and shall be filed with the commissioner at his main office, or at any branch office which he may establish, on or before the fifteenth day of March in each year, and for all taxpayers using a fiscal year, within seventy-five days after expiration of the fiscal year. In case of sickness, absence, or other disability or whenever in his judgment good cause exists, the commissioner may allow further time for filing returns.

There shall be annexed to the return the affirmation of the taxpayer making the return in the following form; “I hereby affirm that this return, including the accompanying schedules and statements (if any) has been examined by me, and, to the best of my knowledge and belief, is true and complete and is made in good faith covering the taxable period stated, pursuant to the Revenue Act of one thousand nine hundred and thirty-nine, as amended and the regulations issued under authority thereof, and that this affirmation is made under the penalties of perjury. The return shall also be signed by a competent witness of the signature.” Any individual who willfully makes and subscribes a return which he does not believe to be true and correct as to every material matter, shall be guilty of a felony, and, upon conviction thereof, shall be subject to the penalties prescribed for perjury. The commissioner shall cause to be prepared blank forms for the said returns, and shall cause them to be distributed throughout the state, and to be furnished upon application; but failure to receive or secure the form shall not relieve any taxpayer from the obligation of making any return herein required. (1939, c. 158, s. 329; 1943, c. 400, s. 4.)

Editor’s Note.—The 1943 amendment rewrote all of the second paragraph except the last sentence.


§ 105-156. Failure to file returns; supplementary returns.—If the commissioner of revenue shall be of the opinion that any taxpayer has failed to file a return or to include in a return, either intentionally or through error, items of taxable income, he may require from such taxpayer a return or supplementary return, under oath, in such form as he shall prescribe, of all the items of income which the taxpayer received during the year for which the return is made, whether or not taxable under the provisions of this article. If from a supplementary return or otherwise the commissioner finds any items of income, taxable under this article, have been omitted from the original return, or any items returned as taxable that are not taxable, or any item of taxable income over-stated, he may require the items so omitted to be disclosed to him under oath of the taxpayer, and to be added to or deducted from the original return. Such supplementary return and the correction of the original return shall not relieve the taxpayer from any of the penalties to which he may be liable under any provision of this article. The commissioner may proceed under the provisions of § 105-159, whether or not he requires a return or a supplementary return under this section. (1939, c. 158, s. 331.)

Collection and Enforcement of Income Tax.

§ 105-157. Time and place of payment of tax.—(1) The full amount of the tax payable, as shown on the face of the return, shall be paid to the commissioner of revenue at the office where the return is filed at the time fixed by law for filing the return. The amount of said tax may be paid in four equal installments, one-fourth at the time of filing the report, one-fourth on or before June fifteenth, one-fourth on or before December fifteenth, and one-fourth on or before December fifteenth. Such deferred payments may be made with interest at four per cent (4%), but if any deferred payment is not made when due, the whole amount of deferred payments shall become due and interest at the rate of four per cent (4%) per annum shall be added to such deferred payment from March fifteenth until paid. This provision for deferred payments shall become effective as of January first, one thousand nine hundred and forty-four.

(2) If the time for filing the return be extended, interest at the rate of four per cent (4%) per annum from the time when the return was originally required to be filed to the time of payment shall be added and paid.

(3) The tax may be paid with uncertified check during such time and under such regulations as the commissioner of revenue shall prescribe; but if a check so received is not paid by the bank on which it is drawn, the taxpayer by whom such check is tendered shall remain liable for the payment of the tax and for all legal penalties the same as if such check had not been tendered. (1939, c. 158, s. 332; 1943, c. 400, s. 4.)

Editor’s Note.—Prior to the 1943 amendment, if the amount of the tax exceeded fifty dollars it was payable in two installments. The amendment changed the interest rate from six to four per cent.


§ 105-158. Examination of returns.—1. As soon as practicable after the return is filed the commissioner of revenue shall examine and compute the tax, and the amount so computed by the commissioner shall be the tax. If the tax found due shall be greater than the amount theretofore paid, the excess shall be paid to the commissioner within thirty days after notice of the amount shall be mailed by the commissioner, and any over-payment of tax shall be returned within thirty days after it is ascertained.

2. If the return is made in good faith and the under-statement of the tax is not due to any fault of the taxpayer, there shall be no penalty or additional tax added because of such under-statement, but interest shall be added to the amount of the deficiency at the rate of one-half (½) of one per cent (1%) per month or fraction thereof from the time said return was required by law to be filed until paid.

3. If the under-statement is due to negligence on the part of the taxpayer, but without intent to defraud, there shall be added to the amount of the deficiency five per cent (5%) thereof, and, in addition, interest at the rate of one-half (½)
of one per cent (1%) per month or fraction thereof from time said return was required by law to be filed until paid.

4. If the under-statement is found by the commissioner of revenue to be false or fraudulent, with intent to evade the tax, the tax on the additional income discovered to be taxable shall be doubled and interest at the rate of one-half (½%) of one per cent (1%) per month or fraction thereof from time said return was required by law to be filed until paid. The provisions of this article, with respect to revision and appeal shall be applied by the commissioner of revenue to his decision. The taxpayer shall be advised of his decision and such amount shall be due within ten days after notice is given. The provisions of this article with respect to revision and appeal shall apply to the tax so assessed. The limitation of three years to the assessment of such tax or an additional tax shall not apply to the assessment of additional taxes upon fraudulent returns. Upon failure to file returns and in the absence of fraud the limitation shall be five years. (1939, c. 158, s. 335.)

Editor's Note.—See 12 N. C. Law Rev. 21, 35.

§ 105-161. Penalties.—1. If any taxpayer, without intent to evade any tax imposed by this article, shall fail to file a return of income and pay the tax, if one is due, at the time required by or under the provisions of this article, but shall voluntarily file a correct return of income and pay the tax due within sixty days thereafter, there shall be added to the tax an additional amount equal to twenty-five per cent (25%) thereof and interest at the rate of one-half of one per cent (¼%) per month or fraction thereof, from the time such return was required to be filed until paid, but the penalty shall not be less than five dollars ($5.00).

3. If any taxpayer fails to file a return within sixty days of the time prescribed by this article, any judge of the superior court, upon petition of the commissioner of revenue or of any ten taxable residents of the state, shall issue a writ of mandamus requiring such person to file a return.

4. The failure to do any act required by or under the provisions of this article shall be deemed an act committed in part at the office of the commissioner of revenue in Raleigh. The certificate of the commissioner of revenue to the effect that a tax has not been paid, that a return has not been filed, or that information has not been supplied, as required by or under the provisions of this article, shall be prima facie evidence that such tax has not been paid, that such return has not been filed, or that such information has not been supplied.

5. If any taxpayer who has failed to file a re-
§ 105-162. Revision by commissioner of revenue.—A taxpayer may apply to the commissioner of revenue for revision of the tax assessed against him at any time within three years from the time of the filing of the return or from the date of the notice of assessment of any additional tax. The commissioner shall grant a hearing thereon, and if upon such hearing he shall determine that the tax is excessive or incorrect, he shall resettle the same according to the law and the facts, and adjust the computation of tax accordingly. The commissioner shall notify the taxpayer of his determination, and shall refund to the taxpayer the amount, if any, paid in excess of the tax found by him to be due. (1939, c. 158, s. 340.)

Revision Barred by Lapse of Time.—Where a taxpayer fails to apply to the Commissioner of Revenue for a revision within three years from the filing of its return, its claim is barred, under this section, and the fact that the exceptions were filed is no bar to the Commissioner of Revenue's determination thereof, shall be fined not more than five hundred dollars ($500.00) or imprisoned not exceeding six months, or punished by both such fine and imprisonment at the discretion of the court, within the limitations aforesaid. (1939, c. 158, s. 336.)

Revision and Appeal.

§ 105-163. Appeal.—Any taxpayer may file formal exceptions to a finding by the commissioner of revenue, under the provisions of this article with respect to his taxable income, either to a matter of fact or law, as far as possible stating such exceptions separately. After they are filed, the commissioner shall pass upon the same formally, and notify the taxpayer immediately of his findings upon these exceptions. The taxpayer may, within ten days after notification of the commissioner's ruling upon these exceptions, appeal to the superior court of Wake county, upon paying the tax assessed by the commissioner and giving a bond for costs in the sum of two hundred dollars ($200.00). Provided, the taxpayer may within the above prescribed time first appeal to the state board of assessment on the exceptions to the findings of the commissioner; and provided further, that the commissioner may in his discretion require a surety bond or a deposit of state or government bonds in double the amount of the alleged deficiency. Appeal may then be taken by either the taxpayer or the commissioner to the superior court of Wake county as provided herein. Upon receipts of such notice and the taxes paid, and the filing of the cost bond in the sum of two hundred dollars ($200.00), the commissioner shall certify the record to the superior court of Wake county. In the superior court the proceedings shall be as follows:

The cause shall be entitled, “State of North Carolina on Relation of the Commissioner of Revenue vs. Appellant” (giving name). If there are exceptions to facts found by the commissioner, it shall be placed on the civil issue docket of such court and shall have precedence over other civil actions, and shall be tried under the same rules and regulations as are prescribed for the trial of such civil actions, except that the findings of the commissioner shall be prima facie correct. If only issues of law, or if issues of fact are raised, and the appellant shall waive jury trial at the time of taking the appeal, the appeal may be had to the superior court of the county in which the appellant resides, and the cause shall be heard by the judge holding court in the judicial district in which the appeal is docketed, at chambers, upon ten days notice to the parties of the time and place of hearing, the said judge shall pass upon and determine all issues, both of law and fact, the state hereby waiving in such cases a trial by jury. Either party may appeal to the supreme court from the judgment of the superior court under the rules and regulations prescribed by law for appeals, except that, if it should appeal, shall not be required to give any undertaking or make any deposit to secure the cost of such appeal, and the supreme court may advance the cause on its docket so as to give the same a speedy hearing. Any taxes, interest, or penalties paid, found by the court to be in excess of those which can be legally assessed, shall be ordered refunded to the taxpayer, with interest from the time of payment. (1939, c. 158, s. 341.)

Art. 5. Schedule E. Sales Tax.

§ 105-164. Short title.—This article shall be known and and may be cited as the sales tax article of the revenue act. (1939, c. 158, s. 400.)

§ 105-165. Purpose.—The taxes levied in this article are to provide revenue for the support of the public schools of the state in substitution for the taxes formerly levied on property for this purpose. They are levied for the biennium of fiscal years beginning July first, one thousand nine hundred thirty-nine, and ending June thirtieth, one thousand nine hundred forty-one, and thereafter until otherwise provided by law. The tax upon the sale of tangible personal property in this state is levied as a license or privilege tax for engaging or continuing in the business of a “wholesale” or “retail” merchant as defined in this article. Retail merchants may add to the price of merchandise the amount of the tax
on the sale thereof, and when so added shall constitute a part of such price, shall be a debt from purchaser to merchant until paid, and shall be recoverable at law in the same manner as other debts. It is the purpose and intent of this article that the tax levied herein on retail sales shall be added to the sales price of merchandise and thereby be passed on to the consumer instead of being absorbed by the merchant.

Any retail merchant who shall, by any character of public advertisement, offer to absorb the tax levied in this article upon the retail sale of merchandise, or in any manner, directly or indirectly, advertise that the tax herein imposed is not considered as an element in the price to the consumer, shall be guilty of a misdemeanor. Any violations of the provisions of this section reported to the commissioner of revenue shall be reported by the commissioner of revenue to the attorney general of the state, to the end that such violations may be brought to the attention of the solicitor of the court of the county or district whose duty it is to prosecute misdemeanors in the jurisdiction. It shall be the duty of such solicitor to investigate such alleged violations and if he finds that this section has been violated to prosecute such violations. The violations of this section are deemed necessary to prevent fraud and unfair practices, but it is the intent of the general assembly that if one or both of such provisions be held unconstitutional and void, that such invalid provision or provisions be considered separable and that the balance of this article be given effect. (1939, c. 158, s. 401.)

§ 105-166. Contingency.—If the Congress of the United States shall, at any time hereafter, enact any form of sales or production tax distributable in whole or in part to the several states, the governor and council of state shall estimate the proportion of such tax distributable to this state, and shall, by proclamation of the governor, abate a uniform percentage of all the taxes levied in this article equal in estimated revenue yield to the estimated proportion of yield of such federal tax, and from and after the effective date of such proclamation the commissioner of revenue shall enforce and collect only the remaining percentage of taxes levied in this article. (1939, c. 158, s. 402.)

§ 105-167. Definitions.—For the purposes of this article:
1. The word "person" shall mean any person, firm, partnership, association, corporation, estate or trust.
2. The word "commissioner" shall mean the commissioner of revenue of the state of North Carolina.
3. The word "merchant" shall include any individual, firm, corporation, domestic or foreign, estate or trust, subject to the tax imposed by this article.
4. The words "wholesale merchant" shall mean every person who engages in the business of buying and reselling any article of commerce and selling same to merchants for resale.
5. The words "wholesale sale" or "sale at wholesale" shall mean a sale of tangible personal property by a wholesale merchant to a manufacturer, jobber or dealer, wholesale or retail merchant, for the purpose of resale, but does not include a sale to users or consumers not for resale. The term "wholesale sale" shall include a sale of tangible personal property to a manufacturer which enters into or becomes an ingredient or component part of the tangible personal property which is manufactured.
6. The words "retail merchant" shall mean every person who engages in the business of buying or acquiring, by consignment or otherwise, any articles of commerce and selling same at retail.
7. The word "retail" shall mean the sale of any articles of commerce in any quantity or quantities for any use or purpose on the part of the purchaser other than for resale.
8. The word "sale" or "selling" shall mean any transfer of title or possession, or both, exchange, barter of tangible personal property, conditional or otherwise, however effected and by whatever name called, for a consideration paid or to be paid, in installments or otherwise, and shall include any of said transactions whereby title or ownership is ultimately to pass notwithstanding the retention of title or possession, or both, for security or other purposes, and shall further mean and include any bailment, loan, lease, rental or license to use or consume tangible personal property for a consideration paid or to be paid, in installments or otherwise: Provided, the provisions of this subsection shall not apply to the lease or rental of motion picture films used for exhibition purposes and for which a tax of three per cent is imposed on the total admissions for such exhibitions.
9. The words "gross sales" shall mean the gross sales price at which such sales were made, whether for cash or on time, and if on time, the price charged on the books for such sales, without allowance for cash discount, and shall be reported as sales with reference to the time of delivery to the purchaser, except as this provision is modified by § 105-171. (1939, c. 158, s. 404; 1941, c. 50, s. 6.)

Editor's Note.—The 1941 amendment changed subsection 8. For comment on this amendment, see 19 N. C. Law Rev. 536. For an analysis of provisions of former law, see 11 N. C. Law Rev. 420. For decisions under former laws, see McCanless Motor Co. v. Maxwell, 210 N. C. 725, 188 S. E. 389; Powell v. Maxwell, 210 N. C. 211, 186 S. E. 326; Leonard v. Maxwell, 216 N. C. 89, 3 S. E. (2d) 316.

§ 105-168. Licenses; wholesale and retail sales tax rates; use tax on motor vehicles.—If any person, after the thirtieth day of June, one thousand nine hundred thirty-nine, shall engage or continue in any business for which a privilege tax is imposed by this article, such person shall apply for and obtain from the commissioner, upon the payment of the sum of one dollar ($1.00), a license to engage in and conduct such business upon the condition that such person shall pay the tax accruing to the state of North Carolina un-
under the provisions of this article; and he shall thereby be duly licensed to engage in and conduct such business. The license tax levied in this section shall be a continuing license until revoked for failure to comply with the provisions of this article. License issued under Article V, chapter four hundred forty-five, Public Laws of one thousand nine hundred thirty-three, for the year one thousand nine hundred thirty-four—one thousand nine hundred thirty-five; under chapter three hundred seventy-one, Public Laws of one thousand nine hundred thirty-five, for the biennium one thousand nine hundred thirty-five—one thousand nine hundred thirty-seven; and chapter one hundred twenty-seven, Public Laws of one thousand nine hundred thirty-seven, for the biennium one thousand nine hundred thirty-seven—one thousand nine hundred thirty-nine, shall be deemed a continuing license under this section.

An additional tax is hereby levied for the privilege of engaging or continuing in the business of selling tangible personal property, as follows:

(a) Wholesale Merchants.—Upon every wholesale merchant as defined in this article, an annual license tax of ten dollars ($10.00). Such annual license shall be paid in advance within the first fifteen days of July in each year or, in the case of a new business, within fifteen days after business is commenced. There is also levied on each wholesale merchant an additional tax of one-tenth of one per cent (1/20th of 1%) of the total gross sales of the business.

The sale of any article of merchandise by any person is hereby made to be taxable at the rate of tax provided in this article upon the retail sale of merchandise. In the interpretation of this article the sale of any articles of commerce by any “wholesale merchant” to any person other than to a licensed retail merchant for resale shall be taxable at the rate of tax provided in this article upon the retail sale of merchandise. In the interpretation of this article the sale of any articles of commerce by any “wholesale merchant” to any person other than to a licensed retail merchant for resale shall be taxable at the rate of tax provided in this article upon the retail sale of merchandise. The commissioner of revenue is authorized to cancel any taxes assessed contrary to the provisions hereof. (1939, c. 158, s. 405; 1943, c. 400, s. 5.)

Editor’s Note.—The 1941 amendment added the last three sentences of subsection (c).


§ 105-169. Exemptions.—The taxes imposed in this article shall not apply to the following:

(a) Sales by manufacturers or producers of their own manufactured products when sold to other manufacturers, producers, wholesale or retail merchants, for resale or to any person for the purpose of resale; for the purpose of such resale; for the purpose of resale; for the purpose of resal

(b) Retail Merchants.—Upon every retail merchant, as defined in this article, a tax of three per cent (3%) of the total gross sales of the business of every such retail merchant: Provided, however, the maximum tax that shall be imposed upon the sale of any single article of merchandise shall be fifteen dollars ($15.00).

(c) Motor Vehicles.—In addition to the taxes levied in this article or in any other law, there is hereby levied and imposed upon every person, for the privilege of using the streets and highways of this state, a tax of three per cent (3%) of the sales or purchase price of any new or used motor vehicle purchased or acquired for use on the streets and highways of this state requiring registration thereof under the Motor Vehicle Laws of this state, which said amount shall not exceed fifteen dollars ($15.00), and shall be paid to the commissioner of revenue at the time of applying for certificate of title or registration of such motor vehicle. No certificate of title or registration plate shall be issued for same unless and until said tax has been paid: Provided, however, if such person so applying for certificate of title or registration and license plate for such motor vehicle shall furnish to the commissioner of revenue a certificate from a motor vehicle dealer licensed to do business in this state, upon a form furnished by the commissioner, certifying that such person has paid the tax thereon levied in this article, the tax herein levied shall be remitted to such person to avoid in effect double taxation on said motor vehicle under this article. The term “motor vehicle” as used in this section shall include trailers. It is declared to have been the purpose of this subsection that whenever a motor vehicle chassis is or has been purchased separately from the body which is thereafter installed thereon, the maximum tax herein levied shall be imposed upon the sale of the chassis and no additional tax shall be imposed upon the body mounted upon the same. It is not the intention of this section to impose any tax upon a body mounted upon the chassis of a motor vehicle which temporarily enters the state for the purpose of having such body mounted thereon by the manufacturer thereof. The commissioner of revenue is authorized to cancel any taxes assessed contrary to the provisions hereof. (1939, c. 158, s. 405; 1943, c. 400, s. 5.)
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is made for the expense of collecting highway revenues, for the administration of the highway and public works commission, for the service of the debt, and for reasonable maintenance of state and county highways, nor shall the application herein made become available to the general fund unless the director of the budget shall find such sum to be reasonably necessary to meet appropriations from the general fund. The amount so allocated to the general fund shall not be transferred from the highway fund, or become a definite charge against it until the surplus in the general fund at the end of the present fiscal year, together with current unforeseen revenues, shall have been exhausted, or until the director of the budget shall find as a fact that such transfer is necessary to prevent a deficit in the general fund; nor shall such transfer or any part thereof be made until the appropriations from the highway fund, hereinabove referred to, have been provided for. In construing this provision the director of the budget shall not be required to take into account an incidental credit balance of the general fund.

(c) Sale of commercial fertilizer on which the inspection tax is paid, and lime and land plaster used for agricultural purposes whether the inspection tax is paid or not.

(d) Sales made to the state of North Carolina or any of its subdivisions, including sales of merchandise and articles of commerce to agencies of state or local governments for distribution in public welfare or relief work. This exemption shall not apply to sales made to organizations, corporations, and institutions that are not governmental agencies, owned and controlled by the state or local governments. Sales of building material made directly to state and local governments in this state shall be exempt from the tax on building material levied in this article, and sales of building material to contractors to be used in construction work for state or local governments shall be construed as direct sales.

Where any person, firm or corporation has entered into a contract with the federal, state, or local governments, or any agency thereof, or with any private person, firm or corporation, or other party whatsoever, to manufacture or fabricate tangible personal property including ships, boats, aircraft, equipment, ordnance, or any other products or articles of commerce, for cost or for cost plus a fixed fee, sales to such manufacturer or fabricator of materials which shall enter into and become an ingredient or component part of the product manufactured or fabricated shall not be subject to retail sales tax or use tax.

(e) The gross receipts from sales of tangible personal property which the state is prohibited from taxing under the constitution or laws of the United States of America or under the constitution of this state.

(f) Accounts of purchasers, representing taxable sales, on which the tax imposed by this article has been paid, that are found to be worthless and actually charged off for income tax purposes may, at corresponding periods, be deducted from gross sales in so far as they represent taxable sales made after July first, one thousand nine hundred thirty-three, and to be added to gross sales if afterwards collected.

(g) Sales of public school books on the adopted list and the selling price of which is fixed by state contract, and Holy Bibles.

(h) Sales of used articles taken in trade, or a series of trades, as a credit or part payment on the sale of a new article, provided the tax levied in this article is paid on the full gross sales price of the new article. In the interpretation of this subsection, new article shall be taken to mean the original stock in trade of the merchant, and shall not be limited to newly manufactured articles. The resale of articles repossessed by the vendor shall likewise be exempt from gross sales taxable under this article.

(i) Conditional exemptions; sales by retail merchants of food and food products for human consumption. The term "food and food products for human consumption" shall be given its usual and ordinary meaning, but shall not include malt or vinous beverages, soft or carbonated drinks, sodas, or beverages such as are ordinarily sold or dispensed at stores, bars, stands or soda fountains or in connection therewith, candies or confectioneries, medicines, tonics, and preparations in liquid, powdered, granular, tablet, capsule, or pill form sold as dietary supplements; nor does "food and food products for human consumption" include prepared meals or foods sold or served on or off the premises of restaurants, hotel dining rooms, drug stores, or other places where prepared meals or foods are sold or served.

(j) Sales of ice, whether sold by the manufacturer, producer, wholesale or retail merchants.

(k) Sales of medicines sold on prescriptions of physicians, or medicines compounded, processed or blended by the druggist offering the same for sale at retail.

(l) Sales of products of farms, forests, mines, and waters when such sales are made by the producers in their original or unmanufactured state. Fish and sea foods shall be likewise exempt when sold by the fishermen.

(m) For the purposes of this article, sales of mill machinery or mill machinery parts and accessories to manufacturing industries and plants may be classified as wholesale sales and, therefore, only subject to the wholesale rate of tax.

(n) Sales of horses and/or mules.

(o) Sales of coffins or caskets which do not sell for more than one hundred dollars ($100.00).

(p) Sales of cotton, tobacco, peanuts and other farm products sold to manufacturers for further manufacturing or processing.

(q) Sales of tangible personal property to hospitals not operated for profit, churches, orphanages, and other charitable or religious institutions or organizations not operated for profit, and educational institutions principally supported by the state of North Carolina, when such tangible personal property is purchased for use in carrying on the work of such institutions or organizations.

(r) Sales of crutches, and sales of artificial limbs, artificial eyes, artificial hearing devices, when the same are designed to be worn on the person of the owner or user, and sales of orthopedic appliances.

Every merchant selling merchandise to other merchants for resale shall deliver to the customer a bill of sale for each sale of merchandise, whether sold for cash or on credit, and shall make and retain a duplicate or carbon copy of each such
§ 105-170. Taxes payable; failure to make return; duty and power of commissioner. — The taxes levied in this article shall be due and payable in monthly installments on or before the fifteenth day of the month next succeeding the month in which the tax accrues. Every taxpayer liable for the tax imposed by this article shall, on or before the fifteenth day of the month, make out or prepare a return on the blank report form furnished by the commissioner of revenue, showing the total gross sales, the sales exempted from the tax, the net taxable sales, the amount of tax covering sales in the preceding month, and shall mail same, together with the remittance for the amount of the tax, to the commissioner. When such extension is granted, the taxpayer shall thereafter include in each monthly return the amount of tax shown to be due by the commissioner or his duly authorized agent. The commissioner shall be assessed with a five per centum penalty plus interest at one-half of one per centum per month from the date the tax was due. The penalty provided in this subsection shall not be less than one dollar ($1.00).

(b) Failure to Make Returns.—If the taxpayer shall fail to make or refuse to make the returns required under this article, then such returns shall be made by the commissioner or his duly authorized agents from the best information available, and such returns shall be prima facie correct for the purposes of this article, and the amount of tax due thereby shall be a lien against all the property of the taxpayer until discharged by payment. In case the tax shown to be due by such returns shall be more than the tax shown by the returns made by the taxpayer, such additional tax shall be due until paid.

(c) Not to Issue Certificate of Title or License. — As an additional means of enforcement, the commissioner or his duly authorized agents from the best information available, and such returns shall be prima facie correct for the purposes of this article, and the amount of tax due thereby shall be a lien against all the property of the taxpayer until discharged by payment. In case the tax shown to be due by such returns shall be more than the tax shown by the returns made by the taxpayer, such additional tax shall be due until paid. 

§ 105-171. Credit sales.—Any person taxable under this article having cash and credit sales may report such cash and credit sales separately, and upon making application therefore may obtain from the commissioner an extension of time for the payment of taxes due on such credit sales. Such extension shall be granted under such rules and regulations as the commissioner may prescribe. When such extension is granted, the taxpayer shall therefor include in each monthly report all collections made during the month next preceding and shall pay taxes due thereon at the time of filing such report. (1939, c. 158, s. 407; 1943, c. 400, s. 5.)

§ 105-172. Forms for making returns. — The monthly returns required under this article shall be made upon forms to be prescribed and provided by the commissioner. (1939, c. 158, s. 411.)

§ 105-173. Extension of time for making returns. — The commissioner for good cause may extend the time for making any return required under the provisions of this article, and may grant such additional time within which to make such
§ 105-174. Commissioner to correct error.—As soon as practicable after the return is filed the commissioner shall examine it; if it then appears that the correct amount of tax is greater or less than that shown in the return, the tax shall be recomputed.

Excessive Payments.—If the amount already paid exceeds that which should have been paid, on the basis of the tax so recomputed, the excess shall be credited or refunded to the taxpayer in accordance with the provisions of this article.

Deficiency of Amount.—(a) If the amount already paid is less than the amount which should have been paid, the difference to the extent not covered by any credits under this article, together with interest thereon at the rate of one-half of one per centum per month from the time the tax was due, shall be paid upon notice and demand by the commissioner.

(b) If any part of the deficiency is due to negligence or intentional disregard of authorized rules and regulations, with knowledge thereof, but without intent to defraud, there shall be added as damages ten per centum of the total amount of the deficiency in the tax, and interest in such a case shall be collected at the rate of one per centum per month of the amount of such deficiency in the tax from the time it was due, which interest and damages shall become due and payable upon notice and demand by the commissioner; provided, however, in the absence of fraud, no assessment authorized by this article shall extend to sales made more than three (3) years prior to the date of assessment; and in cases where an audit shall have been made and the completion of the audit by the commissioner of revenue any assessment in respect to such audit shall be made within one year after the completion of the audit.

(c) If any part of the deficiency is due to fraud with intent to evade the tax, then there shall be added as damages not more than one hundred per centum of the total amount of the deficiency in the tax, and in such case the whole amount of tax unpaid, including charges so added, shall become due and payable upon notice and demand by the commissioner, and an additional one per centum per month on the tax shall be added from the date such tax was due until paid.

(d) If the amount already paid is less than the amount which should have been paid, the commissioner or his duly authorized agent shall notify the taxpayer of the balance due, plus such interest and damages as are set forth in (a), (b), and (c) just preceding, and if this total amount is not paid or no appeal is taken within thirty days from the date of notice, such action shall be considered as a refusal on the part of the taxpayer to make a return, and the taxpayer shall be subject to such penalties or provisions as are provided in this article for failure to make a return.

If any taxpayer, subject to the provisions of this article, goes into bankruptcy, receivership, or turns over his stock of merchandise by voluntary transfer to creditors, the tax liability under this article shall constitute a prior lien on such stock of merchandise, subject to execution, and it shall be the duty of the transferee in any such case to retain the amount of the tax due from the first sales from such stock of merchandise and to pay the same to the commissioner of revenue. (1939 c. 158, s. 412.)

Editor's Note.—The 1941 amendment added the proviso to subsection (b).

§ 105-175. Taxpayer must keep records.—It shall be the duty of every person engaging in business for which a privilege tax is imposed by this article to keep and preserve suitable records of the gross income, gross receipts and/or gross receipts of sales of such business, and such other books or accounts as may be necessary to determine the amount of tax due or to show the amount of sales for which he is liable under the provisions of this article. And it shall be the duty of every such person to keep and preserve, for a period of three years, all invoices of goods and merchandise purchased for resale, and all such books, invoices, and other records shall be open for examination at any time by the commissioner or his duly authorized agent. (1939, c. 158, s. 416.)

§ 105-176. Tax shall be lien.—The tax imposed by this article shall be a lien upon the stock of goods and/or any other property of any person subject to the provisions hereof who shall sell out his business or stock of goods, or shall quit business, and such person shall be required to make out the return provided for under § 105-170 within thirty days after the date he sold out his business or stock of goods, or quit business, and his successor in business shall be required to withhold sufficient of the purchase money to cover the amount of said taxes due and unpaid until such time as the former owner shall produce a receipt from the commissioner showing that the taxes have been paid, or a certificate that no taxes are due. If the purchaser of a business or stock of goods shall fail to withhold purchase money as above provided, and the taxes shall be due and unpaid after the thirty-day period allowed, he shall be personally liable for the payment of the taxes accrued and unpaid on account of the operation of the business by the former owner. (1939, c. 158, s. 416.)

§ 105-177. Aggrieved person may file petition.—If any person having made the return and paid the tax as provided by this article feels aggrieved by the assessment made upon him by the commissioner, or, in the absence of a report, if an assessment has been made by the commissioner under the provisions of this article, the taxpayer may apply to the commissioner by petition, in writing, within thirty days after the notice is mailed to him, for a hearing and a correction of the amount of the tax so assessed upon him by the commissioner, in which petition he shall set forth the reasons why such hearing should be granted and the amount in which such tax should be reduced. The commissioner shall promptly consider such petition, and may grant such hearing or deny the same. If denied, the petitioner shall be forthwith notified thereof; if granted, the
commissioner shall notify the petitioner of the time and place fixed for such hearing. After such hearing the commissioner may make such order in the matter as may appear to him just and lawful, and shall furnish a copy of such order to the petitioner. Any person improperly charged with any tax and required to pay the same may recover the amount paid, together with interest, in any proper action or suit against the commissioner, and the superior court of the county in which the taxpayer resides or is located shall have original jurisdiction of any action to recover any tax improperly collected. In any suit to recover taxes paid or to collect taxes, the court shall adjudge costs to such extent and in such manner as may be deemed equitable.

Either party to such suit shall have the right to appeal to the supreme court of North Carolina as now provided by law. In the event a final judgment is rendered in favor of the taxpayer in a suit to recover illegal taxes, then it shall be the duty of the state auditor, upon receipt of a certified copy of such final judgment, to issue a warrant directed to the state treasurer in favor of such taxpayer to pay such judgment, interest, and costs. It shall be the duty of the state treasurer to honor such warrant and pay such judgment out of any funds in the state treasury.

No injunction shall be awarded by any court or judge to restrain the collection of the taxes imposed by this article, or to restrain the enforcement of this article. (1939, c. 158, s. 417.)

§ 105-178. Warrant for collection of tax; tax shall constitute debt due state.—If any tax imposed or any portion of such tax be not paid within thirty days after the same becomes due, the commissioner shall proceed to enforce the payment of such tax in the manner provided by § 105-424. (1939, c. 158, s. 418, c. 370, s. 1.)

§ 105-179. Additional tax; remittances made to commissioner; records.—The tax imposed by this article shall be in addition to all other licenses and taxes levied by law as a condition precedent to engaging in any business taxable hereunder, except as in this article otherwise specifically provided. But no county, municipality, or district shall be authorized to levy any tax by virtue of the provisions of this article.

Remittances, How Made.—All remittances of taxes imposed by this article shall be made to the commissioner by bank draft, check, cashier’s check, money order, or money, who shall issue his receipt therefor to the taxpayers, when requested, and shall deposit daily all monies received to the credit of the state treasurer as required by law for other taxes: Provided, no payment other than cash shall be final discharge of liability for the tax herein assessed and levied unless and until it has been paid in cash to the commissioner.

The commissioner shall keep full and accurate records of all monies received by him, and how disbursed; and shall preserve all returns filed with him under this article for a period of three years. (1939, c. 158, s. 420.)

§ 105-180. Letters in report not to be divulged.—Unless in accordance with the judicial order or as herein provided, the state department of revenue, its agents, clerks or stenographers, shall not divulge the gross income, gross proceeds of sales, or the amount of tax paid by any person as shown by the reports filed under the provisions of this article except to members of the state department of revenue for the purpose of checking, comparing, and correcting returns, or to the governor, or to the attorney general, or any other legal representative of the state in any action in respect to the amount of tax due under the provisions of this article. (1939, c. 158, s. 421; 1941, c. 50, s. 6.)

Editor’s Note.—The 1941 amendment struck out the former provision of the section relating to withholding certificates of bona fide corporation until payment of tax levied under this article.

§ 105-181. Unlawful to refuse to make returns; penalty.—It shall be unlawful for any person to fail or refuse to make the return provided to be made in this article, or to make any false or fraudulent return or false statement in any return of the tax, or any part thereof, imposed by this article; or for any person to aid or abet another in any attempt to evade the payment of the tax, or any part thereof, imposed by this article; or for the president, vice-president, secretary or treasurer of any company to make or permit to be made for any company or association any false return, or any false statement in any return required by this article, with the intent to evade the payment of any tax hereunder; or for any person to fail or refuse to permit the examination of any book, paper, account, record, or other data by the commissioner or his duly appointed agent, or to refuse to offer testimony or produce any record as required in this article. Any person violating any of the provisions of this section shall be guilty of a misdemeanor, and on conviction thereof shall be fined not more than five hundred dollars ($500.00) or imprisoned not exceeding six months, or punished by both such fine and imprisonment, at the discretion of the court, and either fine and imprisonment, in any attempt to evade the payment of any tax hereunder; or for any person to fail or refuse to permit the examination of any book, paper, account, record, or other data by the commissioner or his duly appointed agent, or to refuse to offer testimony or produce any record as required in this article. Any person violating any of the provisions of this section shall be guilty of a misdemeanor, and on conviction thereof shall be fined not more than one thousand dollars ($1,000.00). (1939, c. 158, s. 422.)

§ 105-182. Commissioner to make regulations.—The commissioner shall from time to time promulgate such rules and regulations not inconsistent with this article for making returns and for the ascertainment, assessment, and collection of the tax imposed hereunder as he may deem necessary to enforce its provisions, and any provisions of the section relating to withholding certificates of bona fide corporation until payment of tax levied under this article.

§ 105-183. Commissioner or agent may examine books, etc.—The commissioner, or his authorized agent, may examine books, papers, records, or other data bearing upon the correctness of any return, or for the purpose of making a return where none has been made, as required
by this article, and may require the attendance of any person and take his testimony with respect to any such matter, with power to administer oaths to such person or persons. If any person summoned as a witness shall fail to obey any summons to appear before the commissioner or his authorized agent, or shall refuse to testify or answer any material question or to produce any book, record, paper, or other data when required to do so, such failure or refusal shall be reported to the attorney general or the district solicitor, who shall thereupon institute proceedings in the superior court of the county where such witness resides to compel obedience to any summons of the commissioner, or his authorized agent. Officers who serve summonses or subpoenas, and witnesses attending, shall receive like compensation as officers and witnesses in the superior courts, to be paid from the proper appropriation for the administration of this article. (1939, c. 158, s. 424.)

§ 105-184. Excess payments; refund.—If upon examination of any monthly return made under this article it appears that an amount of tax has been paid in excess of that properly due, then the amount in excess shall be credited against any tax or installment thereof then due from the taxpayer, under any other subsequent monthly return, or shall be refunded to the taxpayer by certificate of over-payment issued by the commissioner to the state auditor, which warrant shall be payable out of any funds appropriated for that purpose. (1939, c. 158, s. 425.)

§ 105-185. Prior rights or actions not affected by this subchapter.—Nothing in this subchapter shall affect or defeat any claim, assessment, appeal, suit, right or cause of action for taxes due, under the Revenue Act of one thousand nine hundred thirty-seven, prior to March 24, 1939, whether such assessment, appeal, suit, claim or action shall have begun before March 24, 1939 or shall thereafter be begun; and the sections of the Revenue Act of one thousand nine hundred thirty-seven, amended or repealed by this subchapter, are expressly continued in full force, effect, and operation for the purpose of assessment and collection of any taxes due under any such laws prior to March 24, 1939, and for the imposition of any penalties, forfeitures, or claims for a failure to comply therewith. (1939, c. 158, s. 426.)

§ 105-186. To prevent unfair trade practices, commissioner of revenue may require tax passed on to consumer.—In order that fair trade practices may be encouraged and any deleterious effect of the retail sales tax levy may be minimized, the commissioner of revenue is empowered and directed to devise, promulgate and enforce regulations under which retail merchants shall collect from the consumers, by rule uniform as to classes of business, the sales tax levied upon their business by this article: Provided, that the commissioner of revenue shall have the power to change the regulations and methods under which the merchants shall collect the tax from the consumers, from time to time, as experience may prove expedient and advisable. Methods for the passing on by merchants to their customers the retail sales tax on sales to said customers may include plans which require both more and less than the prescribed rate of the tax on the sale price, the purpose being to enable the merchants to collect approximately the amount of the tax imposed on their total sales volume. The commissioner of revenue is hereby authorized and empowered to make and adopt rules and regulations requiring merchants to use tokens or stamps, or other means, if found to be practical, which may be determined by the commissioner to provide a method whereby the amount of the tax collected by the merchant from the consumer shall be as nearly as possible the prescribed rate of the tax on each purchase. Such regulations as herein authorized shall be promulgated by the commissioner of revenue to become effective after reasonable notice to the retail merchants and when so promulgated they shall have the full force and effect of law. Any merchant who violates such rules and regulations shall be guilty of a misdemeanor and upon conviction shall be fined not less than five dollars ($5.00) nor more than five hundred dollars ($500.00) or be imprisoned for not more than six months, or be both fined and imprisoned in the discretion of the court: Provided, however, that every such violation shall be a separate offense hereunder. It shall be the duty of the solicitors of the several judicial districts of the state to prosecute violations of this section.

The provisions of this section shall not affect in any manner the character or validity of the sales tax levy as a merchants' license tax, and they may not be pleaded or considered in the event any provision of this subchapter is attacked as unconstitutional. (1939, c. 262.)

Editor's Note.—See 32 N. C. L. Rev. 99, 102, for an article on "Sales Tax and Transactions."

§ 105-187. Tax on building materials.—There is hereby levied and there shall be collected from every person, firm or corporation, an excise tax of three per cent of the purchase price of all tangible personal property purchased or used subsequent to June thirtieth, one thousand nine hundred thirty-nine, to or in excess of that imposed by this section, the sale or use of which has already been subjected to a tax equal to or in excess of that imposed by this section, whether under the laws of this state or of some other state or territory of the United States: Provided, that if the tax imposed on the sale or use of such tangible personal property imposed by other laws on the sale or use of such property is less than the tax imposed by this section, the provisions of this section shall apply, but at a rate measured by the difference between the rate herein fixed and the rate by which the previous tax upon the sale or use of such property was computed: Provided, that the tax upon the use of a single article of merchandise shall be limited as
provided in Schedule E, and shall not apply to

tangible personal property exempt from tax and/or classified, when sold, as wholesale sales under the provisions of Schedule E preceding this section in Schedule E.

(b) In respect to such tangible personal property as shall enter into any building or structure erected or constructed under any contract with the state of North Carolina or any of its agencies or with any county or municipality in North Carolina or any of their agencies.

Every person liable for the tax imposed by this section shall report to the commissioner of revenue and pay the taxes herein levied in accordance with the provisions of Schedule E and insofar as the provisions of said article are appropriate and not inconsistent herewith, shall be liable for all penalties and shall be subject to all of the provisions of said article. The provisions of said article relating to the administration of said sub-chapter, auditing of returns and as to the authority and powers of the commissioner to make rules and regulations for the administration of this section, shall be deemed and taken as a part of this section.

The terms "retail merchant," as used in this sub-section, shall include wholesalers, jobbers, manufacturers, or their agents, selling taxable building materials for use or consumption in this state to others than merchants for resale. (1939, c. 158, Art. 6. Schedule G. Gift Taxes. § 105-188. Gift taxes: classification of beneficiaries; exemptions; rates of tax. — State gift taxes, as hereinafter prescribed, are hereby levied upon the shares of the respective beneficiaries in all property within the jurisdiction of this state, real, personal and mixed, and any interest therein which shall in any one calendar year pass by gift made after March 24, 1939.

The taxes shall apply whether the gift is in trust or otherwise and whether the gift is direct or indirect. In the case of a gift made by a non-resident, the taxes shall apply only if the property is within the jurisdiction of this state. The taxes shall not apply to gifts made prior to March 24, 1939.

The tax shall not apply to the passage of property in trust where the power to revest in the donor title to any property conveyed in trust shall not apply if the property is not being transferred in trust and shall not apply if the property is not being transferred in trust and shall not be subject to any gift taxes.

Gifts to any one donee not exceeding a total value of one thousand dollars ($1,000.00) in any one calendar year shall not be considered gifts taxable under this article, and where gifts are made to any one donee in any one calendar year in excess of one thousand dollars ($1,000.00), only that portion of said gifts exceeding one thousand dollars ($1,000.00) in value shall be subject to the tax levied by this article.

The amount of tax on all gifts made taxable under this article shall be based on the relationship between the donor and donee, and graduated in proportion to the amount of such gifts. The rates of tax shall be as follows:

(a) Where the donee is lineal issue, or lineal ancestor, or husband, or wife of the donor, or child adopted by the donor in conformity with the laws of this state, or of any of the United States, or of any foreign kingdom or nation, or stepchild of the donor, for each one hundred dollars ($100.00) or fraction thereof:

<table>
<thead>
<tr>
<th>Amount</th>
<th>Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Over $ 1,000.00 and to $ 2,000.00</td>
<td>4 per cent</td>
</tr>
<tr>
<td>Over $ 2,000.00 and to $ 5,000.00</td>
<td>6 per cent</td>
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<tr>
<td>Over $ 5,000.00 and to $ 10,000.00</td>
<td>7 per cent</td>
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<tr>
<td>Over $ 10,000.00 and to $ 20,000.00</td>
<td>8 per cent</td>
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<tr>
<td>Over $ 20,000.00 and to $ 50,000.00</td>
<td>9 per cent</td>
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<tr>
<td>Over $ 50,000.00 and to $ 100,000.00</td>
<td>10 per cent</td>
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<tr>
<td>Over $ 100,000.00 and to $ 250,000.00</td>
<td>11 per cent</td>
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<td>Over $ 250,000.00 and to $ 500,000.00</td>
<td>12 per cent</td>
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<td>Over $ 500,000.00 and to $ 1,000,000.00</td>
<td>13 per cent</td>
</tr>
<tr>
<td>Over $ 1,000,000.00 and to $ 2,000,000.00</td>
<td>14 per cent</td>
</tr>
<tr>
<td>Over $ 2,000,000.00 and to $ 2,500,000.00</td>
<td>15 per cent</td>
</tr>
<tr>
<td>Over $ 2,500,000.00 and to $ 5,000,000.00</td>
<td>16 per cent</td>
</tr>
</tbody>
</table>

(b) Where the donee is the brother or sister, or descendant of the brother or sister, or is the uncle or aunt by blood of the donor (for each one hundred dollars ($100.00) or fraction thereof):

<table>
<thead>
<tr>
<th>Amount</th>
<th>Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Over $ 5,000.00 and to $ 10,000.00</td>
<td>4 per cent</td>
</tr>
<tr>
<td>Over $ 10,000.00 and to $ 20,000.00</td>
<td>5 per cent</td>
</tr>
<tr>
<td>Over $ 20,000.00 and to $ 50,000.00</td>
<td>6 per cent</td>
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<tr>
<td>Over $ 50,000.00 and to $ 100,000.00</td>
<td>7 per cent</td>
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<tr>
<td>Over $ 100,000.00 and to $ 250,000.00</td>
<td>8 per cent</td>
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<tr>
<td>Over $ 250,000.00 and to $ 500,000.00</td>
<td>9 per cent</td>
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<td>Over $ 500,000.00 and to $ 1,000,000.00</td>
<td>10 per cent</td>
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<tr>
<td>Over $ 1,000,000.00 and to $ 2,000,000.00</td>
<td>11 per cent</td>
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<tr>
<td>Over $ 2,000,000.00 and to $ 2,500,000.00</td>
<td>12 per cent</td>
</tr>
<tr>
<td>Over $ 2,500,000.00 and to $ 5,000,000.00</td>
<td>13 per cent</td>
</tr>
</tbody>
</table>
§ 105-189
Over $3,000,000 ... 16 per cent

Editor's Note.—The 1943 amendment added to the fourth paragraph the provision relating to gifts exceeding one hundred dollars ($100.00) or fraction thereof:

First $ 10,000 ................. 8 per cent
Over $ 10,000 and to $ 25,000 ... 9 per cent
Over $ 25,000 and to $ 50,000 ... 10 per cent
Over $ 50,000 and to $ 100,000 ... 11 per cent
Over $ 100,000 and to $ 250,000 ... 12 per cent
Over $ 250,000 and to $ 500,000 ... 13 per cent
Over $ 500,000 and to $ 1,000,000 ... 14 per cent
Over $1,000,000 and to $1,500,000 ... 15 per cent
Over $1,500,000 and to $2,500,000 ... 16 per cent
Over $2,500,000 ................ 17 per cent

A donor shall be entitled to a total exemption of twenty-five thousand dollars ($25,000.00) to be deducted from gifts made to donees named in subsections (a) and (b), and (c) of this section, less the sum of amounts claimed and allowed as an exemption in prior calendar years. The exemption, at the option of the donor, may be taken in its entirety in a single year, or may be spread over a period of years. When this exemption has been exhausted, no further exemption is allowable. When the exemption or any portion thereof is applied to gifts to more than one donee in any one calendar year, said exemption shall be apportioned among said gifts in the same ratio as the gross value of the gifts to each donee is to the total value of said gifts in the calendar year in which said gifts are made. No exemption shall be allowed to a donor for gifts made to donees named in subsections (b) and (c) of this section.

It is expressly provided, however, that the tax levied in this article shall not apply to so much of said property as shall so pass exclusively: (1) for state, county or municipal purposes within this state; (2) for charitable, educational, or religious purposes within this state; (3) to or for the exclusive benefit of any institution, association or corporation in this state, the property of which is exempt from taxation by the laws of this state; and (4) to or for the exclusive benefit of charitable, religious and educational corporations, foundations and trusts, not conducted for profit, incorporated or created or administered under the laws of any other state, when such other state levies no gift taxes upon property similarly passing from residents of such state to charitable, educational or religious corporations, foundations and trusts incorporated or created or administered under the laws of this state, or when such corporation, foundation or trust receives and disburses funds donated in this state for religious, charitable and educational purposes. (1939, c. 158, s. 600; 1943, c. 400, s. 7.)

Editor's Note.—The 1943 amendment added to the fourth paragraph the provision relating to gifts exceeding one thousand dollars. It also made changes in the second paragraph of subsection (c) by rewriting the second sentence and inserting the third and fourth sentences, as stated, or for article on gift tax, see 16 N. C. Law Rev. 194. For comment on this enactment, see 17 N. C. Law Rev. 389.

§ 105-189. Transfer for less than adequate and full consideration.— Where property is transferred for less than an adequate and full consideration in money or money's worth, then the amount by which the value of the property exceeded the value of the consideration shall, for the purpose of the tax imposed by this article, be deemed a gift and shall be included in computing the amount of gifts made during the calendar year. (1939, c. 158, s. 601.)

§ 105-190. Gifts made in property.— If the gift is made in property, the fair market value thereof at the date of the gift shall be considered the amount of the gift. (1939, c. 158, s. 602.)

§ 105-191. Manner of determining tax; time of payment; application to department of revenue for correction of assessment.— The tax imposed by this article shall be paid by the donor on or before the fifteenth day of March following the close of the calendar year.

Report of the gifts shall be made by the donor to the state department of revenue on blank forms prepared by the state department of revenue and furnished upon application to any taxpayer, and the amount of tax due shall be paid at the time such report is made. The department of revenue shall audit the returns made under this article, and if it is found that the amount of tax paid is less than the amount lawfully due under the provisions of this article shall forward a statement of the taxes determined to the person or persons primarily chargeable with the payment thereof, such additional taxes to be collected under the same rules and regulations contained in this subchapter for the collection of other taxes, and if an over-payment should be found to have been made, a refund of such over-payment shall be made to the taxpayer. Within one year after the tax has been determined, any person aggrieved by the determination, may apply in writing to the department of revenue, which may make such corrections of the taxes as it may determine proper: Provided, however, that the rejection of the application in whole or in part by the department of revenue shall not prevent any person from applying to the court, as hereinafter provided, for the correction of said taxes. (1939, c. 158, s. 603.)

§ 105-192. Penalties and interest.—In any case where a donor fails to file a return at the proper time, the department of revenue shall assess a penalty of ten per centum (10%) of the tax determined by it, together with interest upon such tax and penalty at the rate of six per centum (6%) per annum from the date when such report should have been filed until the date of the assessment.

If any tax, or any assessment of tax, penalties and interest, or any part thereof, be not paid when due it shall bear interest at six per centum (6%) per annum from the date of assessment until paid. (1939, c. 158, s. 604.)

§ 105-193. Lien for tax; collection of tax.—The tax imposed by this article shall be a lien upon all gifts that constitute the basis for the tax for a period of ten years from the time they are made. If the tax is not paid by the donor when due, each donee shall be personally liable, to the extent of their respective gifts, for so much of the tax as may have been assessed, or may be assessable thereon. Any part of the property comprised in the gift that may have been sold by the donee to a bona fide purchaser for an adequate and full
§ 105-194. Period of limitation upon assessment; assessment upon failure or refusal to file proper return.—Except as provided in the next succeeding paragraph the amount of taxes imposed by this article shall be assessed within three years after the return was filed. In the case of a false or fraudulent return with intent to evade tax or of a failure to file a return the tax may be assessed at any time. If a donor should fail or refuse on demand to file a correct and proper return as required by this article, the department of revenue may make an estimate of the amount of taxes due the state by such donor, and by the respective donees, from any information in its possession, and assess the taxes, penalties and interest due the state by such taxpayers. (1939, c. 158, s. 606.)

§ 105-195. Tax to be assessed upon actual value of property; manner of determining value of annuities, life estates and interests less than absolute interest.—Said taxes shall be assessed upon the actual value of the property at the time of the transfer by gift. In every case where there shall be a gift to take effect in possession or enjoyment after the expiration of one or more life estates, or at any time in the future, the tax shall be assessed on the actual value of the property or the interest of the beneficiary therein at the time when he or she becomes entitled to the same in possession or enjoyment. The value of an annuity or a life interest in such property, or any interest therein less than an absolute interest, shall be determined by the annuity tables provided for by § 8-47, and upon the basis of six per centum (6%) of the gross value of the estate for the period of expectancy of the life tenant or for the period of the duration of said estate, if said estate is other than a life estate, in determining the value of the respective interests. In every case in which it is impossible to compute the present value of any interest in property so passing, the department of revenue may effect such settlement of the tax as it shall deem to be for the best interest of the state, and payment of the same so agreed upon shall be a full satisfaction of such taxes. (1939, c. 158, s. 607; 1943, c. 400, s. 7.)

Cy’ 105-196. Application for relief from taxes assessed; appeal.—A taxpayer may apply to the commissioner of revenue for revision of the tax assessed against him at any time within three years from the time of the filing of the return or from the date of the notice of assessment of any additional tax. The commissioner shall grant a hearing thereon, and if upon such hearing he shall determine that the tax is excessive or incorrect, he shall resettle the same according to law and the facts, and adjust the computation of tax accordingly. The commissioner shall notify the taxpayer of his determination, and shall refund to the taxpayer the amount, if any, paid in excess of the tax found by him to be due. The taxpayer shall have the right of appeal from any assessment, made by the commissioner of revenue in the same manner and form as set out in § 105-168 with respect to income taxes. (1939, c. 158, s. 608.)

§ 105-197. Returns; time of filing; extension of time for filing.—Any person who within the calendar year nineteen hundred thirty-nine, after March 24, 1939, or any calendar year thereafter, makes any gift or gifts taxed by this article shall report in that year, unless required to do so by the department of revenue, on forms provided for that purpose, showing therein an itemized schedule of all such gifts, the name and residence of each donee and the actual value of the gift to each, the relationship of each of such persons to the donor, and any other information which the department of revenue may require. Such returns shall be filed on or before the fifteenth day of March following the close of the calendar year. The department of revenue may grant a reasonable extension of time for filing a report whenever in its judgment good cause exists. (1939, c. 158, s. 609.)

Art. 7. Schedule H. Intangible Personal Property.

§ 105-198. Intangible personal property.—The intangible personal properties enumerated and defined in this article and specified and hereby classified under authority of section three, Article V of the Constitution, and the taxes levied thereon are for the benefit of the state and the political subdivisions of the state as hereinafter provided and said taxes so levied for the benefit of the political subdivisions of the state are levied for and on behalf of said political subdivisions of the state to the same extent and manner as if said levies were made by the governing authorities of the said subdivisions for distribution therein as hereinafter provided. (1939, c. 158, s. 700.)

Editor’s Note.—For comment on this enactment, see 17 N. C. L. Rev. 200.

County Board of Education Denied Recovery of Funds Allocated to Municipality from Intangible Tax.—In Board of Education v. Wilson, 215 N. C. 216, 1 S. E. (2d) 544, it was held that the county board of education was not entitled to recover from municipality funds allocated to it by state from intangible tax provided by this section, even though municipality is in nowise liable for maintenance of constitutional school term, since it could not expend funds as agent of the municipality in discharging the debts of the municipality for school purposes since the municipality had no such debt, nor could it expend such funds for school purposes in any of its districts since there was no district coterminous with the municipal limits and such expenditure would take taxes collected from citizens of the municipality and expend same in part for the benefit of those living outside its limits, and since the act does not provide for distribution of the funds to the county board of education in such cases and such provisions may not be interpreted therein, and since by a proper construction of
§ 105-200. Money on hand.—All money on hand (including money in safe deposit boxes, safes, cash registers, etc.) on December thirty-first of each year, having a business, commercial or taxable situs in this state, shall be subject to an annual tax, which is hereby levied, of twenty-five cents (25c) on every one hundred dollars ($100.00) of the total amount of such money on hand without deduction for any indebtedness or liabilities of the taxpayer. (1939, c. 158, s. 702.)

§ 105-201. Accounts receivable.—All accounts receivable on December thirty-first of each year, having a business, commercial or taxable situs in this state, shall be subject to an annual tax, which is hereby levied, of twenty-five cents (25c) on every one hundred dollars ($100.00) of the face value of such accounts receivable: Provided, that from the face value of such accounts receivable there may be deducted the accounts payable of the taxpayer; provided further, that no deduction in any case shall be allowed under this section any indebtedness of the taxpayer on account of capital outlay, permanent additions to capital or purchase of capital assets. The term "accounts payable" as used in this section shall not include: (a) reserves, secondary liabilities or contingent liabilities except upon satisfactory showing that the taxpayer will actually be compelled to pay the debt or liability; (b) taxes of any kind owing by the taxpayer; (c) debts owed to a corporation of which the taxpayer is parent or subsidiary or with which the taxpayer is closely affiliated by stock ownership or with which the taxpayer is subsidiary of same parent corporation unless the credits created by such debts are listed if so required by law for ad valorem or property taxation; for taxation at the situs of such credits; or (d) debts incurred to purchase assets which are not subject to taxation at the situs of such assets.

From the total face value of accounts receivable returned to this state for taxation by or in behalf of any taxpayer who or which also owns other such accounts receivable as have situs outside of this state, accounts payable of the taxpayer may be deducted only in the proportion which the total face value of accounts receivable taxable under this section bears to the total face value of all accounts receivable of the taxpayer in this state. The term "accounts payable" as used in this section shall be deemed to include current notes payable of the taxpayer incurred to secure funds which have been actually paid on his current accounts payable within one hundred and twenty days prior to the date as of which the intangible tax return is made. (1939, c. 158, s. 703; 1941, c. 50, s. 9.)

Editor's Note.—The 1941 amendment added the paragraph at the end of this section.

For comments on the amendments, see 19 N. C. Law Rev. 539.

§ 105-202. Bonds, notes, and other evidences of debt.—All bonds, notes, demands, claims and other evidences of debt however evidenced, whether secured by mortgage, deed of trust, judgment or otherwise, or not so secured, having a business, commercial or taxable situs in this state on December thirty-first of each year shall be subject to annual tax, which is hereby levied of fifty cents (50c) on every one hundred dollars ($100.00) of the actual value thereof: Provided, that from the
actual value of such bonds, notes, demands, claims and other evidences of debt there may be deducted like evidences of debt owed by the taxpayer on December thirty-first of the same year. The term "like evidences of debt" deductible under this section shall not include: (a) accounts payable; (b) taxes of any kind owing by the taxpayer; (c) reserves, secondary liabilities or contingent liabilities except upon satisfactory showing that the taxpayer will actually be compelled to pay the debt or liability; (d) evidences of debt owed to a corporation of which the taxpayer is parent or subsidiary or with which the taxpayer is closely affiliated by stock ownership or with which the taxpayer is subsidiary of same parent corporation, unless the credits created by such evidences of debt are listed, if so required by law for ad valorem property taxation, for taxation, for tax purposes, and for penalty, interest and other charges due on the evidence of debt sought to be enforced, and the suitor makes it appear to the court that he has paid or is unable to pay said taxes, penalties and interest as might be due, but is willing or the same to be paid out of the first recovery on the evidence of debt sued upon. When in any action at law or suit in equity it is ascertained that there are unpaid taxes, penalties and interest due on the evidence of debt sought to be enforced, the court makes it appear to the court that he has paid or is unable to pay said taxes, penalties and interest, but is willing for the same to be paid out of the first recovery on the evidence of debt, the court shall have authority to enter as a part of any judgment or decretal order in said proceedings that the amount of taxes, penalties and interest due and owing shall be paid to the proper officer out of the first collection on said judgment or decree. The title to real estate heretofore or hereafter sold under a deed of trust shall not be drawn in question upon the ground that the holder of the notes secured by such deed of trust did not list and return the same for taxation as required by this article. (1939, c. 158, s. 704.)

**Judgment Provision as to Payment of Taxes.**—Nonpayment of taxes on a note in suit is nullified by a provision in the judgment on the note that taxes, penalties and interest due shall be paid to the proper officers out of the first collection on the judgment. Roberts v. Grogan, 222 N. C. 30, 21 S. E. (2d) 829.

§ 105-203. Shares of stock. — All shares of stock owned by residents of this state or having business, commercial or taxable situs in this state on December thirty-first of each year, with the exceptions hereinafter provided, shall be subject to an annual tax, which is hereby levied, of thirty cents (30c) on every one hundred dollars ($100.00) of the total fair market value thereof. The tax herein levied shall not apply to shares of stock in banks, banking associations, trust companies or insurance companies not exempted from an income tax under subsection 2(f) of § 105-134, which are otherwise taxed in this state, nor to shares of stock in building and loan associations which pay a tax as levied under § 105-73; nor shall the tax apply to shares of stock in corporations which pay to this state a franchise tax on their entire capital stock, surplus and undivided profits or entire gross receipts as provided under Schedule C, §§ 105-114 to 105-129, together with the tax upon all of the net income, if any, of such corporations as provided under §§ 105-130 to 105-165. With respect to corporations which pay to this state a franchise tax on a part of their capital stock, surplus and undivided profits or part of their gross receipts as provided in Schedule C, §§ 105-114 to 105-129, and a tax upon a part of the net income of such corporations as provided under §§ 105-130 to 105-163, when such income is earned, there shall be exempt so much of the fair market value of such shares of stock as is represented by the percentage of net income on which tax is paid this is.

Indebtedness incurred directly for the purchase of shares of stock may be deducted from the total value of such shares: Provided, the specific shares of stock so purchased are pledged as collateral to secure said indebtedness; provided, further, that only so much of said indebtedness may be deducted as is in the same proportion as the taxable value of said shares of stock is to the total value of said shares of stock. (1939, c. 158, s. 705; 1941, c. 50, s. 8.)

**Editor's Note.**—The 1941 Amendment added the paragraph at the end of this section.

§ 105-204. Beneficial interest in foreign trusts. — The beneficial or equitable interest on December thirty-first of each year of any resident of this state, or of a nonresident having a business, commercial or taxable situs in this state, in any trust, trust fund or trust account (including custodian accounts) held by a foreign fiduciary, shall be subject to an annual tax, which is hereby levied, of thirty cents (30c) on every one hundred dollars ($100.00) of the total actual value thereof. (1939, c. 158, s. 706; 1941, c. 50, s. 8.)

**Editor's Note.**—The 1941 amendment inserted the above in lieu of the former section.

§ 105-205. Funds on deposit with insurance [1062]
companies.—All funds on deposit with insurance companies on December thirty-first of each year, and any such funds on deposit in trust for a resident of this state or having acquired a taxable situs in this state, shall be subject to an annual tax, which is hereby levied, of twenty-five cents (25c) on every one hundred dollars ($100.00) thereof. The term "funds on deposit" as used in this section shall mean all funds accrued or accruing by virtue of the death of the insured or the original maturity of a policy contract where the party or parties entitled to receive such funds might withdraw same at their option upon stipulated notice; provided, that in the determination of the tax liability under this section the first twenty thousand dollars ($20,000.00) of such funds on deposit or paid over to and held by a bank as trustee shall be disregarded where such funds on deposit are payable wholly and exclusively to a widow and/or children of the person deceased whose death created such funds on deposit.

The tax levied in this section shall be paid by the treasurer, cashier or other officer or officers of every insurance company doing business in this state by report and payment to the commissioner of revenue on or before March fifteenth of each year; any taxes so paid as agent for the party or parties entitled to receive such funds shall be recovered from the owners thereof by deduction from the proceeds payable to and held by a bank as trustee on December thirty-first of each year or at such other time as in the ordinary course of business it becomes convenient to make such charge. (1939, c. 158, s. 707; 1941, c. 50, s. 8.)

Editor's Note.—The 1941 amendment inserted the proviso at the end of the first paragraph.

§ 105-206. When taxes due and payable; date lien attaches; non-residents; forms for returns; extensions.—All taxes levied in this article or schedule shall become due and payable on the fifteenth day of March of each year, and the lien of such taxes shall attach annually to all real estate of the taxpayer within this state as of December thirty-first next preceding the date that such taxes become due and payable, regardless of the time at which liability for the tax may arise or the exact amount thereof be determined; and said lien shall continue until such taxes, with any interest, penalty and costs which shall accrue thereon, shall have been paid.

Every person, firm, association, corporation, clerk of court, guardian, trustee, executor, administrator, receiver, assignee for creditors, trustee in bankruptcy or other fiduciary owning or holding any intangible personal properties defined and classified and/or liable for or required to pay any tax levied, in this article or schedule, either as principal or agent, shall make and file with the commissioner of revenue in such form as he may prescribe a full, accurate and complete return of such tax liability; such return, together with the total amount of tax due, shall be filed on or before the fifteenth day of March in each year.

For the purpose of protecting the revenue of this state and to avoid discrimination and prevent evasion of the tax imposed by this article, every resident or nonresident person, firm, association, trustee or corporation, foreign or domestic, engaged in this state, either as principal or as agent or representative of or on behalf of another, in buying, selling, collecting, discounting, negotiating or otherwise dealing in or handling any of the intangible property defined in this article, shall be deemed to be doing business in this state for the purposes of this article, and the principal, superior or person on whose behalf such business is carried on in this state shall likewise be deemed to be doing business in this state, for the purpose of this article, and where such business is carried on in this state by a corporation, foreign or domestic, its parent corporation or the corporation which substantially owns or controls it, by stock ownership or otherwise, shall be deemed to be doing business in this state, for the purpose of this article, and in all such cases the said intangible property acquired in the conduct of such business in this state, and outstanding on December 31 of each year, shall be deemed to have a situs in this state subject to the tax imposed by this article, notwithstanding any transfer between any of such parties and notwithstanding that the same may be kept or may then be outside of this state, and any of the intangible property defined in this article and acquired in the conduct of any business carried on in this state, and/or having a business, commercial or taxable situs in this state, shall be subject to said tax and returned for taxation by the owner thereof or by the agent, person, the corporation, or the fiduciary owning or acquiring such property or holding such property, and the owner to handle or collect the same.

The commissioner of revenue shall cause to be prepared blank forms for said returns and shall cause them to be distributed throughout the state, and to be furnished upon application; but failure to receive or secure form shall not relieve any taxpayer from the obligation of making full and complete return of intangible personal properties as provided in this article or schedule.

The return required by this article or schedule shall be due on or before the date specified unless written application for extension of time in which to file, containing reasons therefor, is made to the commissioner of revenue on or before due date of return. The commissioner of revenue for good cause may extend the time for filing any such return, provided interest at the rate of six per cent (6%) per annum from due date of return is paid upon the total amount of tax due. (1939, c. 158, s. 708; 1941, c. 50, s. 8.)

Editor's Note.—The 1941 amendment rewrote the third paragraph of this section.

§ 105-207. Penalties; unlawful to refuse to make returns.—If any taxpayer, without intent to evade any tax imposed by this article or schedule, shall fail to file a return and pay the tax, if any be due, at the time required by or under the provisions of this article or schedule, who shall not voluntarily file a complete and correct return and pay the tax due within sixty days after due date, there shall be added to the tax an additional amount equal to five per cent (5%) thereof, said additional amount in no case to be less than one dollar ($1.00), together with interest at the rate of one-half of one per cent (½ of 1%) per month or fraction thereof from the time said return was required to be filed until paid.

If any taxpayer fails voluntarily to file a return and/or pay the tax, if any be due, within sixty days after due date as required by this article or schedule, there shall be added to the tax an addi-
If any taxpayer who has failed to file a return or has filed an incorrect or insufficient return, and who has been notified by the commissioner of revenue of such delinquency, refuses or neglects within thirty days after such notice to file a proper return, the commissioner of revenue shall determine the tax liability of such taxpayer, according to his best information and belief, and shall assess the same at double the amount so determined plus the penalties and interest provided in this section for failure voluntarily to file return within sixty days after due date; the assessment so made by the commissioner of revenue shall be prima facie correct.

It shall be unlawful for any person to fail or refuse to make the return provided for in this article or schedule, or to make any false or fraudulent return or false statement in any return of the tax, or any part thereof, imposed by this article; or for any person to aid or abet another in any attempt to evade the payment of the tax, or any part thereof, imposed by this article; or for the president, vice-president, secretary, or treasurer of any company to make or permit to be made for any company or association any false return, or any false statement in any return required by this article, with the intent to evade the payment of any tax hereunder; or for any person to fail or refuse to permit the examination of any book, paper, account, record, or other data by the commissioner of revenue or his duly appointed agent, or to refuse to offer testimony or produce any record as required. Any person violating any of the provisions of this section shall be guilty of a misdemeanor, and on conviction thereof shall be fined not more than five hundred dollars ($500.00) or imprisoned not exceeding six months, or punished by both such fine and imprisonment, at the discretion of the court within the limitations aforesaid. In addition to the foregoing penalties, any person who shall knowingly swear to or verify any false or fraudulent statement, with the intent aforesaid, shall be guilty of the offense of perjury, and, on conviction thereof, shall be punished in the manner provided by law for the offense of perjury. Any company for which a false return shall be made or a return containing a false statement as aforesaid, shall be guilty of a misdemeanor, and may be punished by a fine of not more than one thousand dollars ($1,000.00). (1939, c. 158, s. 709.)

§ 105-209. Information from the source; commissioner of revenue empowered to make regulations.—In addition to the other requirements of this article or schedule it shall be the duty of every domestic corporation and every foreign corporation doing business and/or owning property in this state, the shares of stock and bonds of which are subject to tax under the provisions of this article or schedule it shall be the duty of the commissioner of revenue empowered to make regulations. Any company or association any false return, or any portion thereof, has not been assessed, he may, at any time within three years after the time when the return was due, give notice in writing to the commissioner of such deficiency. Any taxpayer feeling aggrieved by such proposed assessment shall be entitled to a hearing before the commissioner of revenue, if within thirty days after giving notice of such proposed assessment he shall apply for such hearing in writing, explaining in detail his objections to same. If no request for such hearing is so made, such proposed assessment shall be final and conclusive. If the request for hearing is made, the taxpayer shall be heard by the commissioner of revenue, and after such hearing the commissioner of revenue shall render his decision. The taxpayer shall be advised of his decision and such amount shall be due within ten days after notice is given. The provisions of this article with respect to revision and appeal shall apply to the tax so assessed. The limitation of three years to the assessment of such tax or an additional tax shall not apply to the assessment of additional taxes upon fraudulent returns nor upon failure to file returns. (1939, c. 158, s. 710.)

§ 105-208. Examination of returns; additional taxes.—As soon as practicable after the return is filed the commissioner of revenue shall examine same together with any other facts within his knowledge, and shall compute the tax, and the amount so computed shall be the tax. If the tax found due shall be greater than the amount theretofore paid, the deficiency shall be paid to the commissioner of revenue within thirty days after date of notice to the taxpayer of such deficiency, and any over-payment of tax shall be returned to the taxpayer within thirty days after it is ascertained.

If the return is made in good faith and the under-statement of the tax is not due to any fault of the taxpayer, there shall be no penalty or additional tax added because of such under-statement, but interest shall be added to the amount of the deficiency at the rate of six per cent (6%) per annum until paid. If the under-statement is due to negligence on the part of the taxpayer, but without intent to defraud, there shall be added to the amount of the deficiency five per cent (5%) thereof, together with interest at the rate of six per cent (6%) per annum until paid. If the under-statement is found by the commissioner of revenue to be false or fraudulent, with intent to evade the tax, any additional tax found to be due and payable shall be doubled together with interest at the rate of six per cent (6%) per annum upon the total amount of tax so found. The interest provided for in this section shall in all cases be computed from the date the tax was originally due to the date of payment.

If the commissioner of revenue discovers from the examination of the return or otherwise that the intangible personal property of any taxpayer, or any portion thereof, has not been assessed, he may, at any time within three years after the time when the return was due, give notice in writing to the taxpayer of such deficiency. Any taxpayer feeling aggrieved by such proposed assessment shall be entitled to a hearing before the commissioner of revenue, if within thirty days after giving notice of such proposed assessment he shall apply for such hearing in writing, explaining in detail his objections to same. If no request for such hearing is so made, such proposed assessment shall be final and conclusive. If the request for hearing is made, the taxpayer shall be heard by the commissioner of revenue, and after such hearing the commissioner of revenue shall render his decision. The taxpayer shall be advised of his decision and such amount shall be due within ten days after notice is given. The provisions of this article with respect to revision and appeal shall apply to the tax so assessed. The limitation of three years to the assessment of such tax or an additional tax shall not apply to the assessment of additional taxes upon fraudulent returns nor upon failure to file returns. (1939, c. 158, s. 710.)

§ 105-207. Examination of returns; additional taxes.—As soon as practicable after the return is filed the commissioner of revenue shall examine the same together with any other facts within his knowledge, and shall compute the tax, and the amount so computed shall be the tax. If the tax found due shall be greater than the amount theretofore paid, the deficiency shall be paid to the commissioner of revenue within thirty days after date of notice to the taxpayer of such deficiency, and any over-payment of tax shall be returned to the taxpayer within thirty days after it is ascertained.

If the return is made in good faith and the under-statement of the tax is not due to any fault of the taxpayer, there shall be no penalty or additional tax added because of such under-statement, but interest shall be added to the amount of the deficiency at the rate of six per cent (6%) per annum until paid. If the under-statement is due to negligence on the part of the taxpayer, but without intent to defraud, there shall be added to the amount of the deficiency five per cent (5%) thereof, together with interest at the rate of six per cent (6%) per annum until paid. If the under-statement is found by the commissioner of revenue to be false or fraudulent, with intent to evade the tax, any additional tax found to be due and payable shall be doubled together with interest at the rate of six per cent (6%) per annum upon the total amount of tax so found. The interest provided for in this section shall in all cases be computed from the date the tax was originally due to the date of payment.

If the commissioner of revenue discovers from the examination of the return or otherwise that the intangible personal property of any taxpayer, or any portion thereof, has not been assessed, he may, at any time within three years after the time when the return was due, give notice in writing to the taxpayer of such deficiency. Any taxpayer feeling aggrieved by such proposed assessment shall be entitled to a hearing before the commissioner of revenue, if within thirty days after giving notice of such proposed assessment he shall apply for such hearing in writing, explaining in detail his objections to same. If no request for such hearing is so made, such proposed assessment shall be final and conclusive. If the request for hearing is made, the taxpayer shall be heard by the commissioner of revenue, and after such hearing the commissioner of revenue shall render his decision. The taxpayer shall be advised of his decision and such amount shall be due within ten days after notice is given. The provisions of this article with respect to revision and appeal shall apply to the tax so assessed. The limitation of three years to the assessment of such tax or an additional tax shall not apply to the assessment of additional taxes upon fraudulent returns nor upon failure to file returns. (1939, c. 158, s. 710.)
§ 105-210. Moneyed capital coming into competition with the business of national banks.—On all moneyed capital coming into competition with the business of national banks located in this state at the place of residence of such national banks, less deduction of real estate otherwise taxed in this state, to the same extent and under the same corresponding conditions as this deduction is allowed in the assessment of such shares of stock of national banks located in this state: Provided, That bonds, notes or other evidences of indebtedness in the hands of individual citizens not employed or engaged in the banking or investment business and representing merely personal investments not made in competition with such business shall not be deemed moneyed capital within the meaning of this section. (1939, c. 158, s. 712.)

§ 105-211. Conversion of intangible personal property to evade taxation not to defeat assessment and collection of proper taxes; taxpayer's protection.—Any taxpayer who shall, for the purpose of evading taxation under the provisions of this article or schedule, within thirty days prior to December thirty-first of any year, either directly or indirectly, convert any intangible personal property taxable under the provisions of this article or schedule, or with like intent shall, either directly or indirectly, convert such intangible personal property into a class of property which is taxable in this state at a lower rate than the intangible personal property so converted, shall be taxable on such intangible personal property as if such conversion had not taken place; the fact that such taxpayer within thirty days after December thirty-first of any year, either directly or indirectly, converts such property non-taxable in this state taxable in this state at a lower rate than the intangible personal property taxable at the higher rate shall be prima facie evidence of intent to evade taxation by this state, and the burden of proof shall be upon such taxpayer to show that the first conversion was for a bona fide purpose of investment and not for the purpose of evading taxation by this state.

Taxpayers making a complete return on or before March fifteenth of each year of all their holdings of intangible personal property as provided by this article or schedule (or by similar provisions of prior Revenue Act) shall not thereafter be held liable for failure to list such intangible personal property with the local taxing units of this state in previous years; the taxes levied in this article or schedule shall be in lieu of all other property taxes in this state on such intangible personal property. (1939, c. 158, s. 713.)

§ 105-212. Institutions exempted; conditional exemptions.—None of the taxes levied in this article or schedule shall apply to religious, educational, charitable or benevolent organizations not conducted for profit, nor to any funds held irrevocably in trust exclusively for the maintenance and care of places of burial; insurance companies reporting premiums to the insurance commissioner of this state and paying a tax thereon under the provisions of § 105-121 shall not be subject to the provisions of §§ 105-201, 105-202 and 105-203; and only to the extent, specifically mentioned, and no other.

A clerk of any court of this state may, upon written application therefor, obtain from the commissioner of revenue a certificate relieving the depository bank of such clerk from the duty of collecting the tax levied in this article or schedule from deposits of said clerk: Provided, That such clerk of court shall be liable under his official bond for the full and proper remittance to the commissioner of revenue under the provisions of this article or schedule of taxes due on any deposits so handled. (1939, c. 158, s. 714; 1943, c. 400, s. 8.)

Editor's Note.—The 1943 amendment inserted the provision relating to state credit unions.

§ 105-213. Separate records by counties; disposition and distribution of taxes collected; purpose of tax.—The commissioner of revenue shall keep a separate record by counties of taxes collected under the provisions of this article or schedule, and shall not later than the twentieth day of July of each year submit to the state board of assessment an accurate account of such taxes collected during the fiscal year ending June thirtieth next preceding, showing separately by sections the total collections less refunds in each county of the state. The state board of assessment shall examine such reports and, if found to be correct, shall certify a copy of same to the state auditor and state treasurer. Twenty-five per cent (25%) of the amounts collected under the provisions of this article or schedule shall be retained by the state for use in the maintenance and operation of the public school system of the state, and seventy-five per cent (75%) of such revenue shall be distributed to the counties and municipalities of the state on the following basis: The amount distributable to each county and to the municipalities therein from the revenue collected under §§ 105-200, 105-201, 105-202 to 105-204 shall be determined upon the basis of the amounts collected in each county; the amount distributable to each county and to the municipali-
ties therein from the revenue collected under §§ 103-199 and 105-205 shall be determined upon the basis of population in each county as shown by the latest federal decennial census. The amounts so allocated to each county shall in turn be divided between the county and all municipalities therein in proportion to the total amount of ad valorem taxes levied by each during the fiscal year preceding such distribution. Upon certification by the state board of assessment of the allocations herein provided for, it shall be the duty of the state auditor to issue a warrant on the state treasurer to provide for, it shall be the duty of the state auditor to issue a warrant on the state treasurer to receive said allotment. (1939, c. 158, s. 715; 1941, c. 50, s. 8.)

Editor's Note.—The 1941 amendment changed the percentages in the last sentence of the first paragraph from "forty" and "sixty" to "twenty-five" and "seventy-five," respectively.

§ 105-214. Provision for administration. — For the administration of this article or schedule an appropriation is hereby made for the use of the department of revenue in addition to the appropriation in the Appropriation Act of a sum equal to four per cent (4%) of the total revenues collected under this article to be expended under allotments made by the director of the budget of such part of the whole appropriation as may be found necessary for the administration of this article.

The director of the budget may make estimates of the yield of revenue under this article and make advance appropriations based upon such estimate and to provide for the necessary expense of providing materials, supplies and other needful expenses to be incurred prior to the actual collection of taxes made under and by virtue of this article or schedule. The director of the budget may make such advance allotments from such estimates of revenue yield as he may find proper for the convenient and efficient administration of this article.

Out of the amounts which may become due and payable to the counties and municipalities there shall be deducted pro rata the cost of collection, enforcement and administration as determined by the director of the budget. (1939, c. 158, s. 716.)

§ 105-215. Unconstitutionality or invalidity; interpretation; repeal.—If any clause, sentence, paragraph, or part of this article or schedule shall for any reason be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder of this article or schedule, but shall be confined in its operation to the clause, sentence, paragraph, or part thereof directly involved in the controversy in which such judgment shall have been rendered. No caption of any section or set of sections shall in any way affect the interpretation of this act or any part thereof. All acts and parts of acts inconsistent with the provisions of this article or schedule are specifically hereby repealed. (1939, c. 158, s. 717.)

§ 105-216. Reversion to local units in case of invalidity.—If any clause, sentence, paragraph, or part of this article or schedule shall for any reason be adjudged by any court of competent jurisdiction to be invalid, and if by virtue of said judgment any one or all of the several taxes classified and levied in this article or schedule is/are held invalid, then the particular class or classes of intangible personal property affected by said judgment shall become subject to listing, assessment and taxation by the county, municipality, and other taxing jurisdictions in which said intangible personal property has situs in the same manner and at the same rates as applicable to real estate and other tangible properties: provided, that in such case said listing, assessment and taxation of such intangible personal property by said local taxing units shall become valid and effective as of the tax listing date next preceding March 24, 1939, and shall continue thereafter with full force and effect as if such properties were made taxable by the local taxing units by direct statutory enactment. (1939, c. 158, s. 718.)

§ 105-217. Power of attorney.—The commissioner of revenue shall have authority to require a proper power of attorney of each and every agent for any taxpayer under this article or schedule. (1939, c. 158, s. 719.)

Art. 8. Schedule I. Compensating Use Tax.

§ 105-218. Short title.—This article shall be known and may be cited as the "Compensating Use Tax Article." (1939, c. 158, s. 800; 1941, c. 50, s. 9.)

Editors Note.—The 1941 amendment struck out this article and inserted in lieu thereof the present article, effective January 1, 1941. The former enactment provided that the former article, designated the "Compensation Use Tax Article of 1939," shall be and continue in full force and effect with respect to all acts and transactions done or occurring prior to July 1, 1941, or which ought to be affected by its terms and provisions, and with respect to all liabilities, criminal as well as civil, incurred, or which ought to have been incurred with respect to said acts and transactions done or occurring prior to July 1, 1941.

For comment on the 1939 enactment, see 17 N. C. Law Rev. 386.

§ 105-219. Definitions.—The following words, terms, and phrases when used in this article have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning:

(a) "Storage" means and includes any keeping or retention of possession in this state for any purpose except sale in the regular course of business of tangible personal property purchased from a retailer.

(b) "Use" means and includes the exercise of any right or power by a person or property over tangible personal property by a purchaser thereof and includes, but is not limited to, any withdrawal from storage, installation, affixation to real or per-
ownership is ultimately to pass notwithstanding any transfer of title or possession, or both, except as provided in this subsection shall not apply to the lease or rental of motion picture films used for exhibition purposes and for which a tax of three per cent is paid on the total admission for such exhibitions.

"Purchase" means the buying of, giving an order for, or offering to buy tangible personal property as a result of which there occurs a sale or delivery of tangible personal property by a retailer to a person for the purpose of storage, use, or consumption in this state, and includes the procuring, rental to a retailer to erect, install, or apply tangible personal property for use in this state.

"Sales price" means the total amount for which tangible personal property is sold, including all cost of transportation or delivery to the purchaser, whether paid by the purchaser to the retailer or to the carrier, and any services that are a part of the sale, valued in money, whether paid in money or otherwise, and includes any amount for which credit is given to the purchaser by the seller, without any deduction therefrom on account of the cost of the property sold, the cost of materials used, labor or service cost, interest charged, losses, or any other expenses whatsoever: Provided, however, that the cost for labor or services rendered in erecting, installing, or applying property sold shall not be included as a part of the sales price: Provided, further, that where a manufacturer, producer or contractor erects, installs, or applies tangible personal property for the account of or under contract with the owner of realty or other property, the sales price shall be the fair market value of such property at the time and place of sale.

"Person" means and includes any individual, firm, partnership, joint adventure, association, corporation, estate, trust, business trust, receiver, syndicate, or any other group or combination acting as a unit, and the plural as well as the singular number.

"Retailer" means and includes every person engaged in the business of making sales of tangible personal property, or peddling the same, or soliciting or taking orders for sales, whether for immediate or future delivery, for storage, use or consumption in this state, and every manufacturer, producer, or contractor engaged in business in this state and selling, delivering, erecting, installing, or applying tangible personal property for use in this state notwithstanding that said property may be permanently affixed to a building or to realty or to other tangible personal property: Provided, however, that when in the opinion of the commissioner it is necessary for the efficient administration of this article to regard any salesmen, solicitors, representatives, consignees, peddlers, or canvassers as agents of the dealers, distributors, consignors, supervisors, principals or employers under whom they operate or from whom they obtain the tangible personal property sold by them, irrespective of whether they are making sales on their own behalf or on behalf of such dealers, distributors, consignors, supervisors, principals, or employers, the commissioner may so regard them and may regard the dealers, distributors, consignors, supervisors, principals, or employers as retailers for purposes of this article.

"Commissioner" means commissioner of revenue of the state of North Carolina.

"Tangible personal property" means personal property which may be seen, weighed, measured, felt, touched, or is in any other manner perceptible to the senses, but shall not include electricity, gas or water delivered by or through main lines or pipes either for commercial or domestic use or consumption.

"Engaged in business in this state" shall mean the selling or delivering in this state or any activity in this state in connection with the selling or delivering in this state of tangible personal property for use or consumption.

"In this state" or "in the state" means within the exterior limits of the state of North Carolina, and includes all territory within such limits owned by or ceded to the United States of America. (1939, c. 158, s. 801; 1941, c. 50, s. 9.)
posed by this article, and the liability shall not be extinguished until the tax has been paid to this state: Provided, however, that a receipt from a registered retailer engaged in business in this state given to the purchaser in accordance with the provisions of this article shall be prima facie sufficient to relieve the purchaser from further liability for the tax to which such receipt may refer, and the liability of the purchaser shall be extinguished upon payment of the tax by any retailer from whom he has purchased said property.

The maximum tax imposed upon any single article of tangible personal property shall be limited as provided in § 105-168. (1939, c. 158, s. 805; 1941, c. 50, s. 9.)

§ 105-221. Exemptions.—The storage, use or consumption in this state of the following tangible personal property is hereby specifically exempted from the tax imposed by this article:

(a) Tangible personal property expressly specified and exempted from the retail sales tax imposed by Schedule E, §§ 105-164 to 105-187.

(b) Tangible personal property, the sale of which is classified as a wholesale sale under the provisions of Schedule E.

(c) Tangible personal property, the storage, use or consumption of which is exempt from taxation under the Constitution of North Carolina and the Constitution of the United States.

(d) Motor fuels defined and taxed in subchapter V, as now or hereafter amended or supplemented, and upon which the said gasoline tax has been paid.

(e) Tangible personal property purchased or acquired prior to coming into this state and brought into this state by a person a nonresident thereof for his, her, its or their own use or enjoyment while temporarily in this state. (1939, c. 158, s. 803; 1941, c. 50, s. 9.)

§ 105-222. Registration. — Every retailer, engaged in business in this state, except those registered under Schedule E, §§ 105-164 to 105-187, who shall thereby be deemed to be registered under this article, selling or delivering tangible personal property for storage, use or consumption in this state shall within thirty days after July 1, 1941, register with the commissioner and give the name and address of agents operating in this state and the counties in this state in which they operate, the location of any and all distribution or sales houses or offices or other places of business in this state, the number, location and place of use of all motor vehicles, motorcycles, or other vehicles or conveyances, used or operated in this state by said retailer or in the business of said retailer, or for or under the authority of or under contract with or by license from said retailer, and such other information as the commissioner may require. (1939, c. 158, s. 804; 1941, c. 50, s. 9.)

§ 105-223. Retailer to collect tax from purchaser.—Every retailer engaged in the business of selling, or delivering tangible personal property for storage, use, or consumption in this state shall at the time of selling or delivering said tangible personal property or collecting the sales price thereof, add to the sales price of such tangible personal property the amount of the tax on the sale thereof, and when so added said tax shall constitute a part of such price, shall be a debt from the purchaser to the retailer until paid, and shall be recoverable at law in the same manner as other debts. Said tax shall be stated and charged separately from the sales price and shown separately on the retailer's sales records, and shall be paid by the purchaser to the retailer as trustee for and on account of the state, and the retailer shall be liable for the collection thereof and for its payment to the commissioner, and the retailer's failure to charge to or collect said tax from the purchaser shall not affect such liability. It is the purpose and intent of this article that the tax herein levied and imposed shall be added to the sales price of tangible personal property when sold at retail and thereby be borne and passed on to the purchaser instead of being absorbed by the retailer.

Any retailer who shall by any character of public advertisement offer to absorb the tax levied in this article, or in any manner, directly or indirectly, advertise that the tax herein imposed is not considered or required to be added in the price to the purchaser, shall be guilty of a misdemeanor. Any violations of the provisions of this section reported to the commissioner of revenue shall be reported by him to the attorney general of the state to the end that such violations may be brought to the attention of the solicitor of the court of the county or district whose duty it is to prosecute misdemeanors in the jurisdiction. It shall be the duty of such solicitor to investigate such alleged violations and if he finds that this section has been violated, prosecute such violators in accordance with the law.

Every retailer engaged in business in this state, as defined in this article, shall collect said tax notwithstanding (a) that the purchaser's order or the contract of sale is delivered, mailed, or otherwise transmitted by the purchaser to the retailer at a point outside of this state as a result of solicitation by the retailer through the medium of a catalog or other written advertisement, or (b) that the purchaser's order or the contract of sale is made or closed by acceptance or approval outside of this state or before said tangible personal property enters this state, or (c) that the purchaser's order or the contract of sale provides that said property shall be, or it is in fact, procured or manufactured at a point outside of this state and shipped directly to the purchaser from the point of origin, or (d) that said property is mailed to the purchaser in this state from a point outside this state or delivered to a carrier at a point outside this state, f.o.b., or otherwise, and directed to the purchaser in this state, regardless of whether the cost of transportation is paid by the retailer or by the purchaser, or (e) that said property is delivered directly to the purchaser at a point outside this state, if it is intended to be brought to this state for storage, use, or consumption in this state: Provided, that in the event of direct delivery to the purchaser at a point outside of this state the tax imposed by this article shall be credited with any retail sales tax lawfully imposed and paid with respect to said property in the state where such delivery occurred, or (f) any combination, in whole or in part, of any two or more of the foregoing statements of fact. (1939, c. 158, s. 805; 1941, c. 50, s. 9; 1941, c. 204, s. 1.)
§ 105-224. Taxes payable; when returns are to be filed by retailer.—The tax imposed by this article shall be due and payable to the commissioner monthly on or before the fifteenth day of the month next succeeding the month in which the tax accrues. Every retailer engaged in business in this state shall, on or before the fifteenth day of the month following the month in which the tax accrues, file with the commissioner a return for the preceding month, in such form as may be prescribed by the commissioner, showing the total sales price of the tangible personal property sold and/or delivered by the retailer during such preceding month, the storage, use or consumption of which is subject to the tax imposed by this article, and such other information as the commissioner may deem necessary for the proper administration of this article. The return shall be accompanied by a remittance of the amount of tax herein required to be paid by the retailer during the month covered by the return. Returns shall be signed by the retailer or his duly authorized agent but need not be verified by oath. (1939, c. 158, s. 807; 1941, c. 50, s. 9.)

§ 105-225. Taxes payable; when returns are to be filed by purchaser.—The commissioner of revenue shall have authority to require every person storing, using or consuming tangible personal property in this state to file with the commissioner a return for the preceding month in such form as may be prescribed by him showing the total sales price of the tangible personal property purchased or received by such person during such preceding month, the storage, use or consumption of which is subject to the tax imposed by this article, and such other information as the commissioner may deem necessary for the proper administration of this article. The return shall be accompanied by a remittance of the amount of tax herein required to be paid by the retailer during the month covered by the return. Returns shall be signed by the person liable for the tax or his duly authorized agent but need not be verified by oath.

No return or report shall be required under this section, however, of any person storing, using or consuming tangible personal property purchased from a registered retailer engaged in business in this state to whom said person has paid the tax imposed by this article. (1939, c. 158, s. 808; 1941, c. 50, s. 9.)

§ 105-226. Sales presumed to be for storage, use or consumption.—For the purpose of the proper administration of this article and to prevent evasion of the tax and the duty to pay the same herein imposed, it shall be prima facie presumed that tangible personal property sold by any person for delivery in this state, however made and by carrier or otherwise, is sold for storage, use or other consumption in this state, and a like presumption shall apply to tangible personal property delivered without this state and brought to this state by the purchaser thereof. (1939, c. 158, s. 809; 1941, c. 50, s. 9.)

§ 105-227. Provisions of other articles applicable.—All provisions not inconsistent with this article in Schedule E, §§ 105-164 to 105-174, and Schedule J, §§ 105-229 to 105-269, relating to administration, auditing, and making returns, promulgation of rules and regulations by the commissioner, imposition and collection of tax and the lien therefor, assessments, refunds, and penalties, are hereby made a part of this article and shall be applicable hereto. (1939, c. 158, s. 810; 1941, c. 50, s. 9.)

§ 105-228. Failure to register and file returns misdemeanor.—Any retailer failing or refusing to register and give the information required in this article, and any retailer or other person failing or refusing to make any return required to be made under this article, or failing or refusing to make a supplemental return or to furnish other data or information required by the commissioner, or rendering a false or fraudulent return, shall be guilty of a misdemeanor and subject to a fine of not exceeding five hundred dollars ($500.00) for each such offense.

Any person required by this article to make, render or sign any return or report or to furnish other data or information, who makes any false or fraudulent return or report, or who furnishes any false data or information, with intent to defeat or evade the assessment or determination of any tax due under this article, shall be guilty of a misdemeanor and shall for each such offense be fined not less than three hundred dollars ($300.00) and not more than five thousand dollars ($5,000.00) or be imprisoned not exceeding one year in the county jail and/or be subject to imprisonment in the discretion of the court.

Any willful violation of the provisions of this article, except as otherwise herein provided, shall be a misdemeanor and punishable as such. (1939, c. 168, s. 811; 1941, c. 50, s. 9.)

Art. 8A. Schedule I-A. Gross Earnings Taxes in Lieu of Ad Valorem Taxes

§ 105-228.1. Defining taxes levied and assessed in this article.—The purpose of this article is to levy a fair and equal tax under authority of article V, section three of the constitution of North Carolina and to provide a practical means for ascertaining and collecting it. The taxes levied and assessed in this article shall be upon the gross earnings as defined in the article, and shall be in lieu of ad valorem taxes upon the properties of individuals, firms, or corporations so taxed herein. (1943, c. 400, s. 8.)

§ 105-228.2. Tax upon freight car line companies.—(1) For purposes of taxation under this section the property of freight line companies as defined is declared to constitute a special class of property. In lieu of all ad valorem taxes by either or both the state government and the respective local taxing jurisdictions, a tax upon gross earnings in the state as elsewhere defined shall be imposed.

(2) Any person or persons, joint stock association or corporation, wherever organized or incorporated, engaged in the business of operating cars or engaged in the business of furnishing or leasing cars not otherwise listed for taxation in this state, for the transportation of freight (whether such cars be owned by such company or any other person or company), over any railway or lines, in whole or in part, within this state, such line or
lines not being owned, leased or operated by such company, whether such cars be termed box, flat, coal, ore, tank, stock, gondola, furniture, or refrigerating car, or by some other name, shall be deemed a freight line company.

(3) For the purposes of taxation under this section all cars used exclusively within the state, or used partially within and without the state, and a proportionate part of the intangible values of the business as a going concern, are hereby declared to have situs in this state.

(4) Every freight line company, as hereinbefore defined, shall pay annually a sum in the nature of a tax at three per centum upon the total gross earnings received from all sources by such freight line companies within the state, which shall be in lieu of all ad valorem taxes in this state of any freight company so paying the same.

(5) The term "gross earnings received from all sources by such freight line companies within the state" as used in this article is hereby declared and shall be construed to mean all earnings from the operation of freight cars within the state for all car movements or business beginning and ending within the state and a proportion, based upon the proportion of car mileage within the state to the total car mileage, or earnings on all interstate car movements or business passing through, or into or out of the state.

(6) Every railroad company using or leasing the cars of any freight line company shall, upon making payment to such freight line company for the use or lease, after June thirtieth, one thousand nine hundred and forty-three, of such cars with or without the use or lease, after June thirtieth, one thousand nine hundred and forty-three, or as a foreign corporation domesticated in or doing business in this state, or owning and using a part or all of its capital or plant in this state, fails or neglects to make any such report or return required to file a report under any of the provisions of Schedules B and C of this subchapter fails, refuses, or neglects to make such report or fail to remit the amount so withheld. If any railroad company shall fail to pay the tax levied herein when due a penalty of ten (10%) per cent thereof shall immediately accrue and thereafter one (1%) per cent per month shall be added to such tax and penalty while such tax remains unpaid. All provisions of laws for enforcing payment of taxes levied in this article shall be applicable to the gross earnings taxes of freight line companies. Any freight line company against which a tax is assessed under the provisions of this article may appear and defend in any action brought for the collection of such tax.

(10) The provisions of this article shall apply to all freight line gross earnings accruing from and after June thirtieth, one thousand nine hundred and forty-three. (1943, c. 400, s. 8.)

Art. 9. Schedule J. General Administration—Penalties and Remedies.

§ 105-229. Failure of person, firm, corporation, public utility and/or public service corporation to file report.—If any person, firm, or corporation required to file a report under any of the provisions of Schedules B and C of this subchapter fails, refuses, or neglects to make such report as required herein within the time limited in said schedule for making such report he or it shall pay a penalty of ten dollars ($10.00) for each day's omission. (1939, c. 158, s. 900.)

§ 105-230. Charter canceled for failure to report.—If a corporation required by the provisions of this subchapter to file any report or return or to pay any tax or fee, either as a public utility (not as an agency of interstate commerce) or as a corporation incorporated under the laws of this state, or as a foreign corporation domesticated in or doing business in this state, or owning and using a part or all of its capital or plant in this state, fails or neglects to make any such report or return or to pay any such tax or fee for ninety days after the time prescribed in this subchapter for making such report or return, or for paying such tax or fee, the commissioner of revenue shall certify such fact to the secretary of state. The secretary of state shall thereupon suspend the articles of incorporation of any such corporation which is inc...
corporated under the laws of this state by appropriate entry upon the records of his office, or suspend the certificate of authority of any such foreign corporation to do business in this state by proper entry. Thereupon all the powers, privileges, and franchises conferred upon such corporation by such articles of incorporation or by such certificate of authority shall, cease and determine. The secretary of state shall immediately notify by registered mail every such domestic or foreign corporation of the action taken by him, and also shall immediately certify such suspension to the clerk of superior court of the county in which the principal office or place of business of such corporation is located in this state with instructions to said clerk, and it shall be the clerk's duty, to make appropriate entry upon the records of his office indicating suspension of the corporate powers of the corporation in question. (1939, c. 158, s. 901.)

§ 105-231. Penalty for exercising corporate functions after cancellation or suspension of charter.—Any person, persons or corporation who shall exercise or by any act attempt to exercise any powers, privileges, or franchises under articles of incorporation or certificate of authority after the same are suspended, as provided in any section of this subchapter, shall pay a penalty of not less than one hundred dollars ($100.00) nor more than one thousand dollars ($1,000.00), to be recovered in an action to be brought by the commissioner of revenue in the superior court of Wake county. Any corporate act performed or attempted to be performed during the period of such suspension shall be invalid and of no effect. (1939, c. 158, s. 902.)

§ 105-232. Corporate rights restored.—Any corporation whose articles of incorporation or certificate of authority to do business in this state has been suspended by the secretary of state, as provided in § 105-230, or similar provisions of prior Revenue Acts, upon the filing, within ten years after such suspension or cancellation under previous acts, with the secretary of state, of a certificate from the commissioner of revenue that it has complied with all the requirements of this subchapter and paid all state taxes, fees, or penalties due from it (which total amount due may be computed, for years prior and subsequent to said suspension or cancellation, in the same manner as if said suspension or cancellation had not taken place), and upon payment to the commissioner of revenue, to be transferred to the secretary of state, of an additional penalty of ten dollars ($10.00) to cover the cost of reinstatement, shall be entitled to exercise again its rights, privileges, and franchises in this state; and the secretary of state shall cancel the entry made by him under the provisions of § 105-230 or similar provisions of prior Revenue Acts, and shall issue his certificate entitling such corporation to exercise again its rights, privileges, and franchises, and certify such reinstatement to the clerk of superior court in the county in which the principal office or place of business of such corporation is located with instructions to said clerk, and it shall be his duty to cancel from his records the entry showing suspension of corporate privileges. (1939, c. 158, s. 903; 1939, c. 370, s. 1; 1943, c. 400, s. 9.)
penalties thereon, shall become, from the time it is due and payable, a debt from the person, firm, or corporation liable to pay the same to the state of North Carolina. (1939, c. 158, s. 909.)

Cross Reference.—As to taxes not being a debt subject to set-off and counterclaim, see note to § 105-441.

For prior law see Worth v. Wright, 122 N. C. 335, 29 S. E. 301; Ritter v. Commissioners, 90 N. C. 276; Commissioners v. Hall, 177 N. C. 490, 491, 99 S. E. 372.

§ 105-239. Action for recovery of taxes.—Action may be brought at any time and in any court of competent jurisdiction in this state or other state, in the name of the state and at the instance of the commissioner of revenue, to recover the amount of any taxes, penalties, and interest due under this subchapter. This remedy is in addition to all other remedies for the collection of said taxes and shall not in any respect abridge the same. Any judgment shall be declared to have such preference and priority against the property of the defendant as is provided by law for taxes levied by this subchapter, and free from any claims for homestead or personal property exemption of the defendant therein. (1939, c. 158, s. 910.)

§ 105-240. Tax upon settlement of fiduciary's account.—No final account of a fiduciary shall be allowed by the probate court unless such account shows, and the judge of said court finds, that all taxes imposed by the provisions of this subchapter upon said fiduciary, which have become payable, have been paid, and that all taxes which may become due are secured by bond, deposit, or otherwise. The certificate of the commissioner of revenue and the receipt for the amount of tax herein certified shall be conclusive as to the payment of the tax to the extent of said certificate.

For the purpose of facilitating the settlement and distribution of estates held by fiduciaries, the commissioner of revenue, with the approval of the attorney general, may, on behalf of the state, agree upon the amount of taxes at any time due or to become due from such fiduciaries under the provisions of this subchapter, and the payment in accordance with such agreement shall be full satisfaction of the taxes to which the agreement relates. (1939, c. 158, s. 911.)

§ 105-241. Taxes payable in national currency; for what period, and when a lien.—The taxes herein designated and levied shall be payable in the existing national currency. State, county, and municipal taxes levied for any and all purposes pursuant to this subchapter shall be for the fiscal year of the state in which they become due, except as otherwise provided, and the lien of such taxes shall attach annually to all real estate of the taxpayer within the state on the date that such taxes are due and payable, and said lien shall continue until such taxes, with any interest, penalty, and costs which shall accrue thereon, shall have been paid; in the settlement of the estate of any decedent where, by any order of court or other proceeding, the real estate of the decedent has been sold to make assets to pay debts, such sale shall not have the effect of extinguishing the lien upon the land so sold for state taxes, nor shall the same be postponed in any manner to the payment of any other claim or debt against the estate, save funeral expenses and cost of administration. Whenever the property of any taxpayer liable to any tax imposed by this subchapter or under its authority shall be taken into receivership, the lien of the taxes upon the real estate shall not thereby be in any manner disturbed, and the personal property of the taxpayer liable to said tax upon which there is no prior specific lien shall be subject to a lien for the taxes imposed by this subchapter, or under its authority, from the time the receivership went into effect, subject to prior payment of costs of the receivership only.

The provisions of this section shall not have the effect of releasing any lien for state taxes imposed by other law, nor shall they have the effect of postponing the payment of the said state taxes or depriving the said state taxes of any priority in order of payment provided in any other statute under which payment of the said taxes may be required. (1939, c. 158, s. 912.)

Power to Tax and Manner of Exercise.—The subject of taxation is regulated entirely by statute, and the revenues of this state are collected under the operation of what is known as the Machinery act. Wade v. Commissioners, 74 N. C. 81.

The general assembly have an unlimited right to tax all persons domiciled within the state, and all property within the state, except so far as this right has been limited by the provisions of the constitution expressly or by necessary implication. Pullen v. Commissioners, 66 N. C. 361.

Same—Delegation of Power.—The legislature may authorize a municipal corporation to lay taxes on the town property, the persons, and the subject of taxation incident to the persons, of those who have a business residence in town, though they have a residence also out of town. Worth v. Commissioners, 60 N. C. 617.

Statement of Object.—The North Carolina Const. Art. V, section 7, requires that every act levying taxes shall state the objects to which they shall be appropriated. If they be not so stated, however, has no application to taxes levied by county authorities for county purposes. Parker v. Commissioners, 104 N. C. 166, 11 S. E. 157.

Constitutional Provisions—Uniformity Required.—Under North Carolina Const. Art. V, section 3, the same rule of uniformity applies as to the taxing of "trades, professions, franchises and incomes" as to the other species of property therein named; and the same rule of uniformity is insisted upon in the mode of assessment. Worth v. Petersburg R. Co., 89 N. C. 301. Uniformity, in its legal and proper sense, is insisted upon in the matter of the rate of taxation, whether applied to taxes on property or on the persons of those who have a business residence in any town, though they have a residence also out of town. Worth v. Commissioners, 60 N. C. 617.

Fiscal Year and Tax Year.—Welding this and § 153-114 together by established rules of correct interpretation, the fiscal year and the tax year are coterminous and coincident, and the liability of the landowner for taxes for any year arises and begins on 1 July, of that year. State v. Champion Fibre Co., 204 N. C. 295, 297, 168 S. E. 207.


§ 105-242. Warrant for the collection of taxes.—1. If any tax imposed by this subchapter, or any other tax levied by the state and payable to the commissioner of revenue, or any portion of such tax be not paid within thirty days after the same becomes due and payable, and after the same has been assessed, the commissioner of revenue shall issue an order under his hand and official seal, directed to the sheriff of any county of the state, commanding him to levy upon and sell the real estate of the taxpayer found within his county for the payment of the amount thereof, with the added penalties, additional taxes, interest, and cost of executing the same, and to return to the commissioner of revenue the money collected by virtue thereof within a time to be therein specified, not less than sixty days from the date of the order. The said sheriff shall, thereu-
on, proceed upon the same in all respects with
like effect and in the same manner prescribed by
law in respect to executions issued against prop-
erty upon judgments of a court of record, and
shall be entitled to the same fees for his services
in executing the order, to be collected in the same
manner.

2. Bank deposits, rents, salaries, wages, and all
other choses in action or property incapable of
manual levy or delivery, hereinafter called the in-
tangible, belonging, owing, or to become due to
any taxpayer subject to any of the provisions of
this subchapter, or which has been transferred by
such taxpayer under circumstances which would
permit it to be levied upon if it were tangible, shall
be subject to attachment or garnishment as here-
in provided, and the person owing said intangible,
matured or unmatured, or having same in his pos-
session or control, hereinafter called the gar-
nishee, shall become liable for all sums due by the
taxpayer under this subchapter to the extent of the
amount due or belonging to the taxpayer. To effect
such attachment
or garnishment the commissioner of revenue
shall serve or cause to be served upon the tax-
payer and the garnishee a notice as hereinafter
provided, which notice may be served by any dep-
uty or employee of the commissioner of revenue
or by any officer having authority to serve sum-
monses. Said notice shall show:

(1) The name of the taxpayer and his address,
if known:
(2) The nature and amount of the tax, and the
interest and penalties thereon, and the year or
years for which the same were levied or assessed,
and
(3) Shall be accompanied by a copy of this sub-
section, and thereupon the procedure shall be as
follows:
If the garnishee has no defense to offer or no
set-off against the taxpayer, he shall, within ten
days after service of said notice, answer the same
by sending to the commissioner of revenue by
registered mail a statement to that effect, and if
the amount due or belonging to the taxpayer is
then due or subject to his demand, it shall be re-
mittable to the commissioner with said statement,
but if said amount is matured in the future, the
statement shall set forth that fact and the same
shall be paid to the commissioner upon maturity,
and any payment by the garnishee hereunder shall
be a complete extinguishment of any liability
therefore on his part to the taxpayer. If the gar-
nishee has any defense or a set-off, he shall forth-
said twenty days after service of said notice, shall send two
copies of said statement to the commissioner by regis-
tered mail; if the commissioner admits such de-
fense or set-off, he shall so advise the garnishee in
writing within ten days after receipt of such state-
ment and the attachment or garnishment shall thereupon be discharged to the amount required
by such defense or set-off, and any amount at-
tached or garnished hereunder which is not af-
fected by such defense or set-off shall be remitted
to the commissioner as above provided in cases
where the garnishee has no defense or set-off, and
with like effect. If the commissioner shall not ad-
mit the defense or set-off, he shall set forth in
writing his objections thereto and shall send a
copy thereof to the garnishee within ten days
after receipt of the garnishee's statement, or with-
in such further time as may be agreed on by the
garnishee, and at the same time he shall file a copy
of said notice, a copy of the garnishee's statement,
and a copy of his objections thereto in the superior
court of the county where the garnishee resides or
does business where the issues made shall be tried
as in civil actions.

If judgment is entered in favor of the com-
misssioner of revenue by default or after hearing,
the garnishee shall become liable for the taxes, in-
terest and penalties due by the taxpayer to the ex-
tent of the amount over and above any defense or
set-off of the garnishee belonging, owing, or to
become due to the taxpayer, but payments shall
not be required from amounts which are to be
become due to the taxpayer until the maturity there-
of, nor shall more than ten per cent of any tax-
payer's salary or wages be required to be paid
hereunder in any one month. The garnishee may
satisfy said judgment upon paying said amount,
and if he fails to do so, execution may issue as
provided by law. From any judgment or order
entered upon such hearing either the commis-
sioner of revenue or the garnishee may appeal as
provided by law. If, before or after judgment,
adequate security is filed for the payment of said
taxes, interest, penalties, and costs, the attach-
ment or garnishment may be released or execu-

tion stayed pending appeal, but the final judgment
shall be paid or enforced as above provided. The

taxpayer's sale remedies to question his liability
for said taxes, interest, and penalties shall be
those provided in this subchapter, as now or
hereafter amended or supplemented. If any third
person claims any intangible attached or gar-
nished hereunder and his lawful right thereto,
or to any part thereof, is shown to the commis-
sioner, he shall discharge the attachment or
garnishment to the extent necessary to protect
such right, and if such right is asserted after
the filing of said copies as aforesaid, it may be
established by interpleader as now or hereafter
provided by law in cases of attachment and
garnishment. In case such third party has no
notice of proceedings hereunder, he shall have
the right to file his petition under oath with the
commissioner at any time within twelve months
after said intangible is paid to him and if the
commissioner finds that such party is lawfully
entitled thereto or to any part thereof, he shall
pay the same to such party as provided for re-

funds by § 105-407, and if such payment is
satisfied: Provided, however, if the commissioner
is of opinion that the only effective remedy is that

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After the period of thirty days after due date. (1939, c. 158, s. 914.)

§ 105-246. Actions, when tried.—All actions or processes brought in any of the superior courts of this state, under provisions of this subchapter, the official bond of such sheriff shall be liable for the tax, penalty, interest, and cost due by the taxpayer. (1939, c. 158, s. 916.)

§ 105-247. Municipalities not to levy income and inheritance tax.—No city, town, township, or county shall levy any tax on income or inheritance. (1939, c. 158, s. 918.)

§ 105-248. State taxes; purposes.—The taxes levied in this subchapter are for the expenses of the state government, the appropriations to its educational, charitable, and penal institutions, pensions for Confederate soldiers and widows, the interest on the debt of the state, for public schools, and other specific appropriations made by law, and shall be collected and paid into the general fund of the state treasurer.

The taxes levied under authority of Section four hundred ninety-two of chapter four hundred twenty-seven of the Public Laws of one thousand nine hundred thirty-one, and remaining unpaid, shall be collected in the same manner as other county taxes and accounted for in the same manner as other taxes under the Daily Deposit Act.

The attorney general shall, upon the request of the commissioner of revenue, whenever any taxes, fees, or penalties due under this subchapter from any public utility (not an agency of interstate commerce) or corporation shall have remained unpaid for a period of ninety days, or whenever any corporation or public utility (not an agency of interstate commerce) has failed or neglected for ninety days to make or file any report or return required by this subchapter, or to pay any penalty for failure to make or file such report or return, apply to the superior court of Wake county, or of any county in the state in which such public utility (not an agency of interstate commerce) or corporation is located or has an office or place of business, for an injunction to restrain such public utility (not an agency of interstate commerce) or corporation from the transaction of any business within the state until the payment of such taxes or fees and penalties thereon, or the making and filing of such report or return and payment of penalties for failure to make or file such report or return, and the cost of such application, which shall be fixed by the court. Such petition shall be in the name of the state; and if it is made to appear to the court, upon hearing, that such public utility (not an agency of interstate commerce) or corporation has failed or neglected, for ninety days, to pay such taxes, fees, or penalties thereon, or to make and file such reports, or to pay such penalties, for failure to make or file such reports or returns, such court shall grant and issue such injunction. (1939, c. 158, s. 915.)
county treasurer or other officer receiving such taxes in each county shall remit to the treasurer of the state on the first and fifteenth days of each month all taxes collected up to the time of such remittance under the levy therein provided for, and such remittance to the state treasurer shall also include the proportion of all poll taxes collected required by the constitution of the state to be used for educational purposes.

The tax levy therein provided for shall be subject to the same discounts and penalties as provided by law for other county taxes, and there shall be allowed the same percentage for collecting such taxes as for other county taxes. The obligation to the state under the levy therein provided for shall run against all taxes that become delinquent; and with respect to any property that may be sold for taxes, any public officer receiving such delinquent taxes, when and if such property may be redeemed or such tax obligations in any manner satisfied, shall remit such proportionate part of such tax levy to the state treasurer within fifteen days after receipt of same. At the end of each fiscal year the county accountant shall furnish the state treasurer a statement of the total amount of taxes levied in accordance with the provisions of this section, that are uncollected at the end of the fiscal year.

Whenever in any law or act of incorporation, granted either under the general law or by special act, there is any limitation or exemption of taxation, the same is hereby repealed, and all the property and effects of all such corporations, other than the bonds of this state and of the United States government, shall be liable to taxation, except property belonging to the United States and to municipal corporations, and property of churches, religious societies, charitable, educational, literary, or benevolent institutions or orders, and also cemeteries: Provided, that no property whatever, held or used for investment, speculation, or rent, shall be exempt, other than bonds of this state and of the United States government, unless said rent or the interest on or income from such investment shall be used exclusively for religious, charitable, educational, or benevolent purposes, or the interest upon the bonded indebtedness is not liable to taxation, except property belonging to the United States and to municipal corporations, and property of churches, religious societies, charitable, educational, literary, or benevolent institutions or orders, and also cemeteries. (1939, c. 158, s. 919.)

Cross Reference.—(a) As to authority for adjustment of claims for taxes arising pursuant to corresponding section of Public Laws of 1931, see Public Laws 1939, c. 206.

Editor’s Note.—See 12 N. C. L. Rev. 23.

§ 105-249. Free privilege licenses for blind people.—Any blind person of the age of twenty-one years or more, desiring to operate a legitimate business of any kind to provide a livelihood for himself and dependents, if any, may apply to the welfare officer of the county in which he resides for free privilege license.

No one shall be eligible to the benefits provided for in this section who is not a blind person (the term "blind person" shall for the purposes of this section be construed to mean one who has suffered the total loss of his eyesight, or whose eyesight is so impaired as to unfit the person applying for the benefits under this section to engage in any labor, profession, or ordinary work in competition with his fellowmen with any degree of success, and/or any person suffering with impaired visions likely to produce total blindness), or who has an income of any kind amounting to twelve hundred ($1200.00) dollars, or more net per annum, or whose husband or wife has an income of any kind amounting to twelve hundred ($1200.00) dollars or more net per annum.

It shall be the duty of the county commissioners upon receipt of application from anyone applying for the benefits under this section, to make a thorough investigation to determine whether or not the applicant is entitled to the privilege or other license as provided for in this section. When the commissioners are satisfied that the applicant is capable of operating the business for which said privilege or other license is asked and that he is a deserving person, the commissioners shall then present to the state license department a letter requesting necessary privilege or other license to operate the aforesaid business, and the state license department shall issue free of charge the license requested. The commissioners shall present to the county license department a letter requesting county privilege license necessary to operate the aforesaid business, and the county license department shall likewise issue free of charge the privilege license requested. The county commissioners shall also present, when necessary, to the municipal license department a letter requesting city privilege license necessary to operate aforesaid business, and the municipal license department shall issue free of charge privilege license requested: Provided, that the free privilege license of this section shall not apply to the sale of any kind of fireworks.

Any veteran of the United States armed forces to whom a privilege license was issued free under this section prior to one thousand nine hundred and forty-one shall be entitled to free privilege licenses hereunder so long as such veteran shall continue to be visually handicapped. (1933, c. 53; 1935, c. 162; 1939, c. 306; 1943, c. 122.)

Editor’s Note.—The amendment of 1935 added the proviso at the end of the third paragraph.

The 1939 amendment directed that the words "or other" be inserted between the words "privilege" and "license" where they occur in lines five, nine, twelve and fourteen of which is the intent of this section. When the words do not occur together in line fourteen, and hence the insertions were made in only lines five, nine and twelve. However, such words appear in several other lines of the section and it may have been the legislative intent to make insertions in such instances.

The 1943 amendment added the last paragraph.

§ 105-249.1. Members of armed forces and merchant marine exempt from license taxes and fees.—(a) License Taxes.—Any person serving in any branch of the armed forces of the United States or in the merchant marine during the period of engaging in or carrying on any trade or profession in the state, which trade or profession such person immediately prior to being called into such service was engaged in: Provided, that nothing herein contained shall relieve such person of any license tax for carrying on any trade or profession conducted through agents or employees or which is conducted in the name of and under the license of such person so entering into the service of the United States.
The secretary of state shall withhold the issuance of any certificate of dissolution to, or withdrawal of, any corporation, domestic or foreign, until the receipt by him of a notice from the commissioner of revenue to the effect that any such corporation has met the requirements with respect to reports and taxes required by this subchapter. (1939, c. 158, s. 923; 1941, c. 50, s. 10.)

Editor's Note.—The 1941 amendment added the paragraph at the end of this section.

§ 105-254. Blanks furnished by commissioner of revenue.—The commissioner of revenue shall cause to be prepared suitable blanks for carrying out the purposes of the laws which he is required to administer, and, on application, furnish such blanks to each company, firm, corporation, person, association, co-partnership, or public utility subject thereto. (1939, c. 158, s. 924.)

§ 105-255. Commissioner of revenue to keep records.—The commissioner of revenue shall keep books of account and records of collections of taxes as may be prescribed by the director of the budget; shall keep an assessment roll for the taxes levied, assessed, and collected under this subchapter, showing in same the name of each taxpayer, the amount of tax assessed against each, when assessed, the increase or decrease in such assessment; the penalties imposed and collected, and the total tax paid; and shall make monthly reports to the director of the budget and to the auditor and/or state treasurer of all collections of taxes on such forms as prescribed by the director of the budget. (1939, c. 158, s. 925.)

§ 105-256. Publication of statistics.—The commissioner of revenue shall prepare and publish annually statistics reasonably available, with respect to the operation of this subchapter, including amounts collected, classifications of taxpayers, income and exemptions, and such other facts as are deemed pertinent and valuable. (1939, c. 158, s. 926.)

§ 105-257. Report on system of other states.—The commissioner of revenue shall biennially make report to the general assembly, the said report to contain all available data that may be assembled by his department with respect to the tax laws and systems of this and other states, and making such recommendations as may be useful in improving the tax laws and system of this state. (1933, c. 88, s. 2.)

Editor's Note.—For the compiling of such report, outside assistance seems almost a necessity, in view of the present load of the Commissioner of Revenue. See 11 N. C. Law Rev. 230.

§ 105-258. Powers of commissioner of revenue; assistant commissioner may sign and verify pleadings, etc.—The commissioner of revenue, for the purpose of ascertaining the correctness of any return or for the purpose of making an estimate of the tax due by any taxpayer under this subchapter, shall have the power to examine or cause to be examined, by any agent or representative designated by him for that purpose, any books, papers, records, or memoranda bearing upon the matters required to be included in the return, and may require the attendance of the taxpayer or of any other person having knowledge in the premises, and may take testimony and require proof ma-
terial for his information, and may administer oaths to such person or persons.

In any action, proceeding, or matter of any kind, to which the commissioner of revenue is a party or in which he may have an interest, all pleadings, legal notices, proofs of claim, warrants for collection, certificates of tax liability, executions, and other legal documents may be signed and verified by the assistant commissioner on behalf of the commissioner. (1939, c. 158, s. 927; 1943, c. 400, s. 9.)

Editor's Note.—The 1943 amendment added the second paragraph.

§ 105-259. Secrecy required of officials—penalty for violation.—Except in accordance with proper judicial order, or as otherwise provided by law, it shall be unlawful for the commissioner of revenue, any deputy, agent, clerk, other officer, employee, or former officer or employee, to divulge and make known in any manner the amount of income, income tax or other taxes, act forth or disclose in any report or return required under this subchapter.

Nothing in this section shall be construed to prohibit the publication of statistics, so classified as to prevent the identification of particular reports or returns, and the items thereof; the inspection of such reports or returns by the governor, attorney general, or their duly authorized representative; or the inspection by a legal representative of the state of the report or return of any taxpayer who shall bring an action to set aside or reverse the tax based thereon, or against whom an action or proceeding has been instituted to recover any tax or penalty imposed by this subchapter; nor shall the provisions of this section prohibit the department of revenue furnishing information to other governmental agencies, of persons and firms properly licensed under Schedule B, §§ 105-33 to 105-113. The department of revenue may exchange information with the officers of organized associations of taxpayers under Schedule B, §§ 105-33 to 105-113, with respect to parties liable for such taxes and as to parties who have paid such license taxes. Reports and returns shall be preserved for three years, and destroyed only after the same necessary or advisable, may extend to any person, firm, or corporation or public utility a further specified time within which to file any report required by law to be filed with the commissioner of revenue, in which event the attaching or postponed accordingly. Interest at the rate of six per cent (6%) per annum from the time the report or return was originally required to be filed to the time of payment shall be added to and paid with any tax that might be due on returns so extended. (1939, c. 158, s. 931.)

§ 105-263. Time for filing reports extended.—The commissioner of revenue, when he deems the same necessary or advisable, may extend to any person, firm, or corporation or public utility a further specified time within which to file any report required by law to be filed with the commissioner of revenue, in which event the attaching or taking effect of any penalty for failure to file such report or to pay any tax or fee shall be extended or postponed accordingly. Interest at the rate of six per cent (6%) per annum from the time the report or return was originally required to be filed to the time of payment shall be added to and paid with any tax that might be due on returns so extended. (1939, c. 158, s. 932.)

§ 105-264. Construction of the subchapter; population.—It shall be the duty of the commissioner of revenue to construe all sections of this subchapter imposing either license, franchise, inheritance, income, or other taxes. Such decisions by the commissioner of revenue shall be prima facie correct, and a protection to the officers and taxpayers affected thereby. Where the license tax is graduated in this subchapter according to the population, the population shall be the number of inhabitants as determined by the last census of the United States government: Provided, that if any city or town in this state has extended its limits since the last census period, and thereafter has taken a census of its population in these increased limits by an official enumeration, either through the aid of the United States government or otherwise, the population thus ascertained shall
be that upon which the license tax is to be graduated. (1939, c. 158, s. 933.)

Authority of Commissioner to Construe.—The Commissioner of Revenue is given authority to administratively construe, in the first instance, all sections of the revenue law. Powell v. Maxwell, 211 N. C. 221, 196 S. E. 126.


§ 105-265. Authority for imposition of tax.—This subchapter shall constitute authority for the imposition of taxes upon the subject herein revised, and all laws in conflict with it are hereby repealed, but such repeal shall not affect taxes listed or which ought or should have been listed, or which may have been due, or penalties or fines incurred from failure to make the proper reports, or to pay the taxes at the proper time under any of the schedules of existing law, but such taxes and penalties may be collected, and criminal offenses prosecuted under such law existing on March 24, 1939, notwithstanding this repeal. (1939, c. 158, s. 935.)

§ 105-266. Overpayment of taxes to be refunded with interest. — If the commissioner of revenue discovers from the examination of any return or in any other manner that any taxpayer has overpaid the correct amount of tax (including penalties and interest, if any), such overpayment shall be refunded to the taxpayer within sixty days after it is ascertained together with interest thereon at the rate of six per cent (6%) per annum: Provided, that interest on any such refund shall be computed from a date ninety (90) days after date tax was originally paid by the taxpayer: Provided, further, that demand for such refund is made by the taxpayer within three years from the date of such overpayment. (1939, c. 158, s. 937; 1941, c. 50, s. 10.)

Editor's Note.—The 1941 amendment added the second proviso.

§ 105-267. Taxes to be paid; suits for recovery of taxes. No court of this state shall entertain a suit of any kind brought for the purpose of preventing the collection of any tax imposed in this subchapter. Whenever a person shall have a valid defense to the enforcement of the collection of any tax assessed or charged against him or his property, such person shall pay such tax to the proper officer, and notify such officer in writing that he pays under protest, and at any time within thirty days after the date tax was originally paid by the taxpayer, bring action to recover the amount, the remedy provided in the statute and where the statute specifies the amount of state taxes for which judgment shall be rendered therefor, with interest thereon at the rate of six per cent (6%) per annum. (1939, c. 158, s. 937; 1941, c. 50, s. 10.)

Editor's Note.—The 1941 amendment added the second proviso.

§ 105-268. Reciprocal comity.—The courts of this state shall recognize and enforce liabilities for taxes lawfully imposed by other states which extend to a like comity to this state. (1939, c. 158, s. 938.)

Editor's Note.—For an analysis of this section, see 13 N. C. Law Rev. 405.

§ 105-269. Extraterritorial authority to enforce payment.—The commissioner of revenue, with
§ 105-270. Repeal of laws imposing liability upon governing bodies of local units.—All laws and clauses of laws, statutes and parts of statutes, imposing civil or criminal liability upon the governing bodies of local units, or the members of such governing bodies, for failure to levy or to vote for the levy of any particular tax or rate of tax for any particular purpose, are hereby repealed, and said governing bodies and any and all members thereof are hereby freed and released from any civil or criminal liability herefore imposed by any law or statute for failure to levy or to vote for the levy of any particular tax or tax rate for any particular purpose. (1933, c. 418.)

Art. 10. Liability for Failure to Levy Taxes.

§ 105-271. Official title.—This subchapter may be cited as the Machinery Act. (1939, c. 310, s. 1.)

Editor’s Note.—The annotations under this subchapter relate to similar provisions of former statutes.

For provision for codification, printing and distribution of Machinery Act of 1939, as amended, and presumption of correct compilation, see Public Laws 1941, c. 204, § 3.

§ 105-272. Definitions. — When used in this subchapter (unless otherwise specifically indicated by the context):

(1) The term “person” means an individual, trust, estate, partnership, firm or company.

(2) The term “corporation” includes associations, joint-stock companies, insurance companies, and limited partnerships where shares of stock are issued.

(3) The term “domestic” when applied to corporations or partnerships means created or organized under the laws of the state of North Carolina.

(4) The term “foreign” when applied to corporations or partnerships means a corporation or partnership not domestic.

(5) The term “commissioner” means the commissioner of revenue.

(6) The term “deputy” means an authorized representative of the commissioner of revenue or other commissioner or of the state board of assessment.

(7) The term “taxpayer” means any person or corporation subject to a tax or duty imposed by the Revenue Act or Machinery Act, or whose property is subject to any ad valorem tax levied by the state or its political subdivisions.

(8) The term “state license” means a license issued by the commissioner of revenue, usable, good and valid in the county or counties named in the license.

(9) The term “state-wide license” means a license issued by the commissioner of revenue, usable, good and valid in each and every county in this state.

(10) The term “intangible property” means patents, copyrights, secret processes and formulae, good will, trademarks, trade brands, franchises, stocks, bonds, cash, bank deposits, notes, evidences of debt, bills and accounts receivable, and other like property.

(11) The term “tangible property” means all property other than intangible.

(12) The term “public utility” as used in this subchapter means and includes each person, firm, company, corporation and association, their lessees, trustees or receivers, elected or appointed by any authority whatsoever, and herein referred to as express company, telephone company, telegraph company, Pullman car company, freight line company, equipment company, electric power company, gas company, railroad company, union depot company, water transportation company, street railway company, and other companies exercising the right of eminent domain, and such term, “public utility,” shall include any plant or property owned or operated by any such persons, firms, corporations, companies or associations.

(13) The term “express company” means a public utility company engaged in the business of conveying to, from, or through this state, or part thereof, money, packages, gold, silver, plate, or other articles and commodities by express, not including the ordinary freight lines of transportation of merchandise and property in this state.

(14) The term “telephone company” means a public utility company engaged in the business of transmitting to, from, through or in this state, or part thereof, telephone messages or conversations.

(15) The term “telegraph company” means a public utility company engaged in the business of transmitting to, from, through, or in this state, or a part thereof, telegraphic messages.

(16) The term “Pullman car company” means a public utility company engaged in the business of operating cars for the transportation, accommodation, comfort, convenience, or safety of passengers, on or over any railroad line or lines or other common carrier lines, in whole or in part within this state, such line or lines not being owned, leased, and/or operated by such railroad company, whether such cars be termed sleeping, Pullman, palace, parlor, observation, chair, dining or buffet cars, or by any other name.

(17) The term “freight line company” means a public utility company engaged in the business of operating cars for the transportation of freight or commodities, whether such freight and/or commodities is owned by such company or any other person or company, over any railroad or other common carrier line or lines in whole or in part within this state, such line or lines not being owned, leased and/or operated by such railroad company, whether such cars be termed box, flat, coal, ore, tank, stock, gondola, furniture, refrigerator, fruit, meat, oil, or by any other name.

(18) The term “equipment company” means a public utility company engaged in the business of furnishing and/or leasing cars, of whatsoever kind or description, to be used in the operation of any railroad or other common carrier line or lines, in whole or in part within this state, such line or
linés not being owned, leased, or operated by such railroad company.

(19) The term "electric power company" means a public utility company engaging in the business of supplying electricity for light, heat and/or power purposes to consumers within this state.

(20) The term "gas company" means a public utility company engaged in the business of supplying gas for light, heat, and/or power purposes to consumers within this state.

(21) The term "waterworks company" means a public utility company engaged in the business of supplying water through pipes or tubing and/or similar manner to consumers within this state.

(22) The term "union depot company" means a public utility company engaged in the business of operating a union depot or station for railroads or other common carrier purposes.

(23) The term "water transportation company" means a public utility company engaged in the transportation of passengers and/or property by boat or other water craft, over any waterway, whether natural or artificial, from one point within this state to another point within this state, or between points within this state and points without this state.

(24) The term "street railway company" means a public utility company engaged in the business of operating a street, suburban or interurban railway, either wholly or partially within this state, whether cars are propelled by steam, cable, electricity, or other motive power.

(25) The term "railroad company" means a public utility company engaged in the business of operating a railroad, either wholly or partially within this state, or rights of way acquired or leased and held exclusively by such company or otherwise.

(26) The terms "gross receipts" or "gross earnings" mean and include the entire receipts for business done by any person, firm, or corporation, domestic or foreign, from the operation of business or incidental thereto, or partially within this state. The gross receipts or gross earnings for business done by a corporation engaged in the operation of a public utility shall mean and include the entire receipts for business done by such corporation, whether from the operation of the public utility itself or from any other source whatsoever.

(27) The terms "bank", "banker", "broker", "stock jobber" mean and include any person, firm, or corporation who or which has money employed in the business of dealing in coin, notes, bills of exchange, or in any business of dealing, or in buying or selling any kind of bills of exchange, checks, drafts, bank notes, acceptances, promissory notes, bonds, warrants or other written obligations, or stocks of any kind or description whatsoever, or receiving money on deposit.

(28) The terms "collector" and "collectors" mean and include county, township, city or town tax collectors, and sheriffs.

(29) The terms "list takers" and "assessors" mean and include list takers, assessors and assistants.

(30) The terms "real property", "real estate", "land", "tract", or "lot" mean and include not only the land itself, but also all buildings, structures, improvements and permanent fixtures thereon, and all rights and privileges belonging or in any wise appertaining thereto, except where the same may be otherwise determined by this subchapter or the Revenue Act.

(31) The terms "shares of stock" or "shares of capital stock" mean and include the shares into which the capital or capital stock of an incorporated company or association may be divided.

(32) The terms "tax" or "taxes" mean and include any taxes, special assessments, costs, penalties, and/or interest imposed upon property or other subjects of taxation. (1939, c. 310, s. 2.)

Article 12. State Board of Assessment.

§ 105-273. Creation; officers.—The director of the department of tax research, the commissioner of revenue, the chairman of the public utilities commission, the attorney general, and the director of local government are hereby created the state board of assessment with all the powers and duties prescribed in the subchapter. The director of the department of tax research shall be the chairman of the said board, and shall, in addition to presiding at the meetings of the board, exercise the functions, duties, and powers of the board when not in session. The board may employ an executive secretary, whose entire time may be given to the work of the said board, and is authorized to employ such clerical assistance as may be needed for the performance of its duties; all expenses of said board shall be paid out of funds appropriated out of the general fund to the credit of the department of revenue of the state. (1939, c. 310, s. 200; 1941, c. 327, s. 6.)

Editor's Note.—The 1941 amendment, which substituted the above in lieu of the former section, is effective as of July 1, 1941.

Suits against State Board of Assessment.—The corporation commission (under the prior law constituting the board) acts as a body and in a corporate capacity and not against its members, for its functions are not individual or personal, but corporate. Hence, mandamus to compel the refund of taxes alleged to have been paid under an excessive valuation of property will not be against two of the commissioners as individuals. Jenkins Bros. Shoe Co. v. Travis, 168 N. C. 599, 84 S. E. 1036. This would seem to be applicable to the board as now constituted.

Cited in Catholic Society, etc. v. Madison County, 74 F. (2d) 848.

§ 105-274. Oath of office.—The members of the board shall take and subscribe to the constitutional oath of office and file the same with the secretary of state. (1939, c. 310, s. 201.)

Cross Reference.—As to oath of office, see § 11-7.

Cited in Catholic Society, etc. v. Madison County, 74 F. (2d) 848, 849.

§ 105-275. Duties of the board.—The state board of assessment shall exercise general and specific supervision of the systems of valuation and taxation throughout the state, including counties and municipalities, and in addition it shall be and constitute a state board of equalization and review of valuation and taxation in this state. It shall be the duty of said board:

(1) To confer with and advise boards of county commissioners, tax supervisors, assessing officers, list takers, and all others engaged in the valuation and assessment of property, in the preparation and keeping of suitable records, and in the levying and collection of taxes and revenues, as

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to their duties under this subchapter or any other act passed with respect to valuation of property, assessing, levying or collecting of revenue for counties, municipalities and other subdivisions of the state, to insure that proper proceedings shall be brought to enforce the statutes pertaining to taxation and for the collection of penalties and liabilities imposed by law upon public officers, officers of corporations, and individuals failing, refusing or neglecting to comply with this subchapter; and to call upon the attorney general or any prosecuting attorney in the state to assist in the execution of the powers herein conferred.

(2) To prepare a pamphlet or booklet for the instruction of the boards of county commissioners, tax supervisors, assessing officers, list takers, and all others engaged in the valuation of property, preparing and keeping records, and in the levying and collecting of taxes and revenue, and have the same ready for distribution at least thirty (30) days prior to the date fixed for listing taxes. The said pamphlet or booklet shall, in as plain terms as possible, explain the proper meaning of this subchapter and the revenue laws of this state; shall call particular attention to any points in the law or in the administration of the laws which may be or which have been overlooked or neglected; shall advise as to the practical working of the revenue laws and the Machinery Act, and shall explain and interpret any points that seem to be intricate and upon which county or state officers may differ.

(3) To hear and to adjudicate appeals from boards of county commissioners and county boards of equalization and review as to property liable for taxation that has not been assessed or of property that has been fraudulently or improperly assessed through error or otherwise, to investigate the same, and if error, inequality, or fraud is found to exist, to take such proceedings and to make such orders as to correct the same. In case it shall be made to appear to the state board of assessment that any tax list or assessment roll in any county in this state is grossly irregular, or any property is unlawfully or unequally assessed as between individuals, between sections of a county, or between counties, the said board shall correct such irregularities, inequalities and lack of uniformity, and shall equalize and make uniform the valuation thereof upon complaint by the board of county commissioners under rules and regulations prescribed by it, not inconsistent with this subchapter:

Provided, that no appeals shall be considered or fixed values changed unless notice of same is filed within sixty (60) days after the final values are fixed and determined by the board of county commissioners or the board of equalization and review, as hereinafter provided. Provided, also that such appeals shall be considered except by and with consent of the state board of assessment.

(4) To require from the register of deeds, auditor, county accountant, tax clerk, clerk of the court or other officer of each county, and the mayor, clerk or other officer of each municipality, on forms prepared and prescribed by the said board, such annual and other reports as shall enable said board to ascertain the assessed valuation of all property listed for taxation in this state under this or any other act, the rate and amount of taxes assessed and collected, the amount returned delinquent, tax sales, certificates of purchase at such tax sales held by the state, county or municipality, and such other information as the board may require, to the end that it may have full, complete, and accurate statistical information as to the practical operation of the tax and revenue laws of the state.

(5) To require the secretary of state, and it shall be his duty, to furnish monthly to the said board a list of all domestic corporations incorporated, charter amended or dissolved, all foreign corporations domesticated, charter amended, dissolved or domestication withdrawn during the preceding month, in such detail as may be prescribed by said board.

(6) To make diligent investigation and inquiry concerning the revenue laws and systems of taxation of other states, so far as the same are made known by published reports and statistics and can be ascertained by correspondence with officers thereof.

(7) To report to the general assembly at each regular session, or at such other times as it may deem proper, the amount of revenue or taxes collected in this state, county, and municipal purposes, classified as to state, county, township, and municipal districts, and with the sources thereof; to report to the general assembly the proceedings of the board and such other information and recommendations concerning the public revenues as required by the general assembly or that may be of public interest; to cause two thousand copies of said report to be printed on or before the first day of January in the year of the regular session of the general assembly, and place at the disposal of the state librarian one hundred (100) copies of said report for distribution and exchange, if and when funds are available for said purpose; and to forward a copy of said report to each member of the general assembly as soon as printed.

(8) To discharge such other duties as may be prescribed by law, and take such action, do such things, and prescribe such rules and regulations as may be needful and proper to enforce the provisions of this subchapter and the Revenue Act.

(9) To prepare for the legislative committee of succeeding general assemblies such suggestions of revision of the revenue laws, including the Machinery Act, as it may find by experience, investigation, and study to be expedient and wise.

(10) To report to the governor, on or before the first day of January of each year, the proceedings of said board during the preceding year, with such recommendations as it desires to submit with respect to any matters touching taxation and revenue.

(11) To keep full, correct and accurate records of its official proceedings.

(12) To properly administer the duties prescribed by Schedule H, §§ 105-198 to 105-217, with respect to division and certification of taxes collected thereunder; the state board of assessment shall hear and pass upon any matters relative thereto.

(13) To perform the duties imposed upon it with respect to the classification and assessment of property. (1989, c. 310, s. 262.)

Unless the land is properly listed for taxation, it is not

Writ of Review.—In the case of Reardon v. Phillips, 159 N. C. 213, 74 S. E. 213, neither the owner nor his agent had given in the land, and list taker had copied the entry from the former tax book, and it was held that the land was not rightfully on the tax list, and a sale for taxes pursuant thereto was invalid. This case is discussed with approval in the Stone case, supra.—Ed. Note.

Review of Assessment.—Under the prior law original proceedings in assessments made by the assessor, and when the property had the value of property reduced for taxation will be disregarded and considered as a nullity when the question involved is solely as to whether such value theretofore fixed and agreed upon be reduced. Caldwell County v. Dougherty, 0d 95s Ne Ch62, 141i e eae:

The method provided by statute for assessment and apportionment of the value of the stock held in a foreign corporation instant case the Board reported results of the appeal from the assessment must be followed. In the appeal from the assessment must be followed. In the instant case the Board reported results of the appraisal and did not report the individual items upon which the appraisal was made, and the appraisal of the value of the stock held in a foreign corporation was not so separated from the other property as to permit a variation of this rule. Manufacturing Co. v. Commissioners of Pender, 196 N. C. 744, 247 S. E. 284.

Appeal from Assessment—Sufficiency of Board's Report. —The sufficiency of the board's report for an appeal from the assessment must be followed. In the instant case the Board reported results of the appraisal and did not report the individual items upon which the appraisal was made, and the appraisal of the value of the stock held in a foreign corporation was not so separated from the other property as to permit a variation of this rule. Manufacturing Co. v. Commissioners of Pender, 196 N. C. 744, 247 S. E. 284.

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Applied in Catholic Society, etc. v. Madison County, 74 F. (2d) 848.

§ 105-276. Powers of the board.—To the end that the board may properly discharge the duties placed upon it by law, it is hereby accorded the following powers:

1. It may, in its discretion, prescribe the forms, books, and records that shall be used in the valuation of property and in the levying and collection of taxes, and how the same shall be kept; to require the county tax supervisors, clerks or boards of county-commissioners, or auditor of each county to file with it, when called for, complete abstracts of all real and personal property in the county, itemized and apportioned by the county board of equalization and review; and to make such other rules and regulations, not included in this subchapter or the Revenue Act, as said board may deem needful effectually to promote the purposes for which the board is constituted and the systems of taxation provided for in this and the Revenue Act.

2. The board, its members or any duly authorized deputy shall have access to all books, papers, documents, statements, records and accounts on file or of records in any department of state, county or municipality, and is authorized and empowered to subpoena witnesses upon a subpoena signed by the chairman of the board, directed to such witnesses, and to be served by any officer authorized to serve subpoenas; to compel the attendance of witnesses by attachment to be issued by any superior court upon proper showing that such witness or witnesses have been duly subpoenaed and have refused to obey such subpoena or subpoenas; and to examine witnesses under oath to be administered by any member or authorized agent of the board.

3. The board, its members or any duly authorized deputy are authorized and empowered to examine all books, papers, records or accounts of persons, firms and corporations, both domestic and foreign, owning property liable to assessment for taxes, general or specific, levied by this state or its subdivisions. Said board, its members or any duly authorized deputy are also given power and authority to examine the books, papers, records or accounts of any person, firm or corporation where there is ground for believing that information contained in such books, papers, records and accounts is pertinent to the decision of any matter pending before said board, regardless of whether such person, firm or corporation is a party to the proceeding before the board. Books, papers, records or accounts examined under authority of this subdivision of this section shall be examined only after service of a proper subpoena, signed by the chairman of the board and authorized to serve subpoenas upon the person having the custody of such books, papers, records or accounts.

Any person, persons, member of a firm, or any officer, director or stockholder of a corporation, bank or trust company who shall refuse permission to inspect any books, papers, documents, statements, accounts or records demanded by the state board of assessment, the members thereof, or any duly authorized deputy provided for in this subchapter or the Revenue Act, or who shall willfully fail, refuse, or neglect to appear before said board in response to its subpoena or to testify as provided for in this chapter and the Revenue Act, shall, in addition to all other penalties imposed in this subchapter or the Revenue Act, be guilty of a misdemeanor and fined and/or imprisoned in the discretion of the court.

4. The board is authorized and empowered to direct any member or members of the board to hear complaints, to make examinations and investigations, and to report his or their findings of fact and conclusions of law to the board. Upon demand of any party to an appeal pending before the board, the board shall send one of its members or a special representative designated by it to make an actual examination of the property and other similar property in the same county as the property in question, and to report to the board. The cost of said examination shall be advanced by the county: Provided, that in cases in which the examination is demanded by a taxpayer, if the board's decision does not substantially affirm the contents of the taxpayer, the board in its decision shall direct that the county advancing the cost may add such cost to the taxes levied against the property.

5. The board shall have power to certify copies of its records and proceedings, attested with its official seal, and copies of records or proceedings so certified shall be received in evidence in all courts in this state with like effect as certified copies of other public records.

6. The board may, upon its own motion or upon request of any tax supervisor or county board of commissioners, transmit or make available to a supervisor or duly authorized representative of such board of commissioners any information contained in any report to said state board, or in any report to the department of revenue or other state department to which said state board may have access, or any other information which said state board may have in its possession when, in the opinion of said board, such information will assist said supervisor or representative of the commissioners in securing an adequate listing of property for taxation or in assessing taxable property.

Except as herein specified, and except to the governor or his authorized agent or solicitor or authorized agent of the solicitor of a district in which such information would affect the listing or valuation of property for taxes, the state board shall not divulge or make public the reports made
to it or to other state departments: Provided, this shall not interfere with the publication of assessments and decisions made by said board or with publication of statistics by said board; nor shall it prevent presentation of such information in any administrative or judicial proceedings involving assessments or decisions of said board.

Information transmitted or made available to local tax authorities under this section shall not be divulged or published by such authorities, and shall be used only for the purposes of securing adequate tax lists, assessing taxable property and presentation in administrative or judicial proceedings involving such lists or assessments.

(7) The board is authorized to exercise all powers reasonably necessary to perform the duties imposed upon it by this subchapter or other acts of this state. (1939, c. 310, s. 203.)

§ 105-277. Sessions of board, where to be held.

—The regular sessions of the state board of assessment shall be held in the city of Raleigh at the office of the chairman, and other sessions may be called at any place in the state to be decided by the board. (1939, c. 310, s. 204.)

Art. 13. Quadrennial and Annual Assessment.

§ 105-278. Listing and assessing in quadrennial years.—In one thousand nine hundred forty-one, and quadrennially thereafter, all property, real and personal, subject to taxation, shall be listed and assessed for ad valorem tax purposes: Provided, that in one thousand nine hundred forty-one, and quadrennially thereafter, the county boards of commissioners may determine whether real property in the respective counties and townships shall be valued by horizontal increase or reduction or by actual appraisal thereof, or both. Where the horizontal method is used, the provisions of § 105-279 shall also apply: Provided, that the boards of county commissioners of the various counties of the State may, in their discretion, defer or postpone the revaluation and reassessment of real property required herein in the year one thousand nine hundred and forty-one, and forty-one, and all proceedings and actions hereafter taken by the board of county commissioners in any county in the State as to postponement, or as to increases or reductions or by actual appraisal thereof, are hereby in all respects ratified, validated, and confirmed; any such board of county commissioners may, in its discretion, defer or postpone any such revaluation, reassessment, or reappraisal for the years one thousand nine hundred and forty-two and one thousand nine hundred and forty-three. But this second proviso shall not apply to any county for which a revaluation board of assessors or a board of equalization and review has been created or provided for by any act of the General Assembly of one thousand nine hundred thirty-nine and in other years.—In the year one thousand nine hundred thirty-nine and in other than quadrennial years all property, real and personal, subject to taxation, shall be listed for ad valorem tax purposes. Property not subject to reassessment in such years shall be listed at the value at which it was assessed at the last quadrennial assessment. In all such years the following property shall be assessed or reassessed:

(a) Personal property (which for purposes of taxation shall include all personal property whatsoever, tangible or intangible, except personal property expressly exempted by law).

(b) All machinery, service station equipment, merchandise and trade fixtures, barber shop equipment, meat market equipment, restaurant and cafe fixtures, drug store equipment and similar property not permanently affixed to the real estate.

(c) All real property (which for purposes of taxation shall include all lands within the state and all buildings and fixtures thereon and appurtenances thereto) which:

(i) Was not assessed at the last quadrennial assessment.

(ii) Has increased in value to the extent of more than one hundred dollars ($100.00) by virtue of improvements or appurtenances added since the last assessment of such property.

(iii) Has decreased in value to the extent of more than one hundred dollars ($100.00) by virtue of improvements or appurtenances damaged, destroyed or removed since the last assessment of such property.

(iv) Has increased or decreased in value since the last assessment of such property by virtue of some extraordinary circumstances, such circumstances being those of unusual occurrence in trade or business, and the facts in connection with which shall be found by the board of equalization in each case and entered upon the proceedings of said board.

(e) Has been subdivided into lots located on streets already laid out and open, and sold or offered for sale as lots, since the date of the last assessment of such property. This shall apply to all cases of subdivision into lots, regardless of whether the land is situated within or without an incorporated municipality: Provided, that where lands have been subdivided into lots, and more than five acres of any such subdivision remain unsold by the owner thereof, the unsold portion may be listed as land acreage, in the discretion of the tax supervisor.

(f) Was last assessed at an improper figure as the result of a clerical error.

(g) Was last assessed at a figure which manifestly is unjust by comparison with the assessments placed upon similar property in the county: Provided, that the power to reasses under this
subdivision shall be exercised only by the board of
equalization and review, subject to appeal to the
state board of assessment. (1939, c. 310, s. 301.)

§ 105-280. Date as of which assessment is to
be made.—All property, real and personal, shall
be listed or listed and assessed, as the case may
be, in accordance with ownership and value as of
the first day of April, one thousand nine hundred
ty-nine, and thereafter all property shall be
listed or listed and assessed in accordance with
ownership and value as of the first day of January
each year. (1939, c. 310, s. 302.)

When Lien Attaches.—The lien for taxes attaches to
realty on the first day of April of each year, the date on
which land is required to be listed in the name of the
owner. Bemis Hardwood Lbr. Co. v. Graham County, 214
N. C. 167, 198 S. E. 843.

§ 105-281. Property subject to taxation.—All
property, real and personal, within the jurisdic-
tion of the state, not especially exempted, shall
be subject to taxation. (1939, c. 310, s. 303.)
Editor's Note.—For cases construing former § 7971(18),
now repealed, which defined what should be included as
personal property see Lawrence v. Shaw, 210 N. C. 352, 361,
185 S. E. 504; Mecklenburg County v. Sterchi Bros. Stores,
210 N. C. 79, 185 S. E. 454.

Taxation of Personal Property of Nonresidents Is Con-
stitutional.—The taxation of personal property of nonresi-
dents by this state when such personal property has ac-
tained a taxable situs here does not violate the provisions
of the 14th Amendment of the Federal Constitution, the
rule that personal property follows the domicile of the
owner being subject to an exception when such personalty
is held in such a manner as to create a "business situs"
for the purpose of taxation. Mecklenburg County v. Ster-
chi Bros. Stores, 210 N. C. 79, 185 S. E. 454, construing
§ 7971(18), now repealed.

§ 105-282. Article subordinate to sections 105-
198 to 105-217.—None of the provisions contained
in any of the sections of this article shall be con-
stituted in conflict with Schedule H, §§ 105-198 to
105-217, but rather they shall be subordinate there-
to. (1939, c. 310, s. 304.)

Art. 14. Personnel for County Tax Listing
and Assessing.

§ 105-283. Appointment and qualifications of
tax supervisors.—At or before the regular meeting
next preceding the date as of which property is
to be listed and assessed, the board of county
commissioners of each county shall appoint as
tax supervisor some person who shall be a free-
holder in the county, who shall for one year im-
mediately preceding the appointment, have been
a resident of the county, and whose experience in
the valuation of real and personal property is
satisfactory to the board.

In counties in which there is an auditor, tax
clerk, county accountant, all-time chairman of the
board of county commissioners, or other similar
officer, either may be designated as supervisor by
the board of county commissioners. (1939, c. 310,
s. 400.)

§ 105-284. Term of office and compensation
of supervisors.—The tax supervisor shall serve
for one year or for such shorter period of time as
the board may designate. In the case he is ap-
pointed for one year, he shall serve until his suc-
cessor is appointed and has qualified, subject to
removal for cause by the board of commissioners
at any time. Any vacancy shall be filled by ap-
pointment by the board of commissioners.

The compensation of the supervisor shall be
fixed by the board of commissioners, and he shall
be allowed such expenses as the commissioners
may approve. (1939, c. 310, s. 401.)

§ 105-285. Oath of office of supervisor.—Im-
mEDIATELY after his appointment, and before en-
tering upon the duties of his office, the supervisor
shall file with the clerk of the board of commis-
sioners the following affidavit, subscribed and sworn
to: Before the chairman of the board of commis-
sioners or some other officer qualified to admin-
ister oaths:

"I, .................. County Tax Supervisor for
.................. County, North Carolina, for the
year ..........., do solemnly swear (or affirm) that
I will discharge the duties of my office as super-
visor according to the laws in force governing
such office; so help me, God.

[Signature]" (1939, c. 310, s. 402.)

§ 105-286. Powers and duties of tax super-
visor.—(1) The supervisor shall have general
charge of the listing and assessing of all property
in the county in accordance with the provisions of
law.

(2) He shall appoint the list takers and asses-
sors, subject to the approval of the commission-
ers, as hereinafter provided.

(3) He shall, on the second Monday preceding
the date as of which property is to be assessed or
at some time during the week which includes said
Monday, convene the list takers and assessors for
general consideration of methods of securing a
complete list of all property in the county, and of
assessing, in accordance with law, all property
which is to be assessed during the approaching
listing period.

(4) He shall visit each list taker at least once
during the period of listing, and shall confer with
each list taker during said period as often as he
judges proper. Such visit shall be for the purpose of
securing a complete list of all property in the county,
and of assessing, in accordance with law, all property
which is to be assessed during the approaching
listing period.

(5) He shall have power to subpoena any
person for examination under oath and to subpoena
any books, papers, records or accounts whenever
he has reasonable grounds for the belief that such
person has knowledge of such books, papers, rec-
cords and accounts containing information which is
pertinent to the discovery or the valuation of any
property subject to taxation in the county, or
which is necessary for compliance with the re-
quirements of any law, and shall cause such books,
records and accounts to be delivered to him at
such time and place as he shall direct.

(6) He may require that any or all persons,
firms and corporations, domestic and foreign, en-
gaged in operating any business enterprise in the
county shall submit, in connection with his or its
regular tax list, a detailed inventory, statement of
assets and liabilities, or other similar information
pertinent to the discovery of valuation of property
taxable in the county. Inventories, statements of
assets and liabilities or other information not ex-
pressly required by this subchapter to be shown on
the tax list itself, secured by the supervisor un-
under the terms of this subdivision, shall not be open to public inspection.

Any supervisor or other official disclosing information so obtained, except as such disclosure may be necessary in listing or assessing property or in administrative or judicial proceedings relating to such listing or assessing, shall be guilty of a misdemeanor and punishable by fine not exceeding fifty dollars ($50.00).

(7) He shall have power, for good cause, and prior to the first meeting of the board of equalization and review, to change the valuation placed upon any property by the list taker, provided such property is subject to assessment for the current year, and provided that notice of such change is given to the taxpayer prior to the meeting of said board.

(8) He shall perform such other duties as may be imposed upon him by law, and shall have and exercise all powers reasonably necessary in the performance of his duties, not inconsistent with the constitution or the laws of this state. (1939, c. 310, s. 403.)

§ 105-287. Appointment, qualifications, and number of list takers and assessors.—Subject to the approval of the county commissioners, the supervisor, on or before the second Monday preceding the date as of which property is to be assessed, shall appoint some competent person to act as list taker and assessor in each township.

With the approval of the commissioners he may appoint more than one such person for any township in which is situated an incorporated town or part of an incorporated town. In quadrennial years three such persons shall be appointed in each township, and more than three may be appointed in townships in which is located an incorporated town or part of an incorporated town; and in such years, at the time of their appointment, such appointees shall have been resident freeholders of the county for at least twelve months; Provided, that in any county adopting the horizontal method of revaluations in one thousand nine hundred forty-one, and quadrennially thereafter, the commissioners may appoint less than three list takers and assessors per township; Provided, further, that in quadrennial years the board of county commissioners may appoint one list taker and assessor in each township if in addition thereto at least two county-wide list takers and assessors are appointed; or said board may appoint not more than three qualified assessors to assess all real estate in the county. In every year the persons appointed shall be persons of character and integrity, and shall have such experience in the valuation of types of property commonly owned in the county as shall satisfy the supervisor and the commissioners. (1939, c. 310, s. 404.)

§ 105-288. Term of office and compensation of list takers and assessors.—The list takers and assessors shall serve for such period as may be fixed by the commissioners. They shall receive for their services such compensation as the commissioners may fix. No list taker shall receive compensation until the supervisor has checked over the lists accepted by him, as hereinafter required, and certified that his work has been satisfactory. Each list taker shall make out his account in detail, specifying each day's services, which account shall be audited by the county accountant and approved by the commissioners. (1939, c. 310, s. 405.)

§ 105-289. Oath of list takers and assessors.—Before entering upon his duties each list taker and assessor shall take the following oath, which shall be filed with the clerk to the board of commissioners after having been subscribed and sworn to before some officer qualified to administer oaths:

"I, __________________ List Taker and Assessor for ______________ Township, ______________ County, North Carolina, do hereby solemnly swear (or affirm) that I will discharge the duties of my office according to the laws in force that govern said office; so help me, God.

__________________________
(Signature)"

(1939, c. 310, s. 406.)

§ 105-290. Powers and duties of list takers and assessors.—(1) At least ten days before the date as of which property is to be assessed, each list taker shall post, in five or more public places in his township, a notice containing at least the following: (a) The date as of which property is to be assessed; (b) the date on which listing will begin; (c) the date on which the listing will end; (d) the times and places between the last two dates mentioned at which lists will be accepted; (e) a notice that all persons who, on the date as of which property is to be assessed, own property subject to taxation must list such property within the period set forth in the notice, and that failure to do so will subject such persons to the penalties prescribed by law.

In townships in which more than one list taker has been appointed the posting of these notices shall be the duty of one of them, to be designated by the supervisor.

In case the period of listing in any township shall be extended by the commissioners, as hereinafter permitted, it shall be the duty of the list taker who first posted the notices to post new notices in the same places, giving notice of the extension and notice of the times and places at which lists will be accepted during the extended period.

(2) Each list taker shall attend the meeting referred to in subdivision three of § 105-286.

(3) The list takers and assessors, under the supervision of the supervisor, shall secure lists of all real and personal property and polls subject to taxation in their townships, and shall assess all such property as is subject to assessment under the provisions of this subchapter. To this end they shall secure from each taxpayer or person whose duty it is to list property or poll in their respective townships a list containing the information hereinafter specified, and shall have the authority to visit any such person or his property, to investigate the value of any such property, and to examine under oath any such person present before them for the purpose of listing property. The supervisor may, in his discretion, require any list taker and assessor to visit each person in his township whose property or poll is subject to taxation.

(4) Each list taker and assessor shall have power to subpoena any person for examination under oath whenever he has reasonable grounds for belief that such person has knowledge which
is pertinent to the discovery or valuation of property subject to taxation in his township or which is necessary for compliance with the requirements, hereinafter set forth, as to what the tax list shall contain.

(5) The list takers and assessors shall perform such duties in connection with the making up of the tax records and in connection with the discovery of unlisted property as hereinafter specified.

(6) The list takers and assessors shall perform such other duties as may be by law imposed upon them; and they shall have and exercise all powers necessary to the proper discharge of their duties not inconsistent with the constitution or the statutes of this state. (1939, c. 310, s. 407.)

§ 105-291. Employment of experts.—The board of county commissioners in each county, at the request of the county supervisor of taxation, may in their discretion employ one or more persons having expert knowledge of the value of specific kinds or classes of property within the county, such as mines, factories, mills and other similar property, to aid and assist the county supervisor of taxation and the list takers and assessors in the respective townships, or to advise with, advise and assist the board of equalization and review in arriving at the true value in money of the property in the county. Such expert, or experts, so employed by the board of county commissioners shall receive for their services such compensation as the board of county commissioners shall designate. (1939, c. 310, s. 408.)

§ 105-292. Clerical assistants. — The county commissioners may, in their discretion, upon recommendation of the supervisor, employ such clerical assistants to the supervisor as they deem proper, and at such compensation and for such terms as they deem proper. Such assistants shall perform such duties as the commissioners or the supervisor may assign to them. (1939, c. 310, s. 409.)

§ 105-293. Tax commission.—In all counties having a tax commission, said commission shall do and perform all the duties required by this subchapter to be performed by county commissioners except levying taxes, and all expenses incurred by said tax commission or its appointees in accordance with this subchapter shall be paid by the county commissioners out of the general county funds. (1939, c. 310, s. 410.)

Art. 15. Classification, Valuation and Taxation of Property.

§ 105-294. Taxes to be on uniform ad valorem basis as to class.—All property, real and personal, shall as far as practicable, be valued at its true value in money, and taxes levied by all counties, municipalities and other local taxing authorities shall be levied uniformly on valuations so determined. The intent and purpose of this subchapter is to have all property and subjects of taxation assessed at their true and actual value in money, in such manner as such property and subjects are usually sold, but not by forced sale thereof, and the words "market value," "true value," or "cash value," whenever used in the tax laws of this state, shall be held to mean for what the property and subjects can be transmuted into cash when sold in such manner as such property and subjects are usually sold: Provided, nothing in this section shall be construed as conflicting with or modifying the provisions of Schedule H, §§ 105-198 to 105-217, or the provisions of this subchapter classifying other property.

It is hereby declared to be the policy of this state so to use its system of real estate taxation as to encourage the conservation of natural resources and the beautification of homes and road-sides, and all tax assessors are hereby instructed to make no increase in the tax valuation of real estate as a result of the owner's enterprise in adopting any one or more of the following progressive policies:

1. Planting and care of lawns, shade trees, shrubs and flowers for non-commercial purposes.
2. Repainting buildings.
3. Terracing or other methods of soil conservation, to the extent that they preserve values already existing.
4. Protection of forests against fire.
5. Planting of forest trees on vacant land for reforestation purposes (for ten years after such planting). (1939, c. 310, s. 500.)

Cited in Belk's Department Store v. Guilford County, 222 N. C. 441, 451, 23 S. E. (2d) 897 (dis. op.).

§ 105-295. Land and buildings.—In determining the value of land the assessors shall consider as to each tract, parcel or lot separately listed at least its advantages as to location, quality of soil, quantity and quality of timber, water power, water privileges, mineral or quarry or other valuable deposits, fertility, adaptability for agricultural, commercial or industrial uses, the past income therefrom, its probable future income, the present assessed valuation, and any other factors which may affect its value.

In determining the value of a building the assessors shall consider at least its location, type of construction, age replacement cost, adaptability for residence, commercial or industrial uses, the past income therefrom, the probable future income, the present assessed value, and any other factors which may affect its value. Buildings partially completed shall be assessed in accordance with the degree of completion on the day as of which property is assessed. (1939, c. 310, s. 501.)

Art. 16. Exemptions and Deductions.

§ 105-296. Real property exempt.—The following real property, and no other, shall be exempt from taxation:

(1) Real property owned by the United States or this state, and real property owned by the state for the benefit of any general or special fund of the state, and real property lawfully owned and held by counties, cities, townships, or school districts, used wholly and exclusively for public or school purposes. The repeal of the exemption of real property indirectly owned by federal, state or local governments shall be effective for the tax year one thousand nine hundred and forty-three, and such property indirectly owned shall be placed upon the tax books for one thousand nine hundred and forty-three and subject to the tax rates levied on real estate in the year one thousand nine hundred and forty-three.

(2) Real property, tombs, vaults and mauso-
leums set apart for burial purposes, except such as are owned and held for sale or rental.

(3) Buildings, with the land upon which they are situated, lawfully owned and held by churches or religious bodies, wholly and exclusively used for religious worship or for the residence of the minister of any such church or religious body, together with the additional adjacent land reasonably necessary for the convenient use of any such building.

(4) Buildings, with the land actually occupied, wholly devoted to educational purposes, belonging to, actually and exclusively occupied and used for public libraries, colleges, academies, industrial schools, seminaries, or any other institutions of learning, together with such additional adjacent land owned by such libraries and educational institutions as may be reasonably necessary for the convenient use of such buildings, and also buildings thereon used as residences by the officers or instructors of such educational institutions.

(5) Real property belonging to, actually and exclusively used by, Young Men's Christian Associations and other religious, charitable, educational or benevolent associations, orphanages, or other similar homes, hospitals and nurseries not conducted for profit, but entirely and completely as charitable.

(6) Buildings, with the land actually occupied, belonging to the American Legion or Post of the American Legion or any benevolent, patriotic, historical, or charitable association used exclusively for lodge purposes by said societies or associations, together with such additional adjacent land as may be necessary for the convenient use of the buildings thereon.

(7) The exemptions granted in subsections three, four, five, six and ten, of this section shall apply to real property of foreign religious, charitable, educational, literary, benevolent, patriotic or historical corporations, institutions or orders when such property is exclusively used for religious, charitable, educational or benevolent purposes within this state.

(8) The real property of Indians who are not citizens, except lands held by them by purchase.

(9) Real property falling within the provisions of § 55-11, appropriated especially for public parks and drives.

(10) Real property actually used for hospital purposes, including homes for nurses employed by or in training in such hospitals, held for or owned by hospitals organized and operated as non-stock, non-profit, charitable institutions, without profit to the members or their successors, notwithstanding that patients able to pay are charged for services rendered: Provided, all revenues or receipts of such hospitals shall be used, invested, or held for the purposes for which they are organized; and provided, further, that where hospital property is used partly for such hospital purposes and partly for commercial and business purposes, then only such proportion of the value of such building and the land on which it is located shall be exempt from taxation as is actually used for such hospital purposes. The provisions of this section shall be effective as to taxes for the year one thousand nine hundred and thirty-six and subsequent years.

Cross References—As to extent of power of the legislature to exempt, see note of United Brethren v. Forsyth County Com'rs, 115 N. C. 489, 30 S. E. 625, under N. C. Const., Art. V, § 5.

Editor's Note—The 1941 amendment added subsection (11) and inserted reference thereto in subsection (8). For comment on this amendment, see 19 N. C. Law Rev. 530.

The 1943 amendment struck out former subsection (7). It also added the phrase "the income therefrom is exclusively used for," formerly appearing after the word "for" in line six of subsection (7). This amendment added subsection (4) and struck out former subsection (1). For comment on this amendment, see 21 N. C. Law Rev. 757 (17) which some thought to be unnecessarily literal, the court had held foreign eleemosynary corporations deprived of the exemptions otherwise granted to such organizations on the theory used for commercial purposes.

Gentry, 210 N. C. 579, 187 S. E. 795. The exemptions are now granted in specific terms by subsection (7) of this law and the following section. 15 N. C. Law Rev. 391.

Subsection eleven was made retroactive. Piedmont Mem'ral Hospital v. Guilford County, 221 N. C. 308, 314, 20 S. E. (2d) 332.

Property of Hospital Not Exempt.—The property of a hospital organized as a business corporation and charging all patients according to a fixed schedule is not exempt from taxation, under this section or those immediately following, unless the patients were also customary patients of a hospital organized as a charitable corporation and the profits derived therefrom were not devoted to the payment and classed as charity patients, and although its stockholders, though not waiving their right to dividends, did not expect to receive dividends when they subscribed for stock, and no dividends were paid thereon for the years in question.

Cross References.—As to extent of power of the legislature to exempt, see note of United Brethren v. Forsyth County Com'rs, 115 N. C. 489, 30 S. E. 625, under N. C. Const., Art. V, § 5.
§ 105-297. Personal property exempt.—The following personal property, and no other, shall be exempt from taxation:

(1) Personal property, directly or indirectly owned by this state and by the United States, and that lawfully owned and held by the counties, cities, towns, and school districts of the state, used wholly and exclusively for county, city, town, or public school purposes.

(2) The furniture and furnishings of buildings lawfully owned and held by churches or religious bodies, wholly and exclusively used for religious worship or for the residence of the minister of any church or religious body, and private libraries of such ministers and the teachers of the public schools of this state.

(3) The furniture, furnishings, books, and instruments contained in buildings wholly devoted to educational purposes, belonging to and exclusively used by churches, public libraries, colleges, academies, industrial schools, seminaries, or other bodies, wholly and exclusively used for religious worship or for the residence of the minister of any religious, charitable, educational, literary, benevolent, patriotic, or historical institutions.

(4) The endowment and invested funds of churches and other religious associations, charitable, educational, literary, benevolent, patriotic or historical institutions, associations or orders, when the interest or income from said funds shall be used wholly and exclusively for religious, charitable, educational or benevolent purposes, or to pay the principal or interest of the indebtedness of said associations.

(5) Personal property belonging to Young Men's Christian Associations and other similar religious associations, orphan homes, reformatories, hospitals, and nurseries which are not conducted for profit and entirely and completely used for charitable and benevolent purposes.

(6) The furniture, furnishings, and other personal property belonging to any American Legion, or Post of American Legion, patriotic, historical, or any benevolent or charitable association, when used wholly for lodge purposes and meeting rooms by said association or when such personal property is used for charitable or benevolent purposes.

(7) The exemptions granted in subsections two, three, four, five, six and eleven of this section shall apply to personal property of foreign religious, charitable, educational, literary, benevolent, patriotic or historical corporations, institutions or orders when such property is exclusively used or the income therefrom is exclusively used for religious, charitable, educational or benevolent purposes within this state.

(8) Wearing apparel, household and kitchen furniture, the mechanical and agricultural instruments of farmers and mechanics, libraries and scientific instruments, provisions and live stock, not exceeding the total value of three hundred dollars ($300.00), and all growing crops: Provided, that said three hundred dollars ($300.00) exemption shall be limited to: (1) each household, consisting of the head of the household and all the dependents, one three hundred dollars ($300.00) exemption to be distributed among the members of the household as they see fit; and (2) each single person, not residing with persons on whom he is dependent, as to eligible property actually owned by him.

(9) The intangible personal property referred to in Schedule H, §§ 105-198 to 105-217, which said intangible personal property shall be taxed or exempt in accordance with the provisions of said Schedule H, §§ 105-198 to 105-217: Provided, that the provisions of this subsection shall not be construed to modify the provisions of Article 25 or Article 26 of this subchapter.

(10) Tangible personal property held at any seaport destined for and awaiting foreign shipment.

(11) The furniture, furnishings, books, instruments, and all other tangible or intangible personal property held for or owned by hospitals organized and operated as non-stock, non-profit, charitable institutions, notwithstanding that patients of such hospitals able to pay are charged for services rendered: Provided, all revenues or receipts of such hospitals shall be used, invested, or held for the purposes for which they are organized. The provisions of this section shall be effective as to any assessment for taxes for the year one thousand nine hundred and thirty-six and subsequent years.

(12) All cotton, tobacco or other farm products owned by the original producer, or held by the original producer in any public warehouse and represented by warehouse receipts, or held by the original producer for any cooperative marketing or growers' association, shall be exempt from taxation for the year following the year in which grown, but not for any year thereafter. (1939, c. 310, s. 601; 1941, c. 125, ss. 3, 4; 1941, c. 221, s. 2.)

Editor's Note.—The first 1941 amendment added subsection (11) and inserted reference thereto in subsection (7). The second 1941 amendment added subsection (12).

§ 105-298. Deductions and credits.—(a) Private hospitals shall not be exempt from property taxes and other taxes lawfully imposed, but in consideration of the large amount of charity work done by them, the boards of commissioners of the several counties are authorized and directed to accept, as valid claims against the county, the bills of such hospitals for attention and services voluntarily rendered to afflicted or injured residents of the county who are indigent and likely to become public charges, when such bills are duly itemized and sworn to and are approved by the county physician or health officer as necessary or proper;
and the same shall be allowed as payments on and credits against all taxes which may be or become due by such hospital on properties strictly used for hospital purposes, but to that extent only will the county be liable for such hospital bills: Provided, that the board of aldermen or other governing boards of cities and towns shall allow similar bills against the municipal taxes for attention and services voluntarily rendered by such hospitals to paupers or other indigent persons resident in any such city or town: Provided further, that the governing boards of cities and towns shall require a sworn statement to the effect that such bills shall not be presented to any board of county commissioners as a mnusel against that county, or as a credit on taxes due that county. The provisions of this subsection shall not apply to public hospitals or to hospitals organized and operated as non-stock, non-profit, charitable institutions, which, for the purposes of this subsection and it is the legislative intent that the provisions of this subsection shall control rather than the provisions of § 7880(194) is not empowered to recover the same taxes. Piedmont Memorial Hospital v. Guilford County, 218 N. C. 308, 20 S. E. 2d 265.

Use of Building.—Where the first floor of plaintiff’s building is rented out for stores and shops, the second floor is rented for offices for physicians and surgeons, the third and fourth floors are used for a hospital, as to the first two floors, the second floor Assembly is without authority to grant any exemption from taxation and as to the third and fourth floors, subsection (a) is applicable, and in accordance with its provisions, bills for services rendered the indigent poor may be allowed to be secured in the same manner as other individual property of its property, but it is not exempt from taxation. Piedmont Memorial Hospital v. Guilford County, 218 N. C. 671, 12 S. E. 2d 265.

Distinction between Private and Public Hospitals.—In determining the question of exemption from taxation, a non-profit hospital established solely for charitable purposes through individual donations and which is governed by a self-perpetuating board of trustees named by the incorporators, is a private hospital as contradistinguished from a public hospital, which is one supported, maintained and controlled by public authority, and the distinction observed between charitable hospitals and those operated for gain or profit in determining liability for negligence, has no bearing in determining the question of tax exemption. Piedmont Memorial Hospital v. Guilford County, 218 N. C. 671, 12 S. E. 2d 265.

§ 105-299. Article subordinate to sections 105-198 to 105-217.—None of the provisions contained in any of the sections of this article shall be construed to conflict with Schedule II, §§ 105-198 to 105-217, but rather shall they be subordinate there to. (1939, c. 310, s. 603.)

Art. 17. Real Property—Where and in Whose Name Listed.

§ 105-300. Place for listing real property.—All real property subject to taxation, and not hereinafter required to be assessed originally by the state board of assessment, shall be listed in the township or place where such property is situated. (1939, c. 310, s. 700.)

§ 105-301. In whose name real property to be listed; information regarding ownership; permanent listing.—(1) Except as hereinafter specified, real property shall be listed in the name of its owner; and it shall be the duty of the county recorder to list the same. To this end the board of county commissioners in any county may require the register of deeds, when any transfer of title is recorded, other than a mortgage or deed of trust, to certify the same to the supervisor (or if there be no supervisor acting at the time, to the person in charge of the tax records), and the record of the transfer shall be entered upon the tax records. The certification from the transfer to the supervisor or other person shall include the name of the person conveying the property, the name of the person to whom it is conveyed, the township in which the property is situated, a description of the property sufficient to identify it, and a statement as to whether the parcel is conveyed in whole or in part. For his services in this respect the register shall be allowed, if on fees, the sum of ten cents (10c) per transfer certified, to be paid by the county, and if on salary, such allowance as may be made by the board of commissioners. It shall also be within the power of any board of commissioners, in its discretion, to require that each person recording such conveyance of real property shall, before presenting it to the register
of deeds, present it to the person in charge of the tax records, in order that the conveyance may be noted on the tax records and in order that adequate information concerning the location of the property may be obtained from the person recording the conveyance. If such presentation is required by the commissioners of any county, the register of deeds of that county shall not accept for recording any conveyance which has not first been submitted to the person in charge of the tax records and such person has obtained information for the tax records which he regards as satisfactory. The commissioners may allow the person in charge of the tax records such compensation for this service as they deem appropriate, but they shall not require the person presenting the deed to pay any fee therefor.

It shall also be within the power of the commissioners to authorize the installation of a system for the permanent listing of real estate, under which all real estate may be carried forward by the supervisor, the list takers or some person or persons designated by the supervisor, in the name of the proper person as defined by this subchapter, without requiring that such real estate be listed each year by such person. No such system shall be established, with the approval of the board, the board of assessment; and when such a system is installed, the board may authorize the commissioners to make such modifications of the listing requirements of this subchapter as the board may deem necessary: Provided, that nothing herein shall require the board's approval for any such system installed prior to April 3, 1939.

Any county may, in the discretion of the commissioners, require that all real estate be listed only in the name of the owner of record at the close of the day as of which property is listed and assessed.

(2) For purposes of tax listing and assessing, the owner of the equity of redemption in any property which is subject to a mortgage or deed of trust shall be considered the owner of such real estate.

(3) Real property of which a decedent died possessed, not under the control of an executor or administrator, may be assessed to the heirs or devisees of the deceased without naming them until they have given notice of their respective names to the supervisor and of the division of the estate. It shall be the duty of any executor or administrator having control of real property to list it in his fiduciary capacity until he shall have been divested of control of such property. The right of an administrator, administering upon the estate of an intestate decedent, to petition for the sale of real estate to make assets shall not be considered as control of such real estate for purposes of this subdivision.

(4) A trustee, guardian or other fiduciary having legal title to real property shall be regarded as the owner of such property for purposes of tax listing, except as elsewhere in this section provided, and he shall list such property in his fiduciary capacity.

(5) Where undivided interests in real property are owned by tenants in common, not being copartners, the supervisor, upon request and in his discretion, may allow the property to be listed by the respective owners in accordance with their respective undivided interests.

(6) Real property belonging to a partnership or unincorporated association shall be listed in the name of such partnership or association.

(7) Real property owned by a corporation shall be listed in the name of the corporation.

(8) When land is owned by one party and improvements thereon or mineral, timber, quarry, water power, or similar rights therein are owned by another party, the parties may list their interests separately or may, in accordance with contractual relations between them, have the entire property listed in the name of the owner of the land. Where in such a case the land and improvements or rights are listed by the separate owners, the taxes levied on the improvements, or rights, shall be a lien on the land, and the land shall be subject to foreclosure for non-payment of such taxes in the same manner as if such taxes were levied directly against said land: Provided, nothing herein contained shall prevent said taxes from being also a lien on said improvements, or rights.

(9) A life tenant or tenant for the life of another shall be considered the owner of real property for purposes of tax listing, but he shall indicate when listing such property that he is a life tenant. The taxes levied on property listed in the name of a life tenant shall be a lien on the entire fee: Provided, that this shall not prevent the life tenant from being liable for the taxes under § 105-410.

(10) If the owner or person in whose name the real property should properly be listed, as set forth in the foregoing subdivisions of this section, is unknown, the property may be listed in the name of the occupant, and either or both shall be liable for the taxes; and if there be no occupant, then it may be listed as property the owner of which is unknown: Provided, that wherever the property is so listed against the occupant or an unknown owner, or through error the property has been listed against some person other than the owner as defined in this section, and the name of the true owner is subsequently ascertained, the tax records may be changed so as to list said property against the owner, and the change shall have the same force and effect as if the property has been listed against the owner in the first instance. (1939, c. 310, s. 701.)

In Whose Name Listed.—Land should be listed for taxation in the name of the individual owners and not in the name of the "estate" of one deceased. Morrison v. McLaughlin, 88 N. C. 351.

Same—Improper Listing as Affecting Purchaser's Title.—A tax-title devised by a purchaser at a sheriff's sale of land listed in the name of the "estate" of one deceased is defective. McLaughlin v. McLaughlin, 88 N. C. 351.


Art. 18. Personal Property—Where and in Whose Name Listed.

§ 105-302. Place for listing tangible personal property.—(1) In general, all tangible personal property and polls shall be listed at the residence of the owner, except as otherwise provided in this section. For purposes of this section the residence of a person who has two or more places in which he occasionally dwells shall be the place at which he resided for the longest period of time during the year preceding the date as of which
property is assessed. The residence of a corpora-
tion, partnership or unincorporated association, domestic or foreign, shall be the place of its prin-
cipal office in this state, and if a corporation, part-
nership or unincorporated association such as has no
principal office in this state, its tangible personal
property may be listed at any place at which said
property is situated provided said property has a
taxable situs within the state.

(2) Farm products produced in this state,
owned by the producers, shall be listed where
produced.

(3) Tangible personal property taxable in this
state, owned by an individual nonresident of this
state, shall be listed where situated.

(4) Subject to the provisions of subsection two
of this section, tangible personal property shall
be listed at the place where such property is situ-
a ted, rather than at the residence of the owner,
if the owner or person having control thereof
 hires or occupies a store, mill, dockyard, piling
ground, place for the sale of property, shop, office,
mine, farm, place for storage, manufactory or
warehouse therein for use in connection with such
property. Property stored in public warehouses
and merchandise in the possession of a consignee
or broker shall be regarded as falling within the
provisions of this subdivision.

(5) The tangible personal property of a deced-
ent whose estate is in the process of administra-
tion or has not been distributed shall be listed at
the place at which it would be listed if the de-
cedent were still alive and still residing at the
place at which he resided at the time of his death.

(6) Tangible personal property held by a trust-
ee, guardian or other fiduciary having legal title
thereto shall be listed at the place where such
property would be listed if the beneficiary were
the owner; and if there are several beneficiaries
in a case in which such property would be listed
at the residence of the owner, the value of the
property shall be listed at the various residences
of such beneficiaries according to their respec-
tive interests. This subdivision shall effect
only cases in which the beneficiaries are resi-
dents of this state, but it shall apply whether the fidu-
ciary is a resident or nonresident of this state.
Property delivered by executors or administrators
to themselves or others as testamentary trustees
shall be controlled by this subsection rather than
by subsection five of this section.

(7) In any case where the beneficiary is a non-
resident of this state, tangible personal property
having a taxable situs in this state, held by a trust-
ee, guardian or other fiduciary having legal title,
shall be listed at the place it would be listed if the
trustee or other fiduciary were the beneficial
owner of such property. (1939, c. 310, s. 800.)

Generally.—The rules and regulations fixed by the "Re-
venue Act" and the "Machinery Act" for the guidance of
the officers charged with the listing and assessment of
property for purposes of state taxation govern and control
the action of county and municipal officers charged with
the listing and assessment of property for municipal
taxation. Wiley v. Commissioners, 111 N. C. 397, 16 S. E. 542 and cases there cited. The conclusion, therefore, is
that the legislature has adopted a "uniform rule" which
must be observed. Id.

Fixing Situs of Property.—It is for the legislature to de-
termine the situs of personal property for purposes of tax-
ation, and may provide different rules for different kinds
of property, change them from time to time, and the courts
may not, for consideration of expediency, disregard the

§ 105-304

CH. 105. TAXATION—ASSESSMENT

§ 105-304

Same.—Application of Maxim Mobilia Personam Sequen-
tur.—In Alvany v. Powell, 55 N. C. 51, Chief Justice Pear-
son declares that the true principle upon which to deter-
mine whether personal property is liable to be taxed, is
the situs of the property, and that the distinction attempted
is made between personality and real estate, depending
upon the domicile of the owner, and the house or place
wherein he usually resides.

Where Domicile and Residence Separate.—This section
has been interpreted by the courts in the following way:
1. In the case of an individual nonresident of this state,
residence is according to domicile.
2. In the case of a corporation, the domicile of the pro-
tected or owner, residence is according to domicile.
3. In the case of a corporation, the domicile of the pro-
tected or owner, residence is according to domicile.
4. In the case of a corporation, the domicile of the pro-
tected or owner, residence is according to domicile.
5. In the case of a corporation, the domicile of the pro-
tected or owner, residence is according to domicile.

§ 105-304. Intangible personal property.—The
listing, assessing, and taxation of intangible per-
sonal properties and the administration relative thereto
shall be subject to the provisions of Schedule H, §§ 105-198 to 105-217. (1939, c. 310, s. 801.)

§ 105-304. In whose name personal property
should be listed.—(1) In general, personal prop-
erty shall be listed in the name of the owner
who has possession of said property and is
assessed; and it shall be the duty of the owner to
list the same. The owner of the equity of redeem-
pion in personal property subject to a chattel mort-
gage shall be considered the owner of the prop-
erty; and the vendee of personal property under
a conditional bill of sale, or under any other sale
contract by virtue of which title to the property is
retained in the vendor as security for the pay-
ment of the purchase price, shall be considered
the owner of the property, provided he has pos-
session of such property or the right to use the
same.

(2) Personal property of a corporation, part-
nership, firm or unincorporated association shall
be listed in the name of such corporation, part-
nership, firm, or unincorporated association.

(3) Personal property of which a decedent died
possessed, not under the control of an executor or
administrator, may be assessed to the next of
kin or legatees of the decedent without naming
them until they have given notice of their respec-
tive names to the supervisor and have likewise
given notice of the distribution of the estate; and
for this purpose such next of kin or legatees may
be designated as "heirs." It shall be the duty of
an executor or administrator having control of
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such property to list it in his fiduciary capacity until he shall have been divested of such control.

(4) A trustee, guardian, or other fiduciary having legal title to personal property shall be regarded as the owner thereof for purposes of this section.

(5) In cases in which two or more persons are joint owners of personal property, each shall list the value of his interest.

(6) If any dispute shall arise as to the true owner of personal property, the person in possession thereof shall be regarded as the owner unless the list taker or supervisor shall be convinced that some other person is the true owner. (1939, c. 310, s. 802.)

§ 105-305. Article subordinate to sections 105-198 to 105-217.—None of the provisions contained in any of the sections of this article shall be construed to conflict with Schedule H, §§ 105-198 to 105-217, but rather shall they be subordinate therefo. (1939, c. 310, s. 803.)

Art. 19. What the Tax List Shall Contain and Miscellaneous Matters Affecting Listing.

§ 105-306. What the tax list shall contain.—Each taxpayer or person whose duty it is to list property for taxation shall file with the proper list taker a tax list setting forth, as of the day on which property is assessed, the following information:

(1) The name and residence address of the taxpayer.

(2) The age of the taxpayer, if he is a male taxpayer, listing in the township of his residence.

(3) Each parcel of real property owned or controlled in the township, not subdivided into lots, together with the number of acres cleared for cultivation, waste land, woods and timber, mineral, quarry lands, and lands susceptible of development for water power, and the total acreage. Each separate parcel shall be described by name, if it has one, and by specifying at least two adjoining landowners, or by such other description as shall be sufficient to locate and identify said land by parol testimony. If all or part of such land shall lie within the boundaries of any incorporated town or any district in which a special tax is levied, such fact shall be specified.

(4) Each parcel of manufacturing property owned or controlled in the township, not subdivided into lots, together with the number of acres in said parcel or the dimensions thereof, the name of such parcel, if any, and the names of at least two adjoining landowners, or such other description as shall be sufficient to locate and identify said property by parol testimony. If all or part of such land shall lie within the boundaries of any incorporated town or any district in which a special tax is levied, such fact shall be specified.

(5) Each lot owned or controlled in the township together with the dimensions of said lot, its street number, if any, its number or location on any map filed in the office of the register of deeds or such other description as shall be sufficient to locate and identify it by parol testimony. If any such lot shall lie within the boundaries of an incorporated town or any district in which a special tax is levied, such fact shall be specified.

(6) In conjunction with the listing of any real property listed under subdivisions (3), (4), or (5) of this section, a short description of any improvements thereon, belonging to the taxpayer listing such real property, shall be given. And if some person other than the taxpayer listing such real property shall own mineral, quarry, timber, water power or other separate rights with respect thereto, or shall own any improvements thereon, such fact shall be specified, together with the name of the person owning such rights or improvements, and a short description of such rights or improvements; though the owner of the land may or may not list such separate rights or improvements for taxes in accordance with the provisions of this subchapter.

(7) All mineral, quarry, timber, water power or other separate rights owned by the taxpayer with respect to the lands of another, and all improvements owned by such taxpayer located upon the lands of another. Such rights or improvements shall be listed separately with respect to each parcel or lot of land which is listed separately by the owner thereof, and such parcel or lot shall be identified in the same manner as it is identified on the tax list of the person listing the same: Provided, that such rights or improvements shall not be taxed against the owner thereof if, under the provisions of this subchapter, they are listed for taxes by the owner of the land.

(8) Every person listing real property shall list, in connection with each parcel or lot, every encumbrance thereon, together with the amount due on such encumbrance and the name and address of the person to whom such amount is due.

(9) The amount and value of all machinery and fixtures.

(10) A special description of any improvements, having a value in excess of one hundred dollars ($100.00), which have been begun, erected, damaged or destroyed since the time of the last assessment of such property.

(11) A list of horses, mules, cows, dress horses, cattle, hogs, sheep, goats and other live stock, poultry and dogs, with the number and value of each class shown separately.

(12) The number of open female dogs and the number of other dogs.

(13) The amount and value of farm machinery, farm utensils, and carriages, carts, wagons, buggies, or other vehicles and harness.

(14) The amount and value of household and kitchen furniture, libraries, scientific instruments, tools of mechanics, wearing apparel, and provisions of all kinds.

(15) The amount and value of merchandise, manufactured goods, or goods in the process of manufacture. This subdivision is intended to include all tangible personal property whatever held for the purpose of sale or exchange or held for use in the business of the taxpayer.

(16) The amount and value of all office furniture, fixtures and equipment.

(17) The amount and value of all motor vehicles, tractors, trailers, bicycles, flying machines, pleasure boats of any and all kinds, and their appliances.

(18) The number and value of all seines, nets, fishing tackle, boats, barges, schooners, vessels, and all other floating property.

(19) The number and value of billboards and
§ 105-307

Under the Act of 1874 if the owner fails to attend at the time and place appointed to receive the lists of taxable property, the justice may make out a list for himself to the best of his knowledge. Tores v. Justices, 6 N. C. 167.

Where land is described by the name of one person, belonging to another, has been sold for unpaid taxes and it is discovered, before the deed has been accepted, that the real owner has not listed it as required by this section, the deed is insufficient to pass title, and to the holder of the deed the failure to list said property shall be prima facie evidence that such failure was willful, and the board of county commissioners shall present the names of all such persons, firms and corporations to the grand jury.

(1939, c. 310, s. 901.)

Failure to List Solvent Credits.—The failure to list solvent credits does not destroy the cause of action, but postpones the recovery of the debt, unless the amount of taxes due upon the property, the justice may make out a list for himself to the best of his knowledge. Tores v. Justices, 6 N. C. 167.

Same—How Pleaded.—Unless the failure to list a note is pleaded, that the taxes due upon the property, the justice may make out a list for himself to the best of his knowledge. Tores v. Justices, 6 N. C. 167.

Payment into Court.—The amount of taxes due upon solvent credits may be paid into court, Corey v. Hooker, 171 N. C. 229, 232, 88 S. E. 236, and when this is done it permits the party to proceed to judgment. Hyatt v. Hollowman, 168 N. C. 386, 78 S. E. 476.

A possessory action to recover a horse secured by chattel mortgage, brought by the assignee of the mortgagee notice against one to whom the mortgagee had sold the horse, is not an action to recover the horse, but requires that the taxes be given in and paid before the owner may be permitted to sue thereon. Hyatt v. Hollowman, 168 N. C. 386, 78 S. E. 476.

A former statute which made it a misdemeanor for "any person to evade the payment of taxes by surrendering or exchanging certificates of deposit in any bank of this State or elsewhere for nontaxpaying securi-
§ 105-308. Oath of the taxpayer.—Before accepting any completed tax list, it shall be the duty of the list taker to read and actually to administer the following oath (or so much thereof as may be pertinent) which shall be subscribed by the person filing the list:

"I, .............., do solemnly swear (or affirm) (that I am an officer or agent of the taxpayer named on the attached list, that as such I am duly authorized to submit said list, that I am familiar with the extent and value of all said taxpayer’s property subject to taxation in this township) that the above and foregoing list is a full, true and complete list of all and each kind of property which it is the duty of the above named taxpayer to list as owner or fiduciary, as said list indicates, in ....... Township, ....... County, North Carolina; and that I have not in any way connived at the violation or evasion of requirements of law in relation to the assessment of property; so help me, God. ..............

(Signature)

So much of the foregoing oath as appears in the second parentheses shall be used only in cases in which the list is submitted by an officer or agent. Any list taker who accepts a list without administering said oath shall be guilty of a misdemeanor. (1939, c. 310, s. 902.)

§ 105-309. Listing by agents.—Corporations, partnerships, firms and unincorporated associations, females, nonresidents of the township in which such property is to be listed, and persons physically unable to attend and file a list may have their lists submitted and sworn to by an officer or agent; but the list shall be filed in the name of the principal. (1939, c. 310, s. 903.)

Editor's Note.—As to irregularity in listing taxes by agent as affecting tax sales, see Rexford v. Phillips, 159 N. C. 314, 74 S. E. 55.

§ 105-310. Listing by mail.—All tax lists submitted by mail must be accompanied by the oath of the taxpayer, as prescribed in this subchapter, duly sworn to before a notary public or other officer authorized to administer oaths, and must be mailed to the supervisor. The supervisor may accept or reject any such list in his discretion. (1939, c. 310, s. 904.)

§ 105-311. Length of the listing period; preliminary work.—Tax listing shall begin on the day as of which property is assessed (or on the first business day thereafter if said day is a Sunday or a holiday) and shall continue for thirty days. The board of county commissioners of any county may extend the time for listing for not more than an additional thirty days: Provided, that in years of quadrennial assessment the board of county commissioners may extend the time for listing for not more than an additional sixty days.

Nothing in this section shall be construed to prevent any preparatory work, prior to the beginning of listing, which may be necessary or expedient in connection with an efficient listing or assessing of property; nor shall it prevent the assessment of real property by the list takers prior to the actual time at which it is listed by its owner or carried forward on the tax records: Provided, that no final assessment shall be made by a list taker prior to the day as of which property is required by law to be assessed. (1939, c. 310, s. 905.)

§ 105-312. Records of tax exempt property.—The person making up the tax records shall enter, in regular order, the name of the owner, a clear description of all real and personal property exempt from taxation, together with a statement of its value, for what purpose used, and the rent, if any, obtained therefrom. Each list taker shall secure the necessary information with respect to such property in his township. The list of such exempt property, when completed, shall be delivered by the county supervisor of taxation to the register of deeds of the county on or before the first day of October, and the register of deeds, on or before the first day of November, shall make duplicates thereof and transmit such duplicates to the state board of assessment and shall file the original list of exempt property in his office. (1939, c. 310, s. 906.)

§ 105-313. Forms for listing and assessing property.—All forms and books used in the listing and assessing of property for taxation shall have the approval of the state board of assessment. The board may, in its discretion, design and prescribe such forms and make arrangements for their purchase and distribution through the division of purchase and contract, the cost of same being billed to the counties. (1939, c. 310, s. 907.)

§ 105-314. Article subordinate to sections 105-198 to 105-217.—None of the provisions contained in any of the sections of this article shall be construed to conflict with Schedule H, §§ 105-198 to 105-217, but rather shall they be subordinate thereto. (1939, c. 310, s. 908.)

§ 105-314.1. Certain new motor vehicles in dealers’ stock may be assessed at reduced value during war.—While the existing state of war continues between the United States and any foreign nation, any dealer in motor vehicles who has in stock on January first a new model motor vehicle, the sale of which is subject to priorities, rationing and restrictions by federal government regulations on account of the war, shall be classified as war restricted motor vehicles and the governing bodies of the tax assessing units of the several counties are hereby authorized in their discretion to assess same for taxation at a reduced value. (1943, c. 81.)

Art. 20. Special Provisions Affecting Motor Vehicle Owners, Warehousemen, etc.

§ 105-315. Information to be given by motor vehicle owners applying for license tags.—Every motor vehicle owner applying to the state department of motor vehicles for motor vehicle license tags shall specify in the application the county in which each such motor vehicle is subject to ad valorem taxation. If any such vehicle is not subject to ad valorem taxation in any county of this state, such fact, with the reason therefor,
shall be stated in the application. No state license
tags shall be issued to any applicant until the re-
quirements of this subdivision have been met.
The commissioner of motor vehicles shall, upon
request from any county, send to the supervisor of
such county a list of motor vehicles subject to ad
valorem taxation in such county as shown by the
commissioner's records of applications filed dur-
ing the year preceding the day as of which
property is to be assessed, and shall charge the
county the sum of thirty cents ($0.30) per hundred
names for the same, said amount to be used by
the commissioner as compensation for the prep-
paration of said list. (1939, c. 310, s. 1000; 1941, c.
36, s. 4.)

§ 105-318. Warehouses and co-operative growers'
or marketing associations to furnish lists.—
(1) Every warehouse company or corporation
and every growers' or marketing association
receiving for storage cotton, tobacco or other
products, commodities or property, and issuing
warehouse receipts for same, shall, on the day as
of which property is assessed, furnish to the su-
pervisor of the county in which such property is
stored a full and complete list of all persons, cor-
porations, partnerships, firms or associations for
whom such property is stored, except in cases in
which farm produce is stored for its original pro-
ducer who is a resident of another county in this
state, together with the amount of such property
stored for each owner and the amount advanced
against such property by the warehouse or asso-
ciation. In all cases in which farm produce
is stored for its original producer, who is a resident
of another county in this state, the names of such
producers shall be sent to the supervisors of the
respective counties in which such producers re-
side, together with the amount of such produce
stored for them and the amount advanced against
such produce by the warehouse or association.
(2) Warehouse companies and corporations and
growers' and marketing associations shall not be
liable for taxation on the property stored with
them by others, provided lists of the owners and
amounts of such property are furnished to the re-
spective supervisors under the provisions of sub-
division (1) of this section. If such lists are not
so furnished within fifteen days after the day as
of which property is assessed, such warehouse or
association shall be liable to the respective coun-
tries for the tax upon the full value of such prop-
erty; and if failure to furnish such list is contin-
ued for ten days after demand for same by the
supervisor of any county, such warehouse or as-

association shall be liable for a penalty of two hun-
dred fifty dollars ($250.00), in the same manner and under the
conditions set forth in subdivision (2) of § 105-318.
(1939, c. 310, s. 1002.)

§ 105-318. Private banks, bankers, brokers and
security brokers.—Every bank (not incorporated),
banker, broker or security broker, at the time
fixed by this subchapter for listing and assessing
all real and personal property, shall make out and
furnish to the list takers and assessors a sworn
statement showing:
(1) The amount of property on hand and in
transit.
(2) The amount of funds owned in the hands
of other banks, bankers or brokers.
(3) The amount of checks or other cash items,
the amount of which is not included in either of
the preceding items.
(4) The amount of bills receivable, discounted
or purchased, bonds and other credits due or to
become due, including interest receivable and ac-
rued, but not due, and interest due and unpaid.
(5) All other property appertaining to said
business, other than real estate, which real estate
shall be listed under this subchapter.
(6) The amount of deposits made with them
by any other person, firm or corporation.
(7) The amount of all accounts payable, other
than current deposit accounts. (1939, c. 310, s.
1003.)

§ 105-319. Persons, firms, banks and corpora-
tions dealing in securities on commission taxed as
a private banker.—No person, bank, or corpora-
tion, without a license authorized by law, shall
act as a stockbroker or private banker. Any per-
son, bank, or corporation that deals in foreign
or domestic exchange, certificates of debt, shares
in any corporation or charter companies, bank
or other notes, for the purpose of selling the same
or any other thing for commission or other com-
penation, or who negotiates loans upon real es-
tate securities, shall be deemed a security broker.
Any person, bank, or corporation engaged in the
business of negotiating loans on any class of se-
curity or in discounting, buying or selling negoti-
able or other papers or credits, whether in an
office for the purpose or elsewhere, shall be
deemed to be a private banker. Any person, firm,
or corporation violating this section shall pay a
fine of not less than one hundred nor more than
five hundred dollars for each offense. (1939, c.
310, s. 1004.)

§ 105-320. Partnerships; liability of partners
for tax.—For the purpose of listing and assessing
property, a copartnership shall be treated as an
individual, and its property, real and personal,
shall be listed in the name of the firm. Each part-
ner shall be liable for the whole tax. (1939, c.
310, s. 1005.)

§ 105-321. Article not to be construed in con-
" [1095]
Art. 21. Procedure Subsequent to the Close of the Tax Listing Period.

§ 105-322. Review of abstracts by supervisor and list takers.—After the close of the list taking period, and not later than the first meeting of the board of equalization and review, the supervisor shall examine the abstracts turned in by each list taker, and, unless he is satisfied that said list taker has satisfactorily performed the duties of a list taker, shall not approve payment of any compensation to said list taker.

The supervisor shall meet with each of the list takers not later than the first meeting of the board of equalization, for the purpose of reviewing the abstracts generally to ascertain if the same scales of value have been used in all townships in the county, and if property has been listed at the valuation prescribed by law. (1939, c. 310, s. 1100.)

§ 105-323. Making up the tax records.—The list takers for their respective townships, or such other persons as the commissioners may designate, shall make out, on forms approved by the state board of assessment, tax records which may consist of a scroll designed primarily to show tax valuations and a tax book designed primarily to show the amount of taxes or may consist of one record designated to show both valuations and taxes. Such records for each township shall be divided into four parts: (1) White individual taxpayers (including lists filed by corporate fiduciaries for white individual beneficiaries); (2) colored individual taxpayers (including lists filed by corporate fiduciaries for colored individual beneficiaries); (3) Indian individual taxpayers (including lists filed by corporate fiduciaries for Indian individual beneficiaries); and (4) corporations, partnerships, business firms and unincorporated associations. Such records shall show at least the following information:

(a) The name of each person whose property is listed and assessed for taxation, entered in alphabetical order.
(b) The amount of valuation of real property assessed for county-wide purposes (divided into as many classes as the state board may prescribe).
(c) The amount of valuation of personal property assessed for county-wide purposes (divided into as many classes as the state board may prescribe).
(d) The total amount of real and personal property valuation assessed for county-wide purposes.
(e) The amount of ad valorem tax due by each taxpayer for county-wide purposes.
(f) The amount of poll tax due by each taxpayer.
(g) The amount of dog tax due by each taxpayer.
(h) The amount of valuation of property assessed in any special district or subdivision of the county for taxation.
(i) The amount of tax due by each taxpayer to any special district or subdivision of the county.
(j) The total amount of tax due by the taxpayer to the county and to any special district, subdivision or subdivisions of the county.

All changes in valuations affected between the close of the listing period and the meeting of the board of equalization and review shall be reflected on such records, and so much of such records as may have been prepared shall be submitted to the board at its meetings. Changes made by said board shall also be reflected upon such records, either by correction, rebate or additional charge. (1939, c. 310, s. 1101.)

§ 105-324. Tax receipts and stubs.—Such persons as the county commissioners may designate shall fill out the receipts and stubs for all taxes charged upon the tax books. The form of such receipts and stubs shall be approved by the state board of assessment and shall show at least the following:

(a) The name of the taxpayer charged with taxes.
(b) The amount of valuation of real property assessed for county-wide purposes.
(c) The amount of valuation of personal property assessed for county-wide purposes.
(d) The total amount of valuations of real and personal property assessed for county-wide purposes.
(e) The rate of tax levied for each county-wide purpose, the total rate for all county-wide purposes, and the rate levied for any special district or subdivision of the county, which tax is charged to the taxpayer.
(f) The amount of the valuation of property assessed in any special district or subdivision of the county.
(g) The amount of ad valorem tax due by the taxpayer for county-wide purposes.
(h) The amount of poll tax due by the taxpayer.
(i) The amount of dog tax due by the taxpayer.
(j) The amount of tax due by the taxpayer to any special districts or subdivisions of the county.
(k) The total amount of tax due by the taxpayer to the county and to any special district, subdivision or subdivisions of the county.
(l) Amount of discounts.
(m) Amount of penalties. (1939, c. 310, s. 1102.)

§ 105-325. Disposition of tax records and receipts.—The tax records shall be filed in the office of the supervisor or official computing the taxes of the office of the accountant or clerk to the board of commissioners, as the commissioners may direct. The tax receipts and stubs shall be delivered to the sheriff or tax collector on or before the first Monday in October of the year one thousand nine hundred thirty-nine, and annually thereafter, provided he has made settlement as by law required, and the sheriff or tax collector shall receive for the same. In the discretion of the commissioners, a duplicate copy of the tax books may be made and delivered to the sheriff or tax collector at the same time.

A list of all appeals pending before the state board of assessment shall be delivered with said receipts; and there shall be delivered with said receipts an order, a copy of which shall be spread upon the minutes of the commissioners, directing the sheriff or tax collector to collect said taxes.
§ 105-326 Compensation of officer computing taxes.—The board of county commissioners shall make an order for the payment of the register of deeds, auditor, tax clerk, supervisor, or other official such sum as may be in their discretion a proper compensation for the work of computing taxes, making out the tax book and copies thereof, and the making of such reports as may be required by the state board of assessment; but the compensation allowed for computing the taxes and making out the tax book is not to exceed ten cents (10¢) for each name appearing on the tax book, which shall include the original and duplicate tax book and also the receipts and stubs provided for in this subchapter. (1939, c. 310, s. 1104.)

§ 105-327 County board of equalization and review.—(1) Personnel.—The county board of equalization and review of each county shall be composed of the board of county commissioners. Nothing in this subchapter shall be construed as repealing any law creating a special board of equalization and review, or creating any board charged with the duty of equalization and review in any county.

(2) Compensation.—The members of the board of equalization and review shall be allowed the same per diem compensation and traveling expense, while actually engaged in the performance of their duties, as is ordinarily paid to the members of the board of county commissioners, such compensation to be paid by the county.

(3) Oath.—Before entering upon their duties each member of the board of equalization and review shall take and subscribe to the following oath and file the same with the clerk of the board of county commissioners: "I do solemnly swear (or affirm) that I will faithfully discharge my duties as a member of the Board of Equalization and Review of County, North Carolina: and that I will not allow my actions as a member of said board to be influenced by personal or political friendships or obligations.

(Signature.)

(4) Clerk.—The supervisor shall act as clerk to said board, shall be present at all meetings and give to the board such information as he may have or can obtain with respect to the valuation of taxable property in the county.

(5) Time of Meeting.—Said board shall hold its first meeting on the eleventh Monday following the day on which tax listing began, and may adjourn from time to time as its duties may require; but it shall complete its duties not later than the third Monday following its first meeting.

(6) Notice of Meeting.—Notice of the time, place and purpose of the first meeting of said board shall be given by publishing said notice at least three times in some newspaper published in the county, the first publication to be at least ten days prior to said meeting.

(7) Powers and Duties.—(a) It shall be the duty of the board of equalization and review to equalize the valuation of all property in the county, to the end that such property shall be listed on the tax records at the valuation required by law, and said board shall correct the tax records for each township so that they will conform to the provisions of this subchapter.

(b) The board shall, on request, hear any and all taxpayers who own or control taxable property assessed for taxation in the county in respect to the valuation of such property or the property of others.

(c) The board shall examine and review the tax lists of each township for the current year; shall, of its own motion or on sufficient cause shown by any person, list and assess any real or personal property or polls subject to taxation in the county omitted from said lists; shall correct all errors in the names of persons, in the description of property, and in the assessment and valuation of any taxable property appearing on said lists; shall increase or reduce the assessed value of any property which in their opinion shall have been returned below or above the valuation required by law; and shall cause to be done whatever else shall be necessary to make said lists comply with the provisions of this subchapter: Provided, that said board shall not change the valuation of any real property from the value at which it was assessed for the preceding year except in accordance with the terms of §§ 105-278, and 105-279.

(d) The board may appoint committees, composed of its own members or other persons, to assist it in making any investigations necessary in its work. It may also employ expert appraisers in its discretion. The expense of the employment of committees or appraisers shall be borne by the county: Provided, that the board may, in its discretion, require the taxpayer to pay the cost of any appraisal by experts demanded by him when said appraisal does not result in material reduction of the valuation of the property appraised and where such valuation is not subsequently reduced materially by the board or by the state board of equalization.

(e) The board may subpoena witnesses, or
books, records, papers and documents reasonably considered to be pertinent to the decision of any matter pending before it; and any member of the board may administer oaths to witnesses in connection with the taking of testimony. The chairman of the board shall sign the subpoena, and such subpoena shall be served by any officer qualified to serve subpoenas. (1939, c. 310, s. 1105.)

Local Modification.—Mecklenburg: 1941, c. 239; Wayne: 1941, c. 670.

Editor's Note.—The 1941 amendment added the proviso to subsection (5).

Purpose of Notice.—The notice required before the meeting in June is general, and has reference to a general revision of the county valuation records. The purpose of the notice is to give a general uniform assessment among the several townships, and it is to give opportunity to all who may be dissatisfied with the valuation of their property to make complaint and have it corrected. Commissioners v. Atlanta, etc., Ry. Co., 86 N. C. 541, 544.

Valuation by Owner Subject to Review by Board.—The valuation upon personal property is made by the taxpayer when he lists his property, and is binding upon the list-taker, but it may be corrected by the county commissioner or board of equalization at the dates fixed by the statute, upon due notice to the taxpayer. Pocomoke Guano Co. v. New Bern, 172 N. C. 258, 260, 90 S. E. 202.

Revision without Notice Void.—Where the value of the property of a taxpayer are increased without due notice to him or his agent, such increase shall not be a nullity. Wolfenden v. Commissioners, 152 N. C. 83, 67 S. E. 319.

Designated Date of Meeting Exclusive of Others.—See Wolfenden v. Commissioners, 152 N. C. 83, 67 S. E. 319.

Before Whom Complaint Made.—The complaint against excessive valuation must be made before the board of county commissioners, and the aldermen of the city have no jurisdiction to change such valuation. Pocomoke Guano Co. v. New Bern, 172 N. C. 258, 261, 90 S. E. 202.

Requisites of Complaint.—The complaint in an action against a city to recover for taxes paid must allege that the valuation complained of is greater than that fixed by the county board of equalization, or the tax he was forced to pay was greater than it would have been if correctly computed at the legal rate on the valuation properly ascertained, or a demurrer thereto will be sustained. Pocomoke Guano Co. v. New Bern, 172 N. C. 258, 90 S. E. 202.

Decision of Board Final.—The county commissioners have exclusive original jurisdiction to grant relief against excessive valuation of property for taxation, and unless they proceed upon some erroneous principle, there is no appeal. Wade v. Commissioners, 74 N. C. 81 and cases cited.

When Board of Equalization Cited.—After the board of county commissioners has completed the revision of the tax lists as authorized by this section its duties and powers as a revising board, cease and determine until the time appointed to serve subpoenas. (1939, c. 310, s. 1105.)

§ 105-328. Giving effect to the decisions of the board.—All changes in names, descriptions or valuations made by the board of equalization shall be reflected upon the tax records by correction, rebate or additional charge; and when all such changes have been given effect, and the scroll or tax book has been totaled, the members of the board of equalization, or a majority thereof, shall sign a statement at the end of the scroll or tax book to the effect that the scroll is the final tax list and assessment roll for the current year, subject to the provisions of this subchapter. The omission of such endorsement shall not affect the validity of said scroll or tax book, or of any taxes levied on the basis of the valuations appearing in it. (1939, c. 310, s. 1106.)

§ 105-329. Appeals from the board of equalization and review to the state board of assessment.—Any property owner, taxpayer, or member of the board of county commissioners may except to the order of the board of equalization and review and appeal therefrom to the state board of assessment by filing a written notice of such appeal with the clerk of the board of county commissioners within sixty days after the adjournment of the board of equalization and review. At the time of filing such notice of appeal the appellant shall file with the clerk to the board of county commissioners a statement in writing of the grounds of appeal, and shall, within ten days after filing such notice of appeal with the clerk to the board of county commissioners, file with the state board of assessment a notice of such appeal and attach thereto a copy of the statement of the grounds of appeal filed with the clerk to the board of county commissioners. Each taxpayer or ownership interest shall file separate and distinct appeals; no joint appeals shall be considered except by and with consent of the state board of assessment.

The state board of assessment shall fix a time for the hearing of such appeal, and shall hear the same in the city of Raleigh, or such other place within the state as the said board may designate; shall give notice of time and place of such hearing to the appellant, appellee, and to the clerk to the board of county commissioners at least ten days prior to the said hearing; shall hear all the evidence or affidavits offered by the appellant, appellee, and the board of county commissioners, shall reduce, increase, or confirm the valuation fixed by the board of equalization and review and enter it accordingly, and shall deliver to the clerk of the board of county commissioners a certified copy of such order, which valuation shall be entered upon the fixed and permanent tax records and shall constitute the valuation for taxation. (1939, c. 310, s. 1107.)

§ 105-330. Valuation Final and Conclusive.—This section contemplates that valuation fixed by the state board shall be final and conclusive where no error of law or abuse of discretion is alleged. Belk's Department Store v. Guilford County, 222 N. C. 441, 448, 23 S. E. (2d) 897.

§ 105-330. Powers of the commissioners with respect to the records after adjournment of the board of equalization.—After the board of equalization has finished its work and the changes effected by it have been given effect on the tax records, the board of county commissioners may not authorize any changes to be made on said records except as follows:

1. To give effect to the decision of the state board of assessment on appeal.
2. To add to the records any valuation certified by the state board of assessment with respect to property assessed in the first instance by said state board, or to give effect to any valid corrections made in such assessments by the state board.
3. To correct the name of any taxpayer appearing on said records erroneously, or to substitute the name of the person who should have listed property for the name appearing on the records as listing said property, or to correct descriptions on said records, and any such corrections or substitutions shall have the same force and effect as if the name of the taxpayer or the description had been correctly listed in the first instance.
4. To correct valuations or taxes appearing erroneously on the records as the result of clerical errors.
§ 105-331. Discovery and assessment of property not listed during the regular listing period.

—(1) Duty of Commissioners, Supervisors and List Takers; Carrying Forward Real Estate.—It shall be the duty of the members of the board of commissioners, the supervisor and the list takers to be constantly looking out for property and polls which have not been listed for taxation. After any tax list or abstract has been delivered to a list taker, the supervisor or the board of county commissioners, and such list taker, supervisor or board of county commissioners shall have reason to believe or sufficient evidence upon which to form a belief that the person, firm or corporation making such list or abstract, in person or by agent, has other personal property, tangible or intangible, money, solvent credits, or other thing liable for taxation, they or either of them shall take such action as may be needful to get such property on the tax list.

Either the list takers for the respective townships, the clerical assistants to the supervisor or the supervisor, as the supervisor may designate, shall examine the tax lists for the current year and the tax records for the preceding year, and carry forward all real property which was listed for the preceding year which has not been listed for taxation. In the discretion of the supervisor, such property may be listed on an abstract signed by the official or employee carrying it forward in the name of the taxpayer, or may be entered directly on the tax scroll or tax book by such official or employee. When such property is so listed in the name of the taxpayer, or may be entered directly on the tax scroll or tax book by such official or employee. When such property is so listed in the name of the owner or in the name of the person last listing the same, the listing shall be as valid in every respect as if made by the owner; provided, that such listing shall not render any person individually liable to pay the taxes who is not under a duty to list such property.

(2) Procedure upon Discovery.—When property or polls are discovered they shall be listed in the name of the taxpayer by the supervisor or some person designated by him. The clerk to the board of commissioners, or the supervisor shall mail a notice to the taxpayer at his last known address.
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be ten per cent (10%) of the tax levied for the current year on such property or poll. Where such property or poll is taxed for years preceding the current year, the penalty, in addition to that for the current year, shall be ten per cent (10%) per annum. The minimum penalty shall be one dollar ($1.00). Taxes assessed for years preceding the current year shall be assessed at the rate of tax prevailing in the various preceding years.

The taxes and penalties for each year shall be shown separately on the records, but for the purpose of tax collection and foreclosure the total of all such taxes and penalties shall be regarded as taxes for the current year; and the schedule of discounts and penalties for payment or nonpayment of current taxes shall apply to such taxes and penalties for failure to list, despite the fact that such taxes and penalties for failure to list may not have been levied until the penalties for failure to pay have already accrued.

(4) Commissioners' Power to Compromise.—The board of county commissioners or the governing body of any municipal corporation is hereby authorized and empowered to settle or adjust all claims for taxation arising under this section or any other section authorizing them to place on the tax list any property omitted therefrom.

(5) Application to Cities and Towns.—The provisions of this section shall extend to all cities, towns and other municipal corporations having power to tax property or polls, and the power conferred and the duties imposed upon the board of county commissioners shall be exercised and performed by the governing body of the municipal corporation.

(6) Power to Employ Searchers.—The county commissioners, either separately or in conjunction with one or more municipal corporations in the county, may employ one or more competent men to make a diligent search and to discover and report to the board or the supervisor any unlisted property within the county, to the end that the same may be listed and assessed for taxation as provided in this section: Provided, nothing herein shall be construed as allowing a board of commissioners to appoint a tax collector unless it is otherwise authorized to do so by law.

(7) Tax Receipts.—Tax receipts for the taxes and penalties assessed against the property discovered shall be made up under the provisions of this subchapter, shall be delivered to the sheriff or tax collector, who shall be charged with the same, and shall have the same force and effect and shall be a lien on the property in the same manner as if they had been delivered to the sheriff or tax collector at the time of the delivery of the regular tax bills for the current year.

(8) Appeals.—Appeals may be had from the assessment fixed by the board of equalization or commissioners to the state board of assessment. Notice of said appeal must be served upon the clerk to the board of commissioners within sixty days after the assessment is fixed, and said appeal shall be in conformity with the provisions of this subchapter respecting appeals from boards of equalization. Each taxpayer or ownership interest shall file separate and distinct appeals; no joint appeals shall be considered except by and with consent of the state board of assessment.

(9) Classified Property.—Any property, discovered and listed under the provisions of this section, entitled to classification under the provisions of this subchapter, shall be classified and assessed in accordance with said provisions. (1939, c. 310, s. 1100.)

Editor's Note.—The cases in the following note construe the somewhat similar provisions of former § 7971(50), now repealed.

Discovery and Listing of Omitted Property.—This section provides for discovery of taxable property not listed, by certain tax authorities, and listing same. Hardware Mut. Fire Ins. Co. v. Stinson, 210 N. C. 69, 77, 185 S. E. 449. Where the plaintiff citizen paid taxes on property of his ward, and thereafter, in accordance with a ruling that the property was nontaxable, obtained a refund of the tax and did not list the property again, and the property of the ward was not exempt from taxation, it was held that the prior ruling of the county commissioners to the effect that the property was nontaxable does not prevent them from listing the property for taxation for the prior five years, including the year for which the tax was refunded. Lawrence v. Shaw, 210 N. C. 352, 186 S. E. 504.

Compromise Settlement Is Binding Unless Made in Bad Faith.—In the absence of a finding that the board of commissioners acted in bad faith in making a compromise settlement of a tax, or abused its discretion in so doing, mandamus to compel the commissioners to list and assess will be denied. Stone v. Board of Com'rs, 210 N. C. 226, 186 S. E. 342.

Construed as Whole.—The court in Madison County v. Cox, 204 N. C. 55, 167 S. E. 485, construing Public Laws, 1927, c. 71, § 73, (superseded by this section) declared that the section must be construed as a whole, not piecemeal.

Rebuttal of Presumption.—The presumption created by statute, that the person who was in possession of the personal property involved in this controversy was the owner and in possession of said property on 1 April of the five preceding years, is rebutted by the facts of this case. Coltine v. Donnell, 201 N. C. 515, 516, 166 S. E. 397.


Art. 22. Assessment Procedure of Cities and Towns.

§ 105-332. Status of property and polls listed for taxation.—All property and polls validly listed for taxation in any county, municipal corporation or taxing district shall be subject to dog taxes, the provisions of §§ 105-323 to 105-331, including the year for which the tax was refunded. (1939, c. 310, s. 1120.)

§ 105-333. Tax lists and assessment powers of cities and towns.—All cities and towns may obtain their tax lists from the county records, or have their tax lists signed by the taxpayers, or may set up their own machinery for securing lists from the taxpayers, in the discretion of the governing body.

All cities and towns not situated in more than one county shall accept the valuations fixed by the county authorities, as modified by the state board of assessment, under the provisions of this subchapter: Provided, that nothing in this section shall be construed to modify the authority given to cities and towns under this subchapter with respect to discovered property.

With the exception of the provisions relating to dog taxes, the provisions of §§ 105-323 to 105-331 shall apply to cities and towns and city and town governing bodies shall have the same powers conferred and the duties imposed by said sections upon the board of county commissioners, and wherever counties are referred to in said sec-
§ 105-334. Cities and towns situated in more than one county.—For the purpose of municipal taxation, all real and personal property and polls subject to taxation by cities and towns situated in two or more counties shall be listed and assessed as hereinafter set forth.

1. The governing body of each such city or town shall, in quadrennial years, on or before the date fixed for the appointment of the county supervisor, appoint a city supervisor of taxation, and two or more persons to act as list takers and assessors, each of whom, including the supervisor, shall have been resident freeholders in such city or town for a period of not less than twelve months. In years other than quadrennial years such governing body shall, on or before the date fixed for appointment of the county supervisor, appoint one resident freeholder as city supervisor of taxation and, in its discretion, one or more persons to act as list takers and assessors, each of whom shall have been a resident of such city or town for at least twelve months.

2. With respect to property to be listed for taxation in the city or town the city supervisor shall have the same powers and duties given to the county supervisor under the terms of this subchapter; and the city list takers and assessors shall have the same powers and duties given to county list takers and assessors under the terms of this subchapter; and the procedure of listing and assessing shall be, as nearly as possible, the same as that specified for county listing and assessing under the terms of this subchapter.

3. The governing body of each such city or town may designate some officer or employee of the city or appoint some other person to supervise the preparation of the tax records and receipts, and to make such reports as the state board of assessment may request or require, and may authorize such clerical assistance in this connection as it may deem advisable.

Such governing body shall also be vested with the same powers and duties, with respect to the listing of property for city taxation, as are vested by this subchapter in the county commissioners with respect to the listing of property for county taxation, and shall, with the city supervisor as chairman, sit as a board of equalization and review; and appeals may be taken from said city board of equalization to the state board of assessment in the same manner as provided in this subchapter for appeals from the county boards of equalization.

4. The intent and purpose of this section is to provide such cities and towns as lie in two or more counties only with the machinery necessary for listing and assessing taxes for municipal purposes. The powers to be exercised by and the duties imposed on such boards of aldermen, boards of commissioners or other governing bodies, boards of equalization and review, city supervisor of taxation, list takers and assessors, city clerk and taxpayers shall be the same, and they shall be subjected to the same penalties as provided in this subchapter for all boards of county commissioners, county auditors, registrars of deeds, clerks of boards of county commissioners, county supervisors, list takers and assessors. The county commissioners in their discretion may adopt the tax lists, scroll, or assessment roll of such city or town as fixed and determined by the board of equalization and review of such cities or towns, and when so adopted, shall be considered to all intent and purpose the correct and valid list and the fixed and determined assessment roll for the purpose of county taxation.

5. All expenses incident to the listing and assessing of the property for the purpose of municipal taxation as aforesaid shall be borne by the city or town for whose benefit the same is levied; provided, that where the county or counties in which such city or town lies shall adopt the list and the fixed, determined assessment of the city board of equalization and review, the county board of commissioners may reimburse the governing body in such amounts as in their discretion may be proper. (1939, c. 310, s. 1202.)

Art. 23. Reports to the State Board of Assessment and Local Government Commission.

§ 105-335. Report of valuation and taxes.—The clerk of the board of county commissioners, auditor, tax supervisor, tax clerk, county accountant or other officer performing such duties shall, at such time as the board may prescribe, return to the state board of assessment on forms prescribed by said board an abstract of the real and personal property of the county by townships, showing the number of acres of land and their value, the number of town lots and their value, the value of the several classes of live stock, the number of white and negro polls, separately, and specify every other subject of taxation and the amount of county tax payable on each subject and the amount payable on the whole. At the same time said clerk, auditor, supervisor or other officer shall return to the state board of assessment an abstract or list of the poll, county and school taxes payable in the county, setting forth separately the tax levied on each poll and on each hundred dollars value of real and personal property for each purpose, and also the gross amount of every kind levied for county purposes, and such other and further information as the state board of assessment may require. (1939, c. 310, s. 1300.)

§ 105-336. Clerks of cities and towns to furnish information.—The clerk or auditor of each city and town in this state shall annually make and transmit to the state board of assessment, on blanks furnished by said board, a full, correct, and accurate statement showing the assessed valuation of all property, tangible and intangible, within his city or town, and separately the amount of all taxes levied therein by said city or town, including school district, highway, street, sidewalk, and other similar improvement taxes for the current year, and the purposes for which the same were levied; and shall annually furnish to the local government commission a complete and detailed statement of the bonded and other indebtedness of the city or town, the accrued interest on the same, whether not due or due and unpaid, and the purposes for which said indebtedness was incurred. (1939, c. 310, s. 1301.)

§ 105-337. County indebtedness to be reported.—The auditor or county accountant of each
county in this state shall make and deliver annually to the local government commission a full, correct and accurate statement of the bonded and other indebtedness of his county, including township, school districts, and special tax districts, the purposes for which the same was incurred, and all accrued interest, whether not due or due and unpaid. (1939, c. 310, s. 1302.)

§ 105-338. Penalty for failure to make report. Every register of deeds, auditor, county accountant, supervisor of taxation, assessor, sheriff, clerk of superior court, clerk of board of county commissioners, county commissioners, board of Aldermen or other governing body of a city or town, mayor, clerk of city or town, or any other public officer, who shall willfully fail, refuse, or neglect to perform any duty required, to furnish any report to the state board of assessment or local government commission as prescribed in this subchapter or the revenue act, shall be prima facie evidence that such delay was wilful. (1939, c. 310, s. 1303.)


§ 105-339. Levy of taxes. The levy by the state, counties, cities, towns and special districts shall, not later than Wednesday after the third Monday in August, levy such rate of tax for the general county purposes as may be necessary to meet the general expenditure of the county, not exceeding that authorized by the Constitution of North Carolina: Provided, however, that with respect to veterans of the line of duty in the military service, or poll tax in this State, and who received injury in the line of duty in the armed forces of the United States and any foreign nation continues which has not been paid, shall be cancelled and restore such person relieved of such liability to pay the poll taxes so levied and collected may be used for any purpose permitted by law. (1939, c. 310, s. 1400.)

§ 105-340. Date as of which lien attaches. The lien of taxes levied on property and polls listed pursuant to this subchapter shall attach to real estate as of the day as of which property is listed, regardless of the time at which liability for the tax may arise or the exact amount thereof is determined.

All penalties, interest and costs allowed by law shall automatically be added to the amount of such lien and shall be regarded as attaching at the same time as the lien for the principle amount of the taxes. Said lien shall attach to all real property of the taxpayer in the taxing unit.

Taxes, interest, penalties and cost shall be a lien on personal property from and after levy on or attachment and garnishment of such property. (1939, c. 310, s. 1401.)

Editor's Note.—A modification of the law to meet an unacceptable interpretation of the former statute is found in this section which fixes a lien as of the date the property is listed. Under the old law no lien attached until July first and a transfer between April first and July first seemed to shed the burden of taxes entirely under the decision of the court in State v. Champion Fibre Co., 204 N. C. 295, 168 S. E. 207. No reason appears why a lien cannot be effective to cover obligations yet to be ascertained and it is believed the new section cures a glaring defect in our tax law. N. C. Law Rev. 391.


§ 105-341. Levy of poll tax.—(1) There shall be levied by the board of county commissioners in each county a tax of two dollars ($2.00) on each taxable poll or male person between the ages of twenty-one and fifty years, and the taxes levied and collected under this section shall be for the benefit of the public school fund and the poor of the county.

(2) The board of county commissioners of every county shall have the power to exempt any person from the payment of poll taxes on account of indigency, and when any such person has been once exempted he shall not be required to renew his application unless the commissioners shall revoke the exemption. When such exemption shall have been made, the clerk of the board of commission of the county shall furnish the person with a certificate of such exemption, and the person to whom it is issued shall be required to list his poll, but upon exhibition of such certificate the list taker shall annually enter in the column intended for the poll the word "exempt," and the poll shall not be charged in computing the list.

(3) Cities and towns may levy a poll tax not exceeding that authorized by the constitution, and poll taxes so levied and collected may be used for any purpose permitted by law.

(4) While the existing state of war between the United States and any foreign nation continues and for the next tax listing period thereafter, members of the armed forces of the United States and members of the United States merchant marine shall be exempt from all poll taxes and no county or city shall levy any poll tax on such persons, and poll tax which such person was required to list prior to induction into the armed forces of the United States or joining the merchant marine which has not been paid, shall be cancelled and such person relieved of such liability to pay the same. (1939, c. 310, s. 1402; 1943, c. 3.)


§ 105-342. What veterans exempt from poll tax; world war veterans. Any honorably discharged veteran of any of the wars of the United States, now a resident of, and subject to capitation or poll tax in this State, and who received injuries in the line of duty in the military service, whether compensable or not, and all such honorably discharged veterans that have been, or are now, receiving compensation from the Federal Government for disability of service connected origin, shall be conclusively considered and presumed to have physical infirmities sufficient to warrant exemption from the payment of the capitation or poll tax under Article five, section one, of the Constitution of North Carolina: Provided, however, that with respect to veterans of the World War, this section and § 105-343 shall apply only to those who served not less than ninety days during the period between April sixth, one thousand nine hundred seventeen, and November eleventh, one thousand nine hundred eigh-
§ 105-343. Proof of service and injury must be furnished; exemption by county commissioners.—The veteran or soldier claiming exemption under § 105-342 shall furnish proof of such service and injury by producing to the board of commissioners of his county his or her discharge or release or certificate of such service or injury, signed by a recognized official of the United States War Department or the Adjutant General's office of this State, and said discharge, release or certificate shall be recorded with the register of deeds of such county prior to tax listing date in the year in which exemption is claimed under §§ 105-342 and 105-343. It shall be the duty of the register of deeds at or before tax listing time in each county, to notify the board of county commissioners of the registration with him of such discharge, release or certificate and thereupon, upon application of the veteran, said board of county commissioners may take the action authorized by §§ 105-342 and 105-343. (1931, c. 193, s. 2.)

§ 105-344. Exemption of pensions or compensations from taxation.—Every person receiving a pension or compensation from the state, or United States, or any foreign country or government, for and on account of wounds or physical disabilities contracted or sustained during the late war between the United States and Germany, and any of the allied countries cooperating with the United States, shall not be required to pay any tax of any kind upon such pension or compensation, but the same shall be exempted from any and all taxes. This section shall apply to all such taxes for the year one thousand nine hundred and twenty-three, and thereafter. (1923, c. 259; C. S. 5168(aa).)

§ 105-345. Penalties and discounts for non-payment of taxes.—All taxes assessed or levied by any county, city, town, special district or other political subdivision of this state, in accordance with the provisions of this subchapter, shall be due and payable on the first Monday of October of the year in which they are so assessed or levied, and if actually paid in cash:

(1) On or before the first day of November next after due and payable, there shall be deducted a discount of one-half of one per cent (½ of 1%).

(2) After the first day of November and on or before the first day of December next after due and payable, the tax shall be paid at par or face value.

(3) After the first day of January and on or before the first day of March next after due and payable, there shall be added to the tax a penalty of one per cent (1%).

(4) After the first day of March and on or before the first day of April next after due and payable, there shall be added to the tax a penalty of two per cent (2%).

(5) On and after the second day of April the penalty shall be, in addition to said two per cent (2%), one-half of one per cent per month or fraction thereof until paid from said day on the principal amount of such taxes, which shall continue to accrue on taxes not included in a certificate of sale and which, on taxes included in a certificate of sale, shall continue to accrue until the date of such certificate.

(6) Should any taxpayer desire to make a pre-payment of his taxes between July first and October first of any year, he may do so by making payment to the county or city accountant, city clerk, auditor or treasurer, as the governing body may determine, and shall be entitled to the following discounts: If paid on or before July first, a deduction of two per cent (2%); if paid during the month of July, a deduction of one and one-half per cent (1½%); if paid during the month of August, a deduction of one per cent (1%); if paid during the month of September, a deduction of one per cent (1%). (1939, c. 310, s. 1403; 1943, c. 667.)

Editor’s Note.—The 1943 amendment added at the end of subsection (6) the words “if paid during the month of September, a deduction of one per cent (1%).”

Discrimination between Different Counties.—A statute which discriminates between the different counties of the state, as to the time when payment of taxes can be compelled, is not unconstitutional, since its provisions affect every one alike in the localities, to which they are applicable and contain no violation of the principle of equality of taxation. State v. Jones, 121 N. C. 616, 28 S. E. 347.

Art. 25. Banks, Banking Associations, Trust Companies and Building and Loan Associations.

§ 105-346. Banks, banking associations and trust companies.—The value of shares of stock of banks, banking associations, and trust companies shall be determined as follows:

(1) Every bank, banking association, industrial bank, savings institution, trust company, or joint-stock land bank located in this state shall list its real estate and tangible personal property, except money on hand, in the county in which such real estate and tangible personal property is located for the purpose of county and municipal taxation, and shall, during the second calendar month following the month in which local tax listing begins, list with the state board of assessment, on forms provided by the said state board, in the name of and for its shareholders, all the shares of its capital stock, whether held by residents or nonresidents, at its actual value on the day as of which property is assessed under this subchapter.

(2) The actual value of such shares for the purpose of this section shall be ascertained by adding together the capital stock, surplus, and undivided profits, and deducting therefrom the assessed value of such real and tangible personal property which such banking institutions shall have listed for taxation in the county or counties of this state wherein such real and tangible personal property is located, together with an amount according to its proportion of tax value of any buildings and lands wholly or partially occupied by such banking associations, institutions
§ 105-347. Building and loan associations.—(1) The secretary of each building and loan association organized and/or doing business in this state shall list with the local assessors all the tangible real and personal property owned on the day as of which property is assessed each year, which shall be assessed and taxed as like property of similar kind.

(2) All foreign building and loan associations doing business in this state shall list for taxation, during the second calendar month following the month in which local tax listing begins each year, with the state board of assessment, through the manner herein described, shall be certified to the county and municipality in which such bank or institution is located. Provided, that if any such banking association, institution, or trust company shall have one or more branches, the state board of assessment shall make an allocation of the value of the capital stock so found as between the parent and branch bank, banks, or trust company, and certify the allocated values so found to the counties and municipalities in which the parent and the branch bank, banks, or trust company are located.

(6) The taxes assessed upon the shares of stock of any such banking associations, institutions, or trust companies shall be paid by the cashier, secretary, treasurer, or other officer or officers thereof, and in the same manner and at the same time as other taxes are required to be paid in such counties, and in default thereof such cashier, secretary, treasurer, or other accounting officer, as well as such banking association, institution, or trust company, shall be liable for such taxes, and in addition thereto for a sum equal to ten per cent (10%) thereof. Any taxes so paid upon any such shares may, with the interest thereon, be recovered from the owners thereof by the banking association, institution, or trust company, or by officers thereof paying them, or may be deducted from the dividends accruing on such shares.

The taxation of such shares of capital stock shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of this state coming in competition with the business of such banking associations, institutions, or trust companies.

(3) In addition to the deductions allowed in item two of this section, there may be deducted from the items of surplus and undivided profits an amount not exceeding five per cent (5%) of the bills and notes receivable of such banking associations, institutions, or trust companies to cover bad or insolvent debts, investments in North Carolina state bonds, United States government bonds, joint-stock land bank bonds, and federal land bank bonds, at the actual cost of said bonds owned on and continuously for at least ninety days prior to the day as of which property is assessed in the current year. The value of such shares of capital stock of such banking associations, institutions, or trust companies shall be found by dividing the net amount ascertained above by the number of shares in the said banking associations, institutions, or trust companies.

(4) If the state board of assessment shall have reason to believe that the actual value of such shares of stock of such banking associations, institutions, or trust companies, as listed with it, is not the true value in money, then the said board shall ascertain such true value by such an examination and investigation as seems proper, and increase or reduce the value as so listed to such an amount as it ascertains to be the true value for the purposes of this section.

(5) The value of the capital stock of all such banking associations, institutions, and trust companies as found by the board of state assessment, in the manner herein described, shall be certified to the county and municipality in which such bank or institution is located. Provided, that if any such banking association, institution, or trust company shall have one or more branches, the state board of assessment shall make an allocation of the value of the capital stock so found as between the parent and branch bank, banks, or trust company in proportion to the deposits of the parent and branch bank, banks, or trust company, and certify the allocated values so found to the counties and municipalities in which the parent and the branch bank, banks, or trust company are located.

(6) The taxes assessed upon the shares of stock of any such banking associations, institutions, or trust companies shall be paid by the cashier, secretary, treasurer, or other officer or officers thereof, and in the same manner and at the same time as other taxes are required to be paid in such counties, and in default thereof such cashier, secretary, treasurer, or other accounting officer, as well as such banking association, institution, or trust company, shall be liable for such taxes, and in addition thereto for a sum equal to ten per cent (10%) thereof. Any taxes so paid upon any such shares may, with the interest thereon, be recovered from the owners thereof by the banking association, institution, or trust company, or by officers thereof paying them, or may be deducted from the dividends accruing on such shares.

The taxation of such shares of capital stock shall not be at a greater rate than is assessed upon other moneyed capital in the hands
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their respective agents, its stock held by citizens of this state, with the name of the county, city, or town in which the owners of said stock reside. In listing said stock for taxation the withdrawal value as fixed by the by-laws of each such association shall be furnished to the said board, and the stock shall be valued for taxation at such withdrawal value.

Any association or officer of such association doing business in the state who shall fail, refuse or neglect to so list shares owned by citizens of this state for taxation shall be barred from doing business in this state; any local officer or other person who shall collect dues, assessments, premiums, fines, or interest from any citizen of this state for any such association which has failed, neglected, or refused to so list for taxation the stock held by citizens of this state shall be guilty of a misdemeanor, and fined and/or imprisoned in the discretion of the court.

The value of the shares of stock so held by citizens of this state, as found by the state board of assessment, shall be certified to the register of deeds of the county in which such shareholders reside, shall be placed on the assessment roll in the name of such holders thereof, and taxed as other property is taxed. (1939, c. 310, s. 1501.)

Capital Stock as Property.—The capital stock of a building and loan association is property and hence is taxable according to the uniform ad valorem system established by the constitution. Loan Ass’n v. Commissioners, 115 N. C. 410, 20 S. E. 526.

§ 105-348. Article not to conflict with sections 105-198 to 105-217.—None of the provisions contained in any of the sections of this article shall be construed to conflict with Schedule H, §§ 105-198 to 105-217, but rather shall they be subordinate thereto. (1939, c. 310, s. 1502.)

§ 105-349. State board to keep record of all corporations, etc.; secrecy enjoined.—The state board of assessment shall prepare and keep a record book in which it shall enter a correct list of all the corporations, limited partnerships, joint-stock associations, banks, banking associations, industrial banks, savings institutions, and trust companies which it has assessed for taxation, and said record shall show the assessed valuation placed upon them; and the state board of assessment shall not divulge or make public any report of such corporation, partnership, or association required to be made to it, except as provided in this subchapter or the Revenue Act. (1939, c. 310, s. 1503.)


§ 105-350. Telegraph companies.—Every joint-stock association, company, copartnership or corporation, whether incorporated under the laws of this state or any other state or any foreign nation, engaged in transmitting to, from, through, in, or across the state of North Carolina telegraph messages shall be deemed and held to be a telegraph company; and every such telegraph company shall, during the second calendar month following the month in which local tax listing begins each year, make out and deliver to the state board of assessment a statement, verified by oath of the officer or agent of such company making such statement, with reference to the day as of which property is assessed next preceding, showing:

First. The total capital stock of such association, company, copartnership, or corporation.

Second. The number of shares of capital stock issued and outstanding, and the par or face value of each share.

Third. Its principal place of business.

Fourth. The market value of said shares of stock on the day as of which property is assessed next preceding; and if such shares have no market value, then the actual value thereof.

§ 105-351. Telephone companies.—Every telephone company doing business in this state, whether incorporated under the laws of this state or any other state, or of any foreign nation, shall, during the second calendar month following the month in which local tax listing begins each year, make out and deliver to the state board of assessment of this state a statement, verified by the oath of the officer or agent of such company making such statement, with reference to the day as of which property is assessed next preceding, showing:

First. The total capital stock of such association, company, copartnership, or corporation involved in the operation of such telephone business.

Second. The number of shares of capital stock issued and outstanding, and the par or face value of each share.

Third. Its principal place of business.

Fourth. The market value of said shares of stock on the day as of which property is assessed next preceding; and if such shares have no market value, then the actual value thereof.
§ 105-352. Express companies. — Every joint-stock association, company, copartnership, or corporation incorporated or acting under the laws of this state or any other state, or any foreign nation, engaged in carrying to, from, through, in or across this state, or any part thereof, passengers or travelers in palace cars, drawingroom cars, sleeping cars, dining cars, or chair cars, under any contract, expressed or implied, with any railroad company or the managers, lessees, agents or receivers thereof, provided such joint-stock association, company, copartnership or corporation is not a railroad company, shall be deemed and held to be an express company within the meaning of this subchapter; and every such express company shall, during the second calendar month following the month in which local tax listing begins each year, make out and deliver to the state board of assessment a statement, verified by the oath of the officer or agent of such association, company, copartnership or corporation making such statement, with reference to the day as of which property is assessed next preceding, showing:

First. The total capital stock or capital of said association, copartnership or corporation.

Second. The number of shares of such capital stock issued and outstanding, and the par or face value of each share; and in case no shares of capital stock are issued, in what manner the capital stock thereof is divided, and in what manner such holdings are evidenced.

Third. Its principal place of business.

Fourth. The actual market value of said shares of stock on the day as of which property is assessed next preceding; and if such shares have no market value, then the actual value thereof; and in case no shares of stock have been issued, state the market value, or the actual value in case there is no market value, of the capital thereof, and the manner in which the same is divided.

Fifth. The real estate, structures, machinery, fixtures, and appliances owned by said association, company, copartnership, or corporation and subject to local taxation within the state, and the location and assessed value thereof in each county where the same is assessed for local taxation.

Sixth. The specific real estate, together with the permanent improvements thereon, owned by such association, company, copartnership, or corporation, situated outside of the state of North Carolina, and not used directly in the conduct of the business, with a specific description of each such piece, where located, the purpose for which the same is used, and the sum at which the same is assessed for taxation in the locality where situated.

Seventh. All mortgages upon the whole or any part of its property, together with the dates and amounts thereof.

Eighth. (a) The total length of the lines of said association or company; (b) the total length of so much of their lines as is outside of the state of North Carolina; (c) the length of the lines and wire mileage within each of the counties, townships, and incorporated towns within the state of North Carolina.

Ninth. Such other and further information as the state board of assessment may require. (1939, c. 310, s. 1601.)

§ 105-353. Sleeping-car companies. — Every joint-stock association, company, copartnership or corporation incorporated or acting under the laws of this state or any other state, or of any foreign nation, and conveying to, from, through, in or across this state, or any part thereof, passengers or travelers in palace cars, drawingroom cars, sleeping cars, dining cars, or chair cars, under any contract, expressed or implied, with any railroad company or the managers, lessees, agents or receivers thereof, shall be deemed and held to be a sleeping-car company for the purposes of this subchapter, and shall hereinafter be called “sleeping-car company”; and every such sleeping-car company doing business in this state shall, during the second calendar month following the month in which local tax listing begins each year, make out and deliver to the state board of assessment a statement, verified by the oath of the officer or agent of such company making such statement, with reference to the day as of which property is assessed next preceding, showing:

First. The total capital stock of such sleeping-car company invested in its sleeping-car business.

Second. The number of shares of such capital stock devoted to the sleeping-car business issued and outstanding and the par or face value of each share.

Third. Under the laws of what state it is incorporated.

Fourth. Its principal place of business.

Fifth. The names and post office addresses of its president and secretary.

Sixth. The actual cash value of the shares of such capital stock devoted to its sleeping-car business.
business on the day as of which property is assessed next preceding such report.

Seventh. The real estate, structures, machinery, fixtures, and appliances owned by said sleeping-car company and subject to local taxation within this state, and the location and assessed value thereof in each county within this state where the same is assessed for local taxation.

Eighth. All mortgages upon the whole or any part of its property, and the amounts thereof, devoted to its sleeping-car business.

Ninth. (a) The total length of the main line of railroad over which cars are run; (b) the total length of so much of the main lines of railroad over which the said cars are run outside of the state of North Carolina; (c) the length of the lines of railroads over which said cars are run within each of the counties within the state of North Carolina.

Provided, that where the railroads over which said cars run have double tracks, or a greater number of tracks than a single track, the statement shall only give the mileage as though such tracks were but single tracks; and in case it shall be required, such statement shall show in detail the number of miles of each or any particular railroad or system within the state. When the assessment shall have been made by the state board of assessment in accordance with § 105-358, the board shall thereupon notify the officer attesting such report of the amount assessed against it, and such sleeping-car company shall have twenty days within which to appear and make objection, if any it shall have, to said assessment. If no objection be made within twenty days, the state board of assessment shall certify to the county commissioners of the several counties through which such cars are used the value of the property of such sleeping-car company within such county in the proportion that the number of miles of railroad over which such cars are used in said county bears to the number of miles of railroad over which such cars are used within the state, together with the name and postoffice address of the officers attesting such report of the value of the property of such sleeping-car company, with the information that tax bills, when assessed, are to be sent to him by mail; and such value, so certified, shall be assessed and taxed the same as other property within said county. And when the assessment shall have been made in such county, the sheriff or county tax collector shall send to the address given by the state board of assessment to the county commissioners a bill for the total amount of all taxes due to such county, and such sleeping-car company shall have sixty days thereafter within which to pay said taxes; and upon failure of and refusal to do so such taxes shall be collected the same as other delinquent taxes are, together with a penalty of fifty per cent (50%) added thereto, and costs of collection.

(1939, c. 310, s. 1603.)

§ 105-354. Refrigerator and freight-car companies.—Every person, firm, or corporation owning refrigerator or freight cars operated over or leased to any railroad company in this state or operated in the state shall be taxed in the same manner as hereinafore provided for the taxing of sleeping-car companies, and the collection of the tax thereon shall be followed in assessing and collecting the tax on the refrigerator and freight cars taxed under this section. Provided, if it appears that the owner does not lease the cars to any railroad company, or make any contract to furnish it with cars, but they are furnished to be run indiscriminately over any lines on which shipper or railroad companies may desire to send them, and the owner receives compensation from each road over which the car runs, the state board of assessment shall ascertain and assess the average number of cars which are in use within the state as a part of the necessary equipment of any railroad company for the year ending with the day as of which property is assessed, next preceding the report, and the tax shall be computed upon this assessment. In making distribution of any taxable valuation by virtue of the provisions of this section, the state board of assessment shall give primary consideration to the county or counties in which the taxpayer has the greater car mileage. The operation of this section shall be suspended during the continuance of § 105-228.2, prescribing a method of taxing freight car line companies on the basis of their gross receipts from operation of their properties in this state. If for any reason such method of taxing freight car line companies prescribed in § 105-228.2 should be held to be invalid, the provisions of this section shall again become operative, as if it had not been suspended, and it shall be the duty of the state board of assessment to assess for ad valorem taxation all properties of freight line companies subject to tax under this section and all properties of such freight line companies not heretofore assessed under this section.

(1939, c. 310, s. 1604; 1943, c. 684, s. 3.)

Editor's Note.—The 1943 amendment added the last two sentences.

§ 105-355. Street railway, waterworks, electric light and power, gas, ferry, bridge, and other public utility companies.—Every street railway company, waterworks company, electric light and power company, gas company, ferry company, bridge company, canal company, and other corporations exercising the right of eminent domain, shall, during the second calendar month following the month in which local tax listing begins each year, make out and deliver to the state board of assessment a statement, verified by the oath of the officer or agent of such company making such statement, with reference to the copartnership or corporation, showing:

First. The total capital stock of such association, company, copartnership, or corporation.

Second. The number of shares of capital stock issued and outstanding and the par or face value of each share.

Third. Its principal place of business.

Fourth. The market value of said shares of stock on the day as of which property is assessed next preceding; and if such shares have no market value, then the actual value thereof.

Fifth. The real estate, structures, machinery, fixtures, and appliances owned by said association, company, copartnership or corporation, and subject to local taxation within the state, and the location and assessed value thereof in each county, municipality and township where the same is assessed for local taxation.
Sixth. The specific real estate, together with the permanent improvements thereof, owned by such association, company, copartnership, or corporation situate outside of the state of North Carolina and not directly used in the conduct of the business, with a specific description of each such piece, where located, the purpose for which the same is used, and the sum at which the same is assessed for taxation in the locality where situated.

Seventh. All mortgages upon the whole or any part of its property, together with the dates and amounts thereof.

Eighth. (a) The total length of the lines of said association or company; (b) the total length of so much of their lines as is outside of the state of North Carolina; (c) the length of lines within each of the counties, municipalities and townships within the state of North Carolina.

Ninth. Such other and further information as the state board of assessment may require. (1939, c. 310, s. 1605.)

§ 105-356. State board of assessment may require additional information.—Upon the filing of the statements required in the preceding sections the state board of assessment shall examine the same and, if the board shall deem the same insufficient, or in case it shall deem that other information is requisite, it shall require such officer to make such other and further statements as said board may call for. In case of the failure or refusal of any bank, association, company, copartnership, or corporation to make out and deliver to the state board of assessment any statement or statements required by this subchapter, such bank, association, company, copartnership, or corporation shall forfeit and pay to the state of North Carolina one hundred dollars ($100.00) for each additional day such report is delayed beyond the last day of the month in which required to be made, to be sued for and recovered in any proper form of action in the name of the state of North Carolina on the relation of the state board of assessment, and such penalty, when collected, shall be paid into the general fund of the state. (1939, c. 310, s. 1606.)

§ 105-357. State board of assessment shall examine statements.—The state board of assessment shall thereupon value and assess the property of each association, company, copartnership, or corporation in the manner hereinafter set forth, after examining such statements and after ascertaining the value of such properties therefrom and upon such other information as the board may have or obtain. For that purpose it may require the agents or officers of said association, company, copartnership, or corporation to appear before it with such books, papers, and statements as it may require, or may require additional statements to be made, and may compel the attendance of witnesses in case the board shall deem it necessary to enable it to ascertain the true cash value of such property. (1939, c. 310, s. 1607.)

§ 105-358. Manner of assessment.—Said state board of assessment shall first ascertain the true cash value of the entire property owned by the said association, company, copartnership, or corporation from said statement or otherwise for the purpose, taking the aggregate value of all the shares of capital stock, in case shares have a market value, and in case they have none, taking the actual value thereof or of the capital of said association, company, copartnership, or corporation in whatever manner the same is divided, in case no shares of capital stock have been issued: Provided, however, that in case the whole or any portion of the property of such association, company, copartnership, or corporation shall be encumbered by a mortgage or mortgages, such board shall ascertain the true cash value of such property by adding to the market value of the aggregate shares of stock, or to the value of the capital in case there should be no such shares, the aggregate amount of such mortgages or mortgages, and the result shall be deemed and treated as the true cash value of the property of such association, company, copartnership, or corporation. Such state board of assessment shall, for the purpose of ascertaining the true cash value of property within the state of North Carolina, next ascertain from such statements or otherwise the assessed value for taxation, in the localities where the same is situated, of the several pieces of real estate situated within and without the state of North Carolina and not in any manner used in the general business of such associations, companies, copartnerships or corporations, which assessed value for taxation shall be by said board deducted from the gross value of the property as above ascertained. Said state board of assessment shall next ascertain and assess the true cash value of the property, including intangible personal property, of the associations, companies, copartnerships, or corporations within the state of North Carolina by taking as a guide, as far as practicable, the proportion of the whole aggregate value of said associations, companies, copartnerships as above ascertained, after deducting the assessed value of such real estate without the state which the length of lines of said associations, companies, copartnerships or corporations, in the case of telegraph and telephone companies, within the state of North Carolina bears to the total length thereof, and in the case of express companies and sleeping-car companies the proportion shall be in proportion of the whole aggregate value after such deduction, which the length of lines or routes within the state of North Carolina bears to the whole length of lines or routes of such associations, companies, copartnerships or corporations, and such amounts so ascertained shall be deemed and held as the entire value of the property of said associations, companies, copartnerships or corporations within the state of North Carolina: Provided, the board shall, in valuing the fixed property in this state, give due consideration to the amount of gross and net earnings per mile of line in this state, and any other factor which would give a greater or less value per mile in this state than the average value for the entire system. From the entire value of the property within the state so ascertained there shall be deducted by the state board of assessment the assessed value for taxation of all real estate, structures, machinery, and appliances within the state listed with the local taxing authorities of this state if used in the general business of the taxpayer and subject to local taxation in the
§ 105-359. Value per mile.—Said state board of assessment shall thereupon ascertain the value per mile of the property within the state by dividing the total value as above ascertained, after deducting the specific properties locally assessed within the state, by the number of miles within the state, and the result thereof shall be deemed and held as value per mile of the property of such association, company, copartnership, or corporation within the state of North Carolina: Provided, the value per mile of telephone and telegraph companies shall be determined on a wire mileage basis. (1939, c. 310, s. 1609.)

§ 105-360. Total value for each county and municipality.—Said board of assessment shall thereupon, for the purpose of determining what amount shall be assessed by it to said association, company, copartnership, or corporation in each county in the state through, across, and into or over which the lines of said association, company, copartnership or corporation extend, multiply the value per miles, as above ascertained, by the number of miles in each of such counties as reported in said statements or as otherwise ascertained, and the result thereof shall be by the secretary of said state board certified to the chairman of the board of county commissioners, respectively, of the several counties through, into, over, or across which the lines or routes of said association, company, copartnership or corporation extend: Provided, the total value of street railways, electric light, power and gas companies, as determined in § 105-358 to be certified to each county, shall be the proportion which the locally assessed value of the physical property in each county bears to the total assessed value of the physical property in the state. Distribution and certification by the state board of assessment to the municipalities and other local taxing jurisdictions shall follow the same general rules governing such distribution to the several counties of the state with respect to value per mile and total value as herein set out. All taxes due the state from any corporation taxed under the preceding sections shall be paid by the treasurer of each company direct to the commissioner of revenue. (1939, c. 510, s. 1610.)

§ 105-361. Companies failing to pay tax; penalty.—In case any such association, company, copartnership, or corporation as named in this subchapter shall fail or refuse to pay any taxes assessed against it in any county, municipality or other taxing jurisdiction in this state, in addition to other remedies provided by law for the collection of taxes, an action may be prosecuted in the name of the state of North Carolina by the solicitors of the different judicial districts of the state in the relation of the board of commissioners of the different counties of this state and the judgment in said action shall include a penalty of (50%) of the amount of taxes as assessed and unpaid, together with reasonable attorney’s fees for the prosecution of such action, which action may be prosecuted in any county into, through, over or across which the lines or routes of any association, company, copartnership, or corporation shall extend, or in any county where such association, company, copartnership, or corporation shall have an office or agent for the transaction of business. In case such association, company, copartnership, or corporation shall have refused to pay the whole of the taxes assessed against the same by the state board of assessment, or in case such association, company, copartnership, or corporation shall have refused to pay the taxes or any portion thereof as assessed to it in any particular county or counties, such action may include the whole or any portion of the taxes so unpaid in any county or counties; but the attorney general may, at his option, unite in one action the entire amount of the tax due, or may bring separate actions to each separate county or adjoining counties, as he may prefer. All collections of taxes for or on account of any particular county made in any such suit or suits shall be by said board accounted for as a credit to the respective counties for or on account of which such collections were made by the said board at the next ensuing settlement with such county, but the penalty so collected shall be credited to the general fund of the state, and upon such settlement being made the treasurers of the several counties shall, at their next settlement, enter credits upon the proper duplicates in their offices, and at the next settlement with such county, report the amount so received by him in his settlement with the state, and proper entries shall be made with reference thereto: Provided, that in any such action the amount of the assessments fixed by said state board of assessment and apportioned to such county shall not be controverted. (1939, c. 310, s. 1611.)

§ 105-362. State board made appraisers for public utilities. — The state board of assessment herein established is constituted a board of appraisers and assessors for railroad, canal, steamboat, hydroelectric, street railway, and all other companies exercising the right of eminent domain. (1939, c. 310, s. 1612.)

§ 105-363. Returns to state board by railroads, etc., companies.—The president, secretary, superintendent or other principal accounting officer within this state of every railroad, telegraph, telephone, street railway company, whether incorporated by the laws of this state or not, shall, during the second calendar month following the month in which local tax listing begins each year, return to the state board of assessment, verified by the oath or affirmations of the officer making the return, all the following described property belonging to such corporation within the state, viz:
The number of miles of such railroad lines in each county and municipality in this state, and the total number of miles in the state, including the roadbed, right-of-way and super structures thereon, main and side tracks, depot buildings and depot grounds, section and tool houses and the land upon which they are situated, or by reasonable interpretation of the corporate use, water stations and land, coal chutes and land, and real estate and personal property of every character necessary for the construction and successful operation of such railroad, or used in the daily operation, whether situated on the charter right-of-way of the railroad or on additional land acquired for this purpose, except as provided below, including also, if desired by the state board of assessment, Pullman or sleeping cars or refrigerator cars owned by them or operated over their lines: Provided, however, that all machines and repair shops, general office buildings, storehouses and contents thereof, located outside of the right-of-way shall be listed for purposes of taxation by the principal officers or agents of such companies with the list takers of the county where the real and personal property may be situated, in the manner provided by law for the listing and valuation of real and personal property. A list of such property shall be filed by such company with the state board of assessment. It shall be the duty of the tax supervisor, county accountant and register of deeds, if requested so to do by the state board of assessment, to certify and send to the said board a statement giving a description of the property mentioned in the foregoing proviso, and showing the value of the tangible property, if any, of which shall be deducted from the total value of the property of such railroad company as arrived at by the board in accordance with § 105-365, before the apportionment is made to the counties and municipalities. The tax supervisor, county accountant and register of deeds shall also certify to the board the local rate of taxation for county purposes as soon as the same shall be determined, and such other information obtained in the performance of the duties of their offices as the said board shall require of them; and the mayor of each city or town shall cause to be sent to the said board the local rate of taxation for municipal purposes.

Section Constitutional.—This section is not in conflict with N. C. Const., Art. V, sec. 3, providing that such assessment be uniform and ad valorem. Atlantic, etc., R. Co. v. New Bern, 147 N. C. 165, 60 S. E. 925.

Taxation of Accessories, etc.—The railroad, right of way and superstructures thereon, main and side tracks, depot buildings and depot grounds, etc., by reasonable interpretation and under constitutional powers, are included in the taxable estate, and are subject to taxation, to the Corpora- tion the power to assess railroad properties, as evidenced by the market value of all capital stock, certificates of indebtedness, bonds, or any other securities, the value of which is based upon the earning capacity of the property.

The rolling stock of a railroad company, used upon the branch roads, or roads otherwise acquired, ascertained by a pro rata standard based on the relative length thereof to the whole time is liable to taxation. Wilmington, etc., R. Co. v. Alsbrook, 110 N. C. 137, 14 S. E. 652, construing prior law.

§ 105-365. Railroads; tangible and intangible property assessed separately.—(a) At such dates as real estate is required to be assessed for taxation the said board of assessment shall first determine the value of the tangible property of each division or branch of such railroad or rolling stock and all the other physical or tangible property. This value shall be determined by a due consideration of the actual cost of replacing the property, with a just allowance for depreciation on rolling stock, and also of other conditions, to be considered as the case may require. (b) They shall then assess the value of the franchise, which shall be determined by due consideration of the gross earnings as compared with the operating expenses, and particularly by consideration of the value placed upon the whole property by the public (the value of the physical property being deducted) as evidenced by the market value of all capital stock, certificates of indebtedness, bonds, or any other securities, the value of which is based upon the earning capacity of the property.

(c) The aggregate value of the physical or tangible property, and the franchise, as thus determined, shall be the true value of the property for the purpose of ad valorem taxation, and shall be apportioned in the same proportion that the length of such road in such county bears to the entire length of every division or branch thereof, and the state board of assessment shall certify, on or before the first day of September, or as soon thereafter as practicable, to the chairman of the county commissioners and to the mayor of each city or incorporated town the amounts apportioned to his county, city or town. The board of county commissioners of each county through which said railroad passes shall assess against the same only the tax imposed for county, township, or other taxing
district purposes, the same as is levied on other property in such county, township, or special taxing districts. (1939, c. 310, s. 1615.)

§ 105-366. Railroads; valuation where road both within and without state.—When any railroad has part of its road in this state and part thereof in any other state, the said board shall ascertain the value of railroad track, rolling stock, and all other property liable to assessment by the state board of assessment of such company as provided in § 105-365, and divide it in the proportion to the length such main line of road in this state bears to the whole length of such main line of road and determine the value in this state accordingly: Provided, the board shall, in valuing the fixed property in this state, give due consideration to the character of roadbed and fixed equipment, number of miles of double track, the amount of gross and net earnings per mile of road in this state, and any other factor which would give a greater or less value per mile of road in this state than the average value for the entire system, and shall, in the first Monday in the month following the month in which said reports are required to be made, the said board shall give a hearing to all the companies interested, touching the valuation and assessment of their property. The said board may, if they see fit, require all argument and communications to be presented in writing. (1939, c. 310, s. 1616.)

§ 105-367. Railroads; in cases of leased roads.—If the property of any railroad company be leased or operated by any other corporation, foreign or domestic, the property of the lessor or company whose property is operated shall be subject to taxation in the manner hereinafter directed; and if the lessee or operating company, being a foreign corporation, be the owner or possessor of any property in this state other than that which it derives from the lessor or company whose property is operated, it shall be assessed in respect to such property in like manner as any domestic railroad company. (1939, c. 310, s. 1617.)

§ 105-368. Railroads; board may subpoena witnesses and compel production of records; penalty for failure to furnish required information.—The state board of assessment shall have power to summon and examine witnesses and require that books and papers shall be presented to them for the purpose of obtaining such information as may be necessary to aid in determining the valuation of any railroad company. Any president, secretary, receiver, or accounting officer, servant or agent of any railroad or steamboat company having any proportion of its property or roadway in this state who shall refuse to attend before the said board when required to do so, or refuse to submit to the inspection of said board any books or papers of such railroad company in his possession, custody, or control, or shall refuse to answer such questions as may be put to him by said board, or order touching the business or property, monies and credits, and the value thereof, of said railroad company, shall be guilty of a misdemeanor, and, on conviction thereof before any court of competent jurisdiction shall be confined in the jail of the county not exceeding thirty days, shall be fined in any sum not exceeding five hundred dollars ($500.00) and costs, and any president, secretary, accounting officer, servant, or agent aforesaid so refusing as aforesaid shall be deemed guilty of contempt of such board, and may be confined, by order of said board, in the jail of the proper county until he shall comply with such order and pay the cost of his imprisonment. (1939, c. 310, s. 1618.)

§ 105-369. Taxes on railroads shall be a lien on property of the same.—The taxes upon any and all railroads in this state, including roadbed, right-of-way, depots, side tracks, ties, and rails, now constructed or hereafter to be constructed, are hereby made a perpetual lien thereupon, commencing from the day as of which property is assessed in each current year, against all claims or demands whatsoever of all persons or bodies corporate except the United States and this state, and the above described property or any part thereof may be taken and held for payment of all taxes assessed against said railroad company in the several counties of this state. (1939, c. 310, s. 1619.)

§ 105-370. Board of assessment to certify apportionment of valuation to counties and municipalities; payment of local taxes.—The state board of assessment shall, upon completion of the assessment directed in the preceding sections, certify to the register of deeds or tax supervisor of the counties and the clerk of the board of commissioners of the municipalities through which said companies operate the apportionment of the valuations as hereinbefore determined and apportioned by the board, and the board of county commissioners and taxing authorities of municipalities or other taxing jurisdictions respectively, shall assess against such valuation the same tax imposed for county, township, town, or other tax district purposes, as that levied on all other property in such county, township, town, or other taxing districts. This tax shall be paid to the sheriff or tax collector of the county and municipality. (1939, c. 310, s. 1650.)

§ 105-371. Canal and steamboat companies.—The property of all canal and steamboat companies in this state shall be appraised and assessed for taxation as above provided for railroads. In case any officer fails to return the property provided in this section, the board shall ascertain the length of such property in this state, and shall assess the same in proportion to the length at the highest rate at which property of that kind is assessed by them. (1939, c. 310, s. 1621.)

Art. 27. Collection and Foreclosure of Taxes.

§ 105-372. Definitions.—As used in this article, unless the context otherwise indicates:

1. "Tax collector" or "collector" means sheriffs, tax collectors and all other officials charged with the duty of collecting taxes levied by or for counties, cities, school districts, road districts or other political subdivisions of this state.

(2) "Taxes" means property taxes (other than taxes levied under Schedule H, §§ 105-198 to 105-217), poll taxes and dog taxes levied by or for counties, cities, school districts, road districts or other political subdivisions of this state.

(3) "Taxing unit" means any county, city, school district, road district or other political subdivision of this state by or for which taxes are levied. [1111]
(4) "City" means any incorporated city or town.

(5) "District" means any taxing unit other than counties and cities.

(6) "Person" means any individual, firm, corporation, company, partnership, trust, estate, or fiduciary. (1939. c. 310, s. 1700.)

§ 105-373. Appointment, terms, qualifications and bond of city tax collectors.—The governing body of each city in this state shall appoint a tax collector, who shall be some person of character and integrity, with experience in business or in collection work, to collect taxes levied by the city governing body. The governing body may, in its discretion, designate some official or employee of the city who has other duties, to perform also the duties of tax collector. The governing body shall fix the compensation of said collector and, subject to the provisions of this article, shall prescribe the amount of his bond and approve the sureties thereon. Any premiums on said bond shall be paid in such manner as the governing body may direct. No tax collector shall be allowed to begin his duties until he shall have furnished bond satisfactory to the governing body; nor shall any collector be permitted to continue collecting taxes after his bond has expired without renewal; nor shall any collector be allowed to collect any taxes not covered by his bond.

The collector shall serve for a term of one year and until his successor has been appointed and has qualified. The governing body may, during his term, remove him from office, for good cause shown, upon notice in writing and after giving him an opportunity to appear and be heard at a public session of said governing body: Provided, that no hearing shall be necessary in case of removal for failure to meet the conditions prerequisite prescribed by this article for the delivery of the tax books. Any vacancy caused by removal, resignation, death or otherwise shall be filled, for the unexpired term, by appointment of the governing body, unless otherwise provided by this article.

Appointments under this article shall be made during the first week in July, one thousand nine hundred thirty-nine, and annually thereafter. Until the first such appointments are made, city taxes shall be collected by the collectors now provided for by law; notwithstanding any repealing clauses contained in this article.

Nothing in this section shall be construed to change the manner of appointment or term of any collector who collects both city and county taxes, or of any city collector whose manner of appointment or term is governed by the city charter. (1939, c. 310, s. 1701.)

§ 105-374. County sheriffs and tax collectors.—County and district taxes shall be collected by the sheriffs or tax collectors as provided by law: Provided, that district taxes levied by county commissioners and collected by county officials may, for collection and foreclosure purposes, be treated in the same manner as county taxes. (1939, c. 310, s. 1702.)

§ 105-375. General duties of tax collectors.—It shall be the duty of each tax collector to employ all lawful means for the collection of all taxes in his hands; to give such bond as may be required of him; to perform such duties in connection with the preparation of the tax records, receipts and stubs as the governing body may direct; to keep adequate records of all collections; and to account for all moneys coming into his hands. At each regular meeting of the governing body he shall submit a report of the amount collected on each year's taxes in his hands, the amount remaining uncollected, and the steps he is taking to encourage or enforce payment. The governing body may, at any time, require him to make settlement in full for all taxes in his hands. The governing body may also, at any time, require the collector to send out tax bills or notices, make personal calls upon delinquent taxpayers, or proceed to enforce payment by any lawful means. In addition to the taxes hereinbefore in this article defined, all license, privilege and franchise taxes levied by the taxing unit by which he is employed shall be collected by the collector.

The successor in office of any tax collector may continue and complete any process of tax collection, or any proceeding authorized by this article, begun by his predecessor. (1939, c. 310, s. 1703.)

§ 105-376. The tax lien and discharge there—of.—(a) Priority of the Tax Lien on Real Property.—(1) The lien of taxes shall attach to real property at the time hereinbefore in this subchapter prescribed.

(2) The liens of taxes of all taxing units shall be of equal dignity and shall be superior to all other assessments, charges, rights, liens, and claims of any and every kind in and to said property, regardless of by whom claimed and regardless of whether acquired prior or subsequent to the attachment of said lien for taxes: Provided, that nothing herein shall be construed as affecting such relative priority as may be prescribed by the Revenue Act for the lien of state taxes.

(3) The priority of the lien shall not be affected by transfer of title to the real property after the lien has attached, nor shall it be affected by death, receivership or bankruptcy of the owner of said property.

(b) Discharge of the Lien on Realty; Release of Separate Parcels.—The tax lien shall continue until the taxes, plus interest, penalties, and costs as allowed by law, have been fully paid.

When the lien of taxes of any taxing unit for any year attaches to two or more parcels of real estate owned by the same taxpayer, said lien may be discharged as to any parcel, at any time prior to advertisement of tax foreclosure sale, in the following manner: (1) Upon payment, by or on behalf of the listing taxpayer, of the taxes for said year on the parcel or parcels sought to be released, with penalties and interest thereon, plus all personal property, poll and dog taxes owed by said taxpayer for the same year, with interest and penalties thereon, and all costs allowed by law; or (2) upon payment, by or on behalf of any person (other than said listing taxpayer) having an interest in said property, of the taxes for said year on the parcel or parcels sought to be released, with interest and penalties thereon, plus a proportionate part of personal property, poll and dog taxes owed by said listing taxpayer for the same year, with interest and penalties thereon, and a proportionate part of costs allowed by law. The
proportionate parts shall be determined by the percentage of the total assessed value of the taxpayer’s real estate represented by the assessed value of the parcel or parcels sought to be released.

Nothing in this section shall be construed to affect the rights of any holder of a tax sale certificate, other than a taxing unit, with respect to any certificate held on April 3, 1939.

When real estate listed as one parcel is subdivided, a part thereof may be released in the same manner, after the value of such part for tax purposes has been determined by the county tax supervisor or, if there is no supervisor, by the county accountant, and certified by him to the collector.

It shall be the duty of every collector accepting a payment, made under this section for the purpose of releasing less than all of the taxpayer’s real property, to give the person making the payment a receipt setting forth the description of such property appearing on the tax list and bearing a statement that such property is being released; and it shall also be his duty to indicate the property released on the official records of his office.

In case of failure on the part of the collector to issue such receipt or make such record, the person making the prepayment may be reimbursed at any time.

When any parcel of real estate has been released, under this section, from the lien of taxes of any taxing unit for any year, such property shall not thereafter be subject to the lien of any other regularly assessed taxes of the same taxing unit for the same year, whether such other taxes be levied against the listing owner of said property or against some other person acquiring title thereto.

No tax foreclosure judgment for such other taxes shall become a lien on such released property.

The tax lien, when it attaches to personal property, shall, in so far as it represents taxes assessed against the property to which it attaches, be superior to all other liens and rights, whether such other liens and rights are prior or subsequent to the tax lien in point of time. In so far as said tax lien represents taxes not assessed against such property, said tax lien on personal property shall be inferior to prior valid liens and superior to all subsequent liens. As between the liens of different taxing units, the lien first attaching shall be superior.

Preference Accrued Taxes in Liquidation of Debtor’s Estates.—In all cases in which a taxpayer’s assets are in the hands of a receiver or assignee for the benefit of creditors, or are otherwise being liquidated or managed for the benefit of creditors, the taxes owed by such debtor, together with interest, penalties and costs, shall be a preferred claim, second only to administration expenses and specific liens. Provided, that this shall not be construed to modify or reduce the priority by this subchapter given to tax liens on personal property.

Duration of Lien.—The general assembly, pursuant to the constitution, has established the procedure for levying and collecting taxes, and when levied “The tax lien shall continue until the taxes, plus interest, penalties and costs, as allowed by law, have been fully paid.”

§ 105-377. All interested persons charged with notice of taxes.—All persons who have or may acquire any interest in any property which may be or may become subject to a lien for taxes imposed under this subchapter with notice that such property is or should be listed for taxation, that taxes are or may become a lien thereon, and that if taxes are not paid such proceedings may be taken against said property as are allowed by law. Such notice shall be conclusively presumed, whether such persons have actual notice or not.

§ 105-378. Prepayments.—Payments on taxes, made before the tax books have been turned over to the collector, shall be made to such official as the governing body of the taxing unit may designate, and the official so designated shall give bond satisfactory to said governing body. If, at the time of such prepayment, the tax rate has not been finally fixed or the valuation of the taxpayer’s property has not been finally determined, the prepayment may be made on the basis of the best information available to the collecting official.

If it subsequently develops that there has been an overpayment, the excess shall be refunded by the taxing unit, without interest. If it develops that there has been an underpayment, the taxpayer shall be required to pay the balance due, and shall be allowed the same discount or charged the same penalty on such balance as in force with respect to other taxes for the same year at the time such balance is paid. Receipts issued for payments made on the basis of an estimate shall so state, and such receipts shall not release property from the tax lien; but the official and final receipts, effecting such release, shall be made available to the taxpayer as soon as possible after determination that the tax has been fully paid.

§ 105-379. Delivery of tax books to collector; prerequisites thereto; procedure upon default.—

(a) Time of Delivery.—The tax books shall be delivered to the collector, upon order of the governing body, on or before the first Monday in October, as hereinafter in § 105-325 provided.

(b) Settlement and Bond as Prerequisites; Prepayments.—The tax books for the current year shall not be delivered to the collector until he shall have: (1) delivered to the chief accounting officer of the taxing unit the duplicates or stubs of such receipts as he may have issued for prepayments lawfully received by him; (2) demonstrated to the satisfaction of said chief accounting officer that all moneys received by him as such prepayments have been deposited to the credit of the taxing unit; (3) made his annual settlement, as hereinafter defined, for all taxes in his hands for the current year, and shall have furnished such official and final receipts, effecting such release, shall be made available to the taxpayer as soon as possible after determination that the tax has been fully paid.
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amount than that prescribed by any valid local statute applying to said unit.

Any other official who has accepted prepayment shall order to the delivery of the tax books to the collector, deliver the prepayment receipt duplicates or stubs to the chief accounting officer of the unit and shall demonstrate to the satisfaction of said chief accounting officer that all moneys received by him as such prepayments have been deposited to the credit of the taxing unit: Provided, that where said chief accounting officer has himself lawfully accepted prepayments, he shall, not later than the day on which the tax books are delivered to the collector, make settlement therefor with the governing body in such manner and form as said governing body may prescribe.

It shall be the duty of said chief accounting officer: (1) to reduce the original charge made against the tax collector by deducting from the total amount of taxes levied so much of the amount received as prepayments as need not be refunded under the provisions of this article; (2) to secure and retain in his office, available to the taxpayers upon request, the regular receipts for taxes paid in full by prepayments, and to credit such payments on the tax books or accounts delivered to the collector; (3) to prepare refunds for overpayments made by way of prepayment (such disbursements to be made in the same manner as other disbursements of funds of the taxing unit are made); and (4) to credit all partial prepayments as partial payments on the regular receipts or tax accounts.

(c) Procedure upon Default.—If, on or before the first Monday in October, the regular tax collector shall not meet the requirements prescribed in subsection (b), the governing body of any taxing unit may, in its discretion, allow payment of taxes in not more than four equal installments, the last of which shall be payable not later than the week preceding the day fixed for the beginning of advertisement of the tax sale. The governing body of any unit permitting such installment payments, shall: (a) provide that, upon default in any installment, penalties shall accrue immediately upon the entire balance remaining unpaid at the same rate which would have accrued had such installment plan not been adopted; or (b) provide that, upon default in any installment, penalties shall accrue upon the amount of such installment at the same rate which would have accrued had such installment plan not been adopted. Payments made to any unit adopting installment plans shall not be credited on any installment until all prior installments, together with any penalties thereon, have been paid.

It shall be the duty of each governing body and each collector of a taxing unit adopting an installment plan to indicate, on the tax receipts and on any bills or notices sent to taxpayers, the manner hereinafter provided for collectors retiring from office, and shall then turn over the tax books to the regular collector.

(d) Civil and Criminal Penalties.—(1) Any member of the governing body of any taxing unit who shall vote to deliver the tax books or tax receipts to a tax collector, before said collector has met the requirements prescribed in this section, shall be individually liable for the amount of taxes due by said collector; and any such member so voting, or who willfully fails to perform any duty imposed by this section, shall be guilty of a misdemeanor, punishable by fine or imprisonment, or both, in the discretion of the court. (1939, c. 310, s. 1707.)

§ 105-380. Installment payments. — The governing body of any taxing unit may, in its discretion, allow payment of taxes in not more than four equal installments, the last of which shall be payable not later than the week preceding the day fixed for the beginning of advertisement of the tax sale. The governing body of any unit permitting such installment payments, shall: (a) provide that, upon default in any installment, penalties shall accrue immediately upon the entire balance remaining unpaid at the same rate which would have accrued had such installment plan not been adopted; or (b) provide that, upon default in any installment, penalties shall accrue upon the amount of such installment at the same rate which would have accrued had such installment plan not been adopted. Payments made to any unit adopting installment plans shall not be credited on any installment until all prior installments, together with any penalties thereon, have been paid.

It shall be the duty of each governing body and each collector of a taxing unit adopting an installment plan to indicate, on the tax receipts and on any bills or notices sent to taxpayers, the manner hereinafter provided for collectors retiring from office, and shall then turn over the tax books to the regular collector.

(d) Civil and Criminal Penalties.—(1) Any member of the governing body of any taxing unit who shall vote to deliver the tax books or tax receipts to a tax collector, before said collector has met the requirements prescribed in this section, shall be individually liable for the amount of taxes due by said collector; and any such member so voting, or who willfully fails to perform any duty imposed by this section, shall be guilty of a misdemeanor, punishable by fine or imprisonment, or both, in the discretion of the court. (1939, c. 310, s. 1707.)

§ 105-381. Partial payments. — Unless otherwise directed by the governing body, the tax collector shall, at any time, accept partial payments on taxes and issue a partial payment receipt therefor. In crediting a payment on the tax for any year or on any installment, the payment shall first be applied to accrued penalties, interest and costs and then to the principal amount of such tax or installment. (1939, c. 310, s. 1709.)

§ 105-382. Payment of taxes; notes and checks. — Taxes shall be payable in existing national currency.

No tax collector shall accept a note of the taxpayer in payment of taxes. Any other official who has accepted prepayment shall fail to account for prepayments received in the manner prescribed by this section, and any chief accounting officer failing to perform the duties imposed upon him by this section, shall be guilty of a misdemeanor, subject to fine or imprisonment, or both, in the discretion of the court. (1939, c. 310, s. 1707.)

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§ 105-383. Remedies against personal property.—(a) Time for.—From the first day of the fiscal year until taxes become due the collector shall not proceed against the personal property of the taxpayer, in the manner herein provided, unless there is reasonable ground for believing that the taxpayer is about to remove his property from the state. The collector may proceed against such personal property, in the manner herein provided, at any time after taxes are due and before filing of a tax foreclosure complaint or docketing of a judgment for said taxes as hereinafter provided. Every official charged with the duty of collecting taxes, current or delinquent, shall have power and authority to proceed against such personal property in the manner herein provided.

(b) Relation between Remedies against Personal Property and Remedies against Real Property.—The collector may proceed against the personal property of the taxpayer, as herein provided, in his discretion; and, for such personal property, the collector may proceed against such property: (1) if directed so to do by the governing body; or (2) upon demand by the taxpayer, mortgagee or other person holding a lien upon the real property of the taxpayer: Provided, that said taxpayer, mortgagee or other person making said demand shall furnish the collector with a written memorandum describing such personal property and stating where it can be found.

After the sale of a tax sale certificate, no person shall be allowed to attack the validity of the sale on the ground that the tax should have been procrssed against such personal property; but this shall not be construed as prohibiting proceedings against personal property after said sale.

(c) Levy upon Personal Property.—Subject to the provisions of this article governing the priority of the lien acquired, the following property may be levied upon and sold for failure to pay taxes: (1) any personal property of the taxpayer, regardless of the time at which it was acquired and regardless of the existence or date of creation of mortgages or other liens thereon; (2) any personal property transferred by the taxpayer to others than by bona fide sale for value: Provided, that said taxpayer, mortgagee or other person holding a lien upon the real property of the taxpayer: Provided, that said taxpayer, mortgagee or other person making said demand shall furnish the collector with a written memorandum describing such personal property and stating where it can be found.

Any collector failing or refusing to furnish such certificate, upon request in good faith made as herein provided, shall be liable for a penalty of fifty dollars ($50.00). (1939, c. 310, s. 1711.)

§ 105-384. Place for collection of taxes.—Taxes shall be payable at the office of the collector: Provided, that the governing body of any taxing unit may for the convenience of the taxpayers, require the collector, in person or by deputy to attend at his office at such times and places to be designated by said governing body for the collection of taxes. Fifteen days' notice of such times and places shall be given by the collector by advertisement published in some newspaper published in the county, and, if there be no such newspaper published in the county, then by posting such notice at three or more places in said unit. (1939, c. 310, s. 1712.)
Costs, shall be added to and collected in the same manner as the taxes. The advertising costs, when collected, shall be used to reimburse the taxing unit which shall advance the cost of said advertising; and the levy and sale fees, when collected, shall be treated in the same manner as other fees collected by said official.

(d) Attachment and Garnishment.—Subject to the provisions of this article governing the priority of rights acquired, the collector may attach wages or other compensation, rents, bank deposits, the proceeds of property subject to levy and sale, or other property incapable of manual delivery: Provided, the same belongs to the taxpayer or has been transferred to another under circumstances which would permit it to be levied upon if it were tangible, or is due to the taxpayer or may become due to him within the calendar year; and the person owing same or having same in his possession shall become liable for the taxes to the extent of the amount he owes or has in his possession: Provided, that not more than ten per centum of wages or other compensation for personal services shall be liable to attachment and garnishment for failure to pay taxes.

To proceed under this subsection, the collector shall serve or cause to be served upon the taxpayer and the person owing or having in his possession the wages, rents, debts or other things sought to be attached, a notice showing at least: (1) the name of the taxpayer; (2) the amount of the taxes, penalties and costs (including the fees allowed by this subsection) and year or years for which such taxes were levied; (3) the name of the taxing unit or units by which such taxes were levied; (4) a brief description of the thing sought to be attached; and (5) a statement that the person served has the right to appear, within ten days after service, before some designated justice of the peace or (if the amount is beyond the jurisdiction of a justice of the peace) the superior court in the county in which the taxing unit lies, and show cause why he should not be compelled to pay said taxes, penalties and costs.

Notices concerning two or more taxpayers may be combined if they are to be served upon the same person, but in such case the taxes, penalties and costs charged against each taxpayer must be set forth separately.

A copy of each notice shall be retained by the collector and a copy shall be filed, not later than the first business day following the day of service, with the justice or court before which the notice is returnable, together with a notation of service. Upon entry of judgment, by default or after appearance and hearing, in favor of the taxpayer, the person served has the right to appear, within ten days after service, before some designated justice of the peace or (if the amount is beyond the jurisdiction of a justice of the peace) the superior court in the county in which the taxing unit lies, and show cause why he should not be compelled to pay said taxes, penalties and costs.

Sale by Assignee Prior to Levy.—Where an assignee for the benefit of the creditors of a taxpayer sells personal property of his assignor, on which a tax had been assessed, but not levied, prior to the assignment, the proceeds in the hands of the assignee are not subject to garnishment for the payment of the tax, but belong to the creditors. Shelby v. Tiddy, 118 S. N. C. 792, 34 S. E. 521.

§ 105-386. Collection of taxes outside the taxing unit.—If a taxpayer has no property in the taxing unit to which the taxes are due, but does have property in some other unit, or if the taxpayer has removed from the taxing unit in which the taxes are due and has left no property there and is known to be in some other unit in this state, it shall be the duty of the collector to send a copy of the tax receipt, with a certificate stating that such taxes are unpaid, to the collector of the unit in which such property is located or in which such taxpayer is known to be. Such receipt and certificate shall have the force and effect of a tax list of his own unit in the hands of the collector receiving it, and it shall be the duty of such collector to proceed immediately to collect such taxes by any means by which he could lawfully collect taxes of his own unit. The collector receiving such receipt and certificate shall report, within thirty days after such receipt, to the collector who sent the same, either that he has collected the same or is unable to collect the same by any lawful means or that he has begun proceedings for the collection of same. All collections made under this section shall be remitted to the unit levying the tax within the five days after such collection, but the collector making collection shall retain ten per centum of the amount thereof, which shall be for his personal use. All reports under this section, reporting that the tax is uncollectible, shall be under oath and shall state
that the collector has used due diligence and is unable to collect said taxes by levy, garnishment or otherwise. Upon failure to make such sworn report the collector receiving such receipt and certificate shall be liable on his bond for such taxes.

It shall be the duty of the governing body of each taxing unit to require reports from the tax collector, at such times as it may prescribe (but not less frequently than in connection with each annual settlement), concerning the efforts he has made to locate taxpayers who have removed from the unit, the efforts he has made to locate property in other units belonging to delinquent taxpayers, and the efforts he has made under this section to collect the taxes.

(1939, c. 310, s. 1714.)

§ 105-387. Sales of tax liens on real property for failure to pay taxes.—(a) Report of Delinquent Taxes Which Are Liens on Real Property.

The tax collector of each county and district shall, on the first Monday in April each year, and the tax collector of each city shall, on the second Monday in April each year, report a list of all taxpayers owing taxes for the current year which are liens on real property, and the governing body shall thereupon order sale of the tax lien on said real property of said taxpayers to be held at one of the times hereinafter prescribed. For purposes of all subsections of this section, district taxes collected by city tax collectors shall be regarded as city taxes.

(b) Date of Sale; Effect of Delay.—The county and district sale shall be held on the first Monday in May of each year, and the city sale on the second Monday in May of each year, for four successive months. Failure to hold said sale within the time prescribed shall not affect the validity of the taxes or the tax liens, nor shall it affect the validity of the sale when thereafter held. All sales held shall begin, in the case of county and district taxes, on the first Monday of the month and, in the case of city taxes, on the second Monday in the month: Provided, that where county and city taxes are collected by the same collector, the sale may be held on either of said Mondays.

No sale shall be delayed or restrained by order of any court of this state.

(c) Place and Hour of Sale.—Public notice of the time, place and purpose of such sale shall be given by advertisement at the door of the courthouse or city hall for four successive weeks preceding such sale, and by advertisement once each week for four successive weeks preceding such sale in some newspaper published in the county. If there be no newspaper published in the county, such advertisement shall be posted in at least one public place in each township, in the case of county taxes, and in at least three public places in the city in the case of city taxes.

Said advertisement shall set forth, in addition to the time, place and purpose of such sale: (1) the name of each taxpayer owing taxes which are a lien on real estate; (2) a brief description of the land listed in the name of each; (3) the principal amount of the taxes owed by each. Failure to include penalties and costs in the amount advertised shall not be construed as a waiver of same, but such advertisement shall state generally that the amounts advertised are subject to be increased by such penalties and costs.

(d) Place and Hour of Sale.—All county and district sales shall be held at the courthouse door, and city sales shall be held at the courthouse door or at the city hall door as the collector may advertise. All sales shall begin at such hour as may be specified in the advertisement, and they may be continued from day to day until full compliance is necessary in order to complete the sales, without further advertisement.

(e) Manner of Sale.—The sale may be conducted by the collector or any deputy designated by him for the purpose. The tax liens on all parcels advertised against one taxpayer shall be sold as one lot at public outcry to the highest bidder: Provided, that in case of county sales, liens on parcels in different townships may be sold separately. The collector may, in his discretion, demand immediate payment from any successful bidder, and reject such bid upon failure to comply with said demand. No bid shall be received unless for an amount at least equal to the principal amount of the taxes plus all penalties and costs accrued thereon. In the absence of a bid at least equal to such sum the taxing unit shall become the purchaser, without submitting a formal bid, for an amount equal to such sum.

In all cases in which bids are accepted which exceed such sum the tax collector shall immediately report such excess to the governing body, and said governing body shall order such excess paid directly to the person entitled thereto or order it paid to the clerk of superior court for distribution as the collector may direct.

(f) Costs of Sale.—Costs of sale, which shall be included in the minimum sale price, shall consist of actual advertising cost and a sale fee not exceeding fifty cents (50c) per parcel. Actual advertising cost per parcel shall be determined by the collector, and may be determined upon an advertising lineage basis or an average cost per insertion basis or by any other reasonable method. The taxing unit shall pay all advertising expense, and all advertising cost collected shall be paid to it for use as its governing body may direct. All sale fees collected shall be treated in the same manner as other fees collected by said collector.

(g) Payments during the Advertising Period.—At any time between the beginning of the advertisement and the time of actual sale, any parcel may be withdrawn from the sale list by payment of taxes and penalties as required by law and a proportionate part of the advertising cost as determined by the collector. Thereafter, such parcel shall be eliminated from the advertisement: Provided, that failure to eliminate such parcel shall not subject the collector to liability if the lien on said parcel is not thereafter actually sold.

(h) Failure of Collector to Attend Sale.—If any collector shall fail to attend any duly advertised sale, in person or by competent deputy, he shall be guilty of a misdemeanor and liable on his bond to a penalty of three hundred dollars.

(i) Land Listed in Wrong Name.—No sale shall be void because such real estate was charged in the name of any other person than the rightful owner, if such real estate be in other respects correctly described on the tax list: Provided, no sale of the lien on real estate listed in the name of the wrong person shall be valid when the rightful owner has listed the same and paid the taxes thereon.
(j) Irregularities Immaterial.—No irregularities in making assessments or in making the returns thereof in the equalization of property as provided by law, or in any other proceeding or requirement, shall invalidate the sale of tax liens on real estate or sale of real estate in tax foreclosure proceedings, nor in any manner invalidate the tax levied on any property or charged against any person. The following defects, omissions, and circumstances occurring in the assessment of any property for taxation, or in the levy of taxes, or elsewhere in the course of the proceedings, shall be deemed to be irregularities within the meaning of this subsection; the failure of the assessors to take or subscribe an oath or attach an oath to an assessment roll; the omission of a dollar mark or other designation descriptive of the value of figures used to denote an amount assessed, levied, charged against any property or the valuation of any property upon any record; the failure to make or serve any notice mentioned in this chapter; the failure or neglect of the collector to offer any tax lien or real estate for sale at the time mentioned in the advertisement or notice of such sale; failure of the collector to adjourn the sale from day to day, or any irregularity or informality in such adjournment; any irregularity or informality in the order or manner in which tax liens or real estate may be offered for sale; the failure to assess any property for taxes or to levy any tax within the time prescribed by law; any irregularity, informality or omission in any such assessment or levy; any defect in the description, upon any assessment book, tax list, sales book, or other record, of real or personal property, as assessed for taxation, or upon which any taxes are levied, or which may be sold for taxes, provided such description be sufficiently definite to enable the collector, or any person interested, to determine what property is meant or intended by the description, and in such cases a defective or indefinite description, on any book, list, or record, or in any notice or advertisement, may be made definite by the collector at any time by correcting such book, list, or record, or may be made definite by using a correct description in any tax foreclosure proceeding authorized by this subchapter, and any such correction shall have the same force and effect as if said description had been correct on the tax list; any other irregularity, informality, or omission or neglect on the part of any person or in any proceedings, whether mentioned in this subsection or not; the neglect or omission to tax or assess for taxation any person or property; the overtaxation of persons or property liable to be taxed.

(k) Acts of De Facto Officers.—In all actions, proceedings, and controversies involving the right of a person elected or appointed to fill the office of real estate clerk, deputy real estate clerk, real estate deputy, tax collector, or any other officer or person who shall hold or have held such office or any office or other record, list, or book relating to the sale of real estate for taxes, the acts or transactions of such de facto officer or officers shall be deemed and construed to be of the same validity as acts of officers de jure.

(l) Proof of Sale.—The books and records of the office of the collector making the sale, or copies thereof properly certified, shall be deemed sufficient evidence to prove the sale of the tax lien on any real property under this section, the redemption thereof or the payment of taxes thereon.

(m) Wrongful Sale.—Any collector or deputy collector who shall sell, or assist in selling, the tax lien on any real property, knowing the same not to be subject to taxation, or that the taxes for which the lien is sold have been paid, or shall knowingly and willingly sell or assist in selling the tax lien on any real property for payment of taxes to defraud the owner of such real property, or shall knowingly and willingly cause foreclosure proceedings to be instituted against real property so sold, shall be guilty of a misdemeanor, and be liable to a fine of not less than one thousand nor more than three thousand dollars, or to imprisonment not exceeding one year, or to both fine and imprisonment, and to pay the injured party all damages sustained by such act; and all such sales shall be void.

When by mistake or wrongful act of the collector a tax lien on real property has been sold on which no tax was due, the taxing unit shall reimburse the purchaser by paying to him the amount expended by him in such purchase, with interest thereon at six per cent per annum: and the collector shall be liable to the taxing unit upon his bond for all amounts so expended by it in excess of the amount received by it from said sale. Any amount paid by a taxing unit under this section for state taxes shall, on proper certificate from the treasurer of the governing body, be allowed by the auditor and paid by the treasurer of the state, and the state shall have the right of recovery against the collector on his bond to the amount so paid.

(n) Joint Sales by Several Taxing Units.—Wherever the taxes of two or more taxing units are collected by the same collector, one sale shall be held for the taxes of both at such time as is prescribed by law for sales by either; and in the absence of bids the larger unit may become the purchaser, or such units may become joint purchasers, for the benefit of all according to their respective interests: Provided, that this shall not repeal any local law designating the purchaser in case of joint sales. (1939, c. 310, s. 1715.)

Local Modification.—Wayne: 1941, c. 40; Cumberland: 1947, c. 144, s. 106.

The power to sell real estate for taxes was repealed by Chapter 310, Public Laws 1939, and the sheriff or tax collector is limited to the sale of the tax lien. Crandall v. Clemmons, 222 N. C. 225, 227, 22 S. E. (2d) 448 (1942).

The tax lien can be enforced only by an action in the superior court in the county in which the land is situated in the nature of an action to foreclose a mortgage. Cran dall v. Clemmons, 222 N. C. 225, 227, 22 S. E. (2d) 448 (1942). See § 105-381.

Power of Redemption.—Under this section the first sale by the sheriff has no more significance than to put the purchaser in the position of a lienor as represented by his certificate of sale, which he must enforce, as in the case of mortgage, by a foreclosure of the equity of redemption. The imminence of injury to the remainderman by “dis- herison” or loss of his estate through operation of the first sale has been almost altogether removed, since, to secure foreclosure, the purchaser must institute and carry to conclusion a suit in which all interested persons must be made parties and notified, and thereby the period of redemption for the life tenant and others interested is necessarily greatly enlarged. Cooper v. Cooper, 220 N. C. 490, 493, 17 S. E. (2d) 655 (dis. op.).

§ 105-388. Certificates of sale.—(a) Issued to Private Purchasers.—As soon as possible after [1118]
sale, but not earlier than payment of the purchase price, the collector shall issue to each successful bidder, other than taxing units, a certificate of sale, for the tax lien on real property of each delinquent, purchased by him, dated as of the day of sale. Property held jointly by two or more owners shall be construed as the property of one delinquent for this purpose. Said certificate shall be in substantially the following form:

"North Carolina, .................. (taxing unit)
I, .................. tax collector of
........................ (taxing unit)
do hereby certify that the tax lien on the following
described real property in said taxing unit, to wit: .................. (describing the same)
was, on the day of ........... , 19.., duly sold by me in the manner provided by law, for the delinquent taxes of ........... for the year ........... , amounting to $ ........... , including penalties thereon and costs allowed by law, when and where ........... (name of purchaser) .................. purchased said lien on said real property at the price of $ ........... , said amount being the highest and best bid for same. And I further certify that unless payment of said lien is made within the time and in the manner provided, by law, said ........... (name of purchaser) .................. or his heirs or assigns, shall have the right to foreclose said real property by any proceeding allowed by law.

"In witness whereof, I have hereunto set my hand this ...... day of ........... Tax Collector."

A copy of each such certificate shall be retained by the collector in a special book or file designated "Certificates of Sale for Taxes for the Year ........... ". All payments made on any such certificate shall be made to the collector for the use of the owner of such certificate, and all such payments shall be credited by the collector on the copy of the certificate in his possession, and shall be remitted to the owner of the certificate upon proper receipt therefor. For failure to account for and pay over any such payments the collector shall be liable to the person entitled thereto. The copies of such certificates in the collector's office shall be the official records for the purpose of determining whether a lien exists in favor of any certificate owner other than a taxing unit. The owner of a certificate may assign it at any time, but said assignment shall not be effective until the collector shall have recorded the same in his files. Each such purchaser, his heirs and assigns, shall also have a lien for other taxes and assessments levied against said property, paid by him after acquisition of said certificate, whether such taxes or assessments were charged before or after such acquisition. Said lien shall be entitled to the same priorities as the original lien of the taxes and assessments so paid.

(b) Issuance of Certificates. The governing body of each taxing unit which becomes the purchaser at a tax sale, as hereinbefore provided, shall determine whether or not it is necessary to issue certificates to and in the name of such unit. If, in the opinion of said governing body, the issuance of such certificates is not necessary in order to provide adequate records of tax liens and tax collections, the said certificates may be dispensed with and the collector ordered to mark or stamp the original tax receipts or accounts "Sold to ........... (name of tax unit) ........... ". If issuance of certificates is deemed necessary, they shall be issued in substantially the form set forth in subdivision (a) of this section with stubs or duplicates on which shall be reflected all payments or assignments. In either case, the taxing unit shall have the right to foreclose the real property by any method authorized by law; and in either case interest at the rate of eight per cent per annum shall accrue, on the amount bid by said unit, from the date of the sale.

(c) Prima Facie Case.—A certificate issued, or a tax receipt or account marked or stamped, in accordance with the provisions of subdivisions (a) or (b) of this section, shall be presumptive evidence of the regularity of all prior proceedings incident to the sale and of the due performance of all things essential to the validity thereof. 

§ 105-389. Assignment of liens by taxing unit after sale.—At any time after the sale hereinbefore provided for, any taxing unit may assign any lien owned by it to any person who pays an amount which, if paid by the taxpayer, would be sufficient to discharge said lien. If a certificate has already been issued to the taxing unit, it shall be assigned to the person making the payment, and the copy of stub of such certificate or a copy of such stub, showing such assignment, shall be filed in the manner provided for certificates originally issued to private purchasers. If no certificate has been issued to the taxing unit, a certificate shall immediately be so issued, and said certificate shall be assigned to the person making such payment in the manner set forth in the preceding sentence. The collector to whom the payment is made shall have authority to make all such assignments and issue all such certificates.

The provisions of this section shall be construed as being in addition to the provisions of this article with respect to release of individual parcels of real property from the tax lien. The person making a payment, after the sale hereinbefore provided for, shall have the right to pay the entire amount or to pay an amount sufficient under the provisions of this article to release one or more specified parcels; and such person shall
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§ 105-390. Settlements. — (a) Annual Settlement of Tax Collector.—(1) Preliminary report. On the second Monday following the sale of certificates, the tax collector shall, under oath, report to the governing body: (1) action with respect to such sale; and (2) a list of those not listing land for taxes whose taxes remain unpaid, making oath that he has made diligent effort to collect such taxes out of the personal property of such taxpayers or by other means open to him for collection of such taxes, and reporting such other information as to such taxpayers as may be of interest to or required by the governing body (including a report on his efforts to make collection outside the taxing unit under the provisions of this article.)

(2) Insolvents. The governing body shall, upon receipt of said report, enter upon its minutes the list of such taxpayers listing no land as may be found by said governing body to be insolvents, and shall by resolution designate said list so entered in the minutes as the insolvent list to be credited to the collector in his settlement.

(3) Settlement for current taxes. On the first Monday of the month following sale of certificates, but not earlier than the first Monday of July, the collector shall make full settlement with the governing body of the taxing unit for all taxes, in his hands for collection, for the year involved in said sale. In such settlement the collector shall be charged with: (1) the total amount of all taxes for said year, in his hands for collection, including amounts originally charged to him and all subsequent amounts charged on account of discovered property; (2) all penalties, interest and costs collected by him in connection with taxes for said year; and (3) all other sums to be collected by said collector. He shall be credited with: (1) all sums deposited by him to the credit of the taxing unit, or received for by the proper official of said unit, on account of taxes for said year; (2) releases allowed by the governing body as prescribed by statute; (3) the principal amount of taxes included in certificates sold to the taxing unit, for which he shall produce certificates duly executed or receipts or accounts duly stamped in accordance with the provisions of this article; (4) the principal amount of taxes for said year included in the insolvent list, determined as hereinbefore provided; (5) discounts allowed by law; and (6) commissions, if any, lawfully payable to him as compensation. For any deficiency the collector shall be liable on his bond, and, in addition, thereto, shall be liable to all criminal penalties provided by law.

Said settlement, together with the action of the governing body with respect thereto, shall be entered in full upon the minutes of said governing body.

(4) Disposition of tax books after settlement. Uncollected taxes allowed as credits in the settlement prescribed in the preceding subsection, whether represented by sales to the taxing unit or included in the list of insolvents, shall be charged to the collector or charged to some other person, in accordance with the provisions of any valid local statute governing tax collection in the particular taxing unit. In the absence of any local statute determining the matter: (1) Such taxes in cities, and in counties having tax collectors other than sheriffs, shall be charged to the collector; and (2) such taxes, in counties having sheriffs as tax collectors, shall be charged to such other county officer or employee as the governing body may designate to perform the duties of delinquent tax collector.

The person so charged or recharged shall give bond satisfactory to the governing body; shall receive the tax receipts, certificates and records representing such uncollected taxes; shall have and exercise and perform all powers and duties conferred or imposed by law upon tax collectors; and shall receive such compensation as may be fixed by valid local statute or, in the absence of such statute, as the governing body may determine.

(b) Settlements for Delinquent Taxes. — Annually, at the time prescribed for the settlement hereinbefore in this section provided, all persons having in their hands for collection any taxes for years prior to the year involved in said settlement hereinbefore provided, shall settle with the governing body of the taxing unit for collections made on the taxes for each such prior year. Such settlement for the taxes of prior years shall be in such form as may be satisfactory to the chief accounting officer and the governing body of the taxing unit, and shall be entered in full upon the minutes of the governing body.

(c) Settlement at End of Term. Whenever any tax collector or other person collecting taxes, current or delinquent, shall fail to succeed him in the discharge of his term of office, he shall, on the last business day of his term, make full and complete settlement for all taxes in his hands and deliver the tax records, receipts and accounts to his successor in office. Such settlement shall be in such manner and form as may be satisfactory to the chief accounting officer and the governing body of the taxing unit, and shall be entered in full upon the minutes of the governing body.

(d) Settlement upon Vacancy During Term. — In case of voluntary resignation of any person collecting taxes he shall, upon his last day in office, make full settlement for all taxes in his hands in the same manner as required herein for settlements made at the end of a term of office. In default of such settlement, or in case of a vacancy occurring during a term for any other reason, it shall be the duty of the chief accounting officer or, in the discretion of the governing body, of some duly qualified person appointed by it, immediately to prepare and submit to the governing body a report in the nature of a settlement made on behalf of the ex-collector; and such report, together with the action of the gov-
erning body, shall be entered in full upon the minutes of the governing body. In such cases the governing body may turn over the tax books to the successor collector immediately upon occurrence of the vacancy, or may make such temporary arrangements for collection of taxes as may be expedient: Provided, that no person shall be permitted to collect taxes until he shall have given bond satisfactory to the governing body. 

(e) Effect of Approval.—Approval of any settlement by the governing body shall not relieve the collector or his bondsmen of liability for any shortage actually existing and thereafter discovered; nor shall it relieve the collector of any criminal liability.

(f) Penalties.—In addition to all other civil and criminal penalties, provided by law, any member of a governing body, collector, person collecting taxes, or chief accounting officer failing to perform any duty imposed upon him by this section shall be guilty of a misdemeanor, punishable by fine or imprisonment, or both, in the discretion of the court. (1939, c. 310, s. 1718.)

Local Modification.—Cumberland: 1941, c. 44, s. 1(d), (e). Cross reference.—For earlier statute relating to settlement, see § 105-424.

Legislative Power to Penalize.—The Legislature has the power to impose penalties on the sheriff for his delay or failure to make settlement with the proper county authorities within a stated time. State v. Gentry, 183 N. C. 825, 112 S. E. 427. The court said: "The power to coerce prompt collection and settlement of taxes is no less necessary than the power to levy and assess them, and both are essential to the maintenance of the government."

An extension of time within which a sheriff may settle state taxes, thus may extend the suerites upon his bond. Worth v. Cox, 89 N. C. 44.

§ 105-391. Foreclosure of tax liens by action in nature of action to foreclose a mortgage.—(a) Time for Beginning Such Action.—Actions for the foreclosure of tax liens brought under this section shall be brought not less than six months after the sale hereinbefore provided for.

(b) Private Purchasers.—Foreclosure under this section shall be the sole remedy of certificate owners other than taxing units.

(c) Taxing Units.—Taxing units may proceed under this section to foreclose a mortgage on the tax liens acquired or whose interest therein is subsequently discovered; or shall it relieve the collector of any criminal liability.

(d) General Nature of the Action.—The foreclosure action shall be an action in superior court, in the county in which the land is situated, in the nature of an action to foreclose a mortgage.

(e) Parties.—The listing taxpayer and spouse, if any, the current owner, all other taxing units having tax liens, all other lien-holders of record, and all persons who would be entitled to be made parties to a court action (in which no deficiency judgment is sought) to foreclose a mortgage on such property, shall be made parties and served with summons in the manner provided by § 1-89: Provided, that alias summonses may be issued or service by publication begun at any time within one year after the issuance of the original summons.

The fact that the listing taxpayer or any other defendant is a minor, is incompetent or 's under any other disability shall not prevent or delay the collector's sale or the foreclosure of the tax lien; and all such defendants shall be made defendants and served with summons in the same manner as in other civil actions.

Persons who have disappeared or cannot be located and persons whose names and whereabouts are unknown, and all possible heirs or assignees of such persons may be served by publication; and such persons, their heirs and assignees may be designated by general description or by fictitious names in such action. It is hereby declared that service of summons by publication against such persons, in the manner provided by law, shall be as valid in all respects as such service against the best known persons who are non-residents of this state.

(f) Complaint as a Lis Pendens.—The complaint in an action brought under this section shall, from the time of the filing thereof in the office of the clerk of superior court, serve as notice of the pendency of such action, and every person whose interest in such property is subsequently acquired or whose interest therein is subsequently registered or recorded shall be bound by all proceedings taken in such action after the filing of said complaint in the same manner as if said person had had actual notice of such action. It shall not be necessary to have said complaint cross indexed as a notice of action pending to have the effect prescribed by this subsection.

(g) Subsequent Taxes.—The complaint in a tax foreclosure action brought under this section by a taxing unit shall, in addition to alleging the tax lien on which the action is based, include a general allegation of subsequent taxes which are or may become a lien on the same property in favor of the plaintiff unit. Thereafter it shall not be necessary to amend said complaint to incorporate said taxes by specific allegation. In case of redemption before judgment of confirmation the person redeeming shall be required to pay, before said action is discontinued, at least all taxes on said property which have at the time of discontinuance been due to plaintiff unit for one year, plus interest, penalties and costs thereon. Immediately prior to judgment of sale in such action, if there has been no redemption, the tax collector, or the attorney for plaintiff unit, shall file in said action a certificate setting forth the amount of which has not been definitely determined.

Any plaintiff in a tax foreclosure action, other than a taxing unit, may include in his complaint, originally or by amendment, all other taxes and assessments paid by him which were liens on the same property.

(h) Joinder of Parcels.—All real estate within one township, subject to liens for taxes levied against the same taxpayer by the same taxing unit for the first year involved in the action shall be joined in one action: Provided, that where
property is transferred by the listing taxpayer subsequent to such year, all subsequent taxes, penalties, interest and costs, for which said property is ordered sold under the terms of this subchapter, shall be prorated to such property in the same manner as if payments were being made to release such property under the provisions of this subchapter.

(i) Special Benefit Assessments.—A cause of action for the foreclosure of the lien of any special benefit assessment may be included in any complaint filed under this section.

(j) Joint Foreclosure by Two or More Taxing Units.—Liens of different taxing units on the same parcel, representing taxes in the hands of the same collector, shall be foreclosed in one action. Liens of different taxing units on the same parcel, representing taxes in the hands of different collectors, may be foreclosed in one action in the discretion of the governing bodies.

Liens of taxing units made parties defendant in any such action shall be alleged in an answer filed by such unit, and the collector of each such answering unit shall, prior to judgment, file a certificate of subsequent taxes similar to that filed by the collector of the plaintiff unit, and the taxes of each such answering unit shall be of equal dignity with the taxes of the plaintiff unit; and any such answering unit may, in case of payment of the plaintiff's taxes, continue such action until all taxes due to it for more than one year have been paid. It shall not be necessary for any such defendant unit to file a separate foreclosure action or proceed under § 105-392 with respect to any such taxes.

All taxes of any taxing unit which is properly served as a party defendant in such action, and which does not answer and file the certificate as aforesaid, shall be barred by the judgment of sale except to the extent that the purchase price at foreclosure sale, after payment of costs and of the liens of all taxing units whose liens are properly alleged by complaint or answer and certificates, may be sufficient to pay said taxes:

Provided, that if a defendant unit is plaintiff in another action pending against the same property, or has begun a proceeding under § 105-392, its answers may allege said fact in lieu of alleging its liens, and the court, in its discretion, may order consolidation of such actions or such other disposition thereof, and such disposition of the costs therein, as it may deem advisable:

And provided, further, that any such order may be made by the clerk of the superior court, subject to appeal in the same manner as appeals are taken from orders of said clerk.

(k) Costs.—Costs may be taxed in any action brought under this section in the same manner as in other civil actions, subject to the provisions of this subsection; and upon collection of said costs, either upon redemption or upon payment of the purchase price at foreclosure sale, the fees allowed officers shall be paid to those entitled to receive the same:

Provided, that the fees allowed any officer, whether for the personal use of such officer or for the benefit of the unit of which he is an official shall not exceed one-half the fees allowed in other civil actions:

Provided, further, that no process tax for the use of the state shall be levied or collected in tax foreclosure actions, and, where the plaintiff is a taxing unit, no prosecution bond shall be required in such actions.

 Said costs may include one reasonable attorney's fee for the plaintiff, which shall not exceed five dollars:

Provided, that the governing body of any unit may, in its discretion, pay a greater sum to its attorney as a suit fee and said governing body may, in its discretion, make a reasonable arrangement with its attorney on delinquent taxes collected by him after said taxes have been placed in his hands; or said governing body may arrange with its attorney for the handling of tax suits on a salary basis or make such other reasonable agreement with its attorney or attorneys as said governing body may approve; and any arrangement made may provide that attorney's fees collected as costs be collected for the use of the taxing unit: And provided, further, that when any taxing unit is made a party defendant in a tax foreclosure action and files answer therein, there may be included in the costs an attorney's fee for not more than exceeding three dollars.

In any action in which real property is actually sold after judgment, costs shall include a commissioner's fee to be fixed by the court, not exceeding five per centum of the purchase price; and in case of redemption between the date of sale and judgment of confirmation, said fee shall be added to the amount otherwise necessary for redemption. In case more than one sale is made of the same property in any action, the commissioner's fee may be fixed by the highest amount bid, but said commissioner shall not be allowed a separate fee for each such sale. The governing body of any taxing unit may, in its discretion, appoint the commissioner a salaried official, attorney or employee of the unit and, if such appointment is made, may require that such commissioner's fees, when collected, be paid to plaintiff unit for use as it may direct.

(l) Contested Actions. — Any action brought under this section, in which an answer raising an issue requiring trial is filed within the time allowed by law, shall be entitled to a preference as to time of trial over all other civil actions.

(m) Judgment of Sale.—Any judgment in favor of the plaintiff or any defendant taxation unit in an action brought under this section shall order the sale of the property, or so much thereof as may be necessary for the satisfaction of: (1) taxes adjudged to be liens in favor of the plaintiff, other than taxes the amount of which has not been definitely determined, together with interest, penalties and costs thereon; and (2) taxes adjudged to be liens in favor of other taxing units, other than taxes the amount of which has not yet been definitely determined, if said taxes have been alleged in answers filed by said units, together with interest, penalties and costs thereon.

Said judgment shall appoint a commissioner to conduct said sale and shall order that the property be sold in fee simple, free and clear of all liens, claims and liens whatever, except that said sale shall be subject to taxes the amount of which cannot be definitely determined at the time of said judgment, subject to taxes and assessments of taxing units which are not parties to said action, and, in the discretion of the court, subject to taxes alleged in other tax foreclosure actions or proceedings pending against the same property.
In all cases in which no answer is filed within the time allowed by law, and in cases in which answers filed do not seek to prevent sale of said property, the clerk of the superior court may render said judgment, subject to appeal in the same manner as appeals are taken from other judgments of said clerk.

(n) Advertisement of Sale.—The sale shall be advertised, and all necessary resales shall be advertised, in the manner provided by §§ 1-327, 1-328, or by such statute as may be enacted in substitution therefor.

(o) Sale.—The sale shall be by public auction to the highest bidder, and shall, in accordance with the judgment, be held at the courthouse door on any day of the week except a Sunday or legal holiday: Provided, that in actions brought by any city which is not a county seat the court may, in its discretion, direct said sale to be held at the city hall door. The commissioner conducting such sale may, in his discretion, require from any successful bidder a deposit equal to not more than twenty per centum of his bid, which said deposit, in the event that said bidder refuses to take title and a resale becomes necessary, shall be applied to pay the costs of sale and any loss resulting: Provided, that this shall not deprive the commissioner of the right to sue for specific performance of the contract.

(p) Report of Sale.—Within three days following said sale the commissioner shall report said sale to the court, giving full particulars thereof.

(q) Exceptions and Increased Bids.—At any time within twenty days after the filing of said report of sale any person having an interest in the property may file exceptions to said report, and at any time within said period an increased bid may be filed in the amount specified by and subject to the provisions (other than provisions in conflict herewith) of § 45-98, or to the provisions (other than provisions in conflict herewith) of any law enacted in substitution for said section.

(r) Judgment of Confirmation.—At any time after the expiration of said twenty days, if no exception or increased bid has been filed, the commissioner may apply for judgment of confirmation; and in like manner he may apply for such judgment after the court has passed upon any exceptions filed, or after any necessary resales have been held and reported and twenty days have elapsed: Provided, that the court may, in its discretion, order resale of the property, in the absence of exceptions or increased bids, whenever it deems such resale necessary for the best interests of the parties.

Said judgment of confirmation shall direct the commissioner to deliver the deed upon payment of the purchase price.

Said judgment may be rendered by the clerk of the superior court, subject to appeal in the same manner as appeals are taken from other judgments of said clerk.

(s) Application of Proceeds of Sale; Final Commissions.—After delivery of the deed and collection of the purchase price, the commissioner shall apply the proceeds as follows: first, to payment of all costs of the action, including commissioner’s fee and attorney’s fee, which said costs shall be paid to the officials or funds entitled thereto; then to the payment of taxes, penalties and interest for which said property was ordered to be sold, and in case the funds remaining are insufficient for this purpose they shall be distributed pro rata to the various taxing units for whose taxes the property was ordered sold; then pro rata to the payment of any special benefit assessments for which said property was ordered sold, together with interest and costs thereon; then pro rata to payment of taxes, penalties, interest and costs of taxing units which were parties to said action but which filed no answers therein; then pro rata to payment of special benefit assessments of taxing units which were parties to said action but which filed no answers therein, together within interest and costs on said assessments; and any balance then remaining shall be paid in accordance with any directions given by the court and, in the absence of such directions, shall be paid into court for the benefit of the persons entitled thereto. The commissioner in all such cases shall make a full report to the court, within five days after delivery of the deed, showing delivery of the deed, receipt of the purchase price, and the disbursement of the proceeds, accompanied by receipts evidencing all such disbursements.

In case the purchaser is a taxing unit such unit may proceed in accordance with the provisions hereinafter set forth in this section; and the commissioner shall make report accordingly.

(t) Bids by Taxing Units.—Any taxing unit, or two or more units jointly, may bid at foreclosure sale, and any taxing unit which becomes the successful bidder may assign its bid, or portion thereof, at any time, by private sale, for not less than the amount thereof.

(u) Payment of Purchase Price by Taxing Units; Status of Property Purchased by Taxing Units.—Any taxing unit which becomes the purchaser at final tax foreclosure sale may, in the discretion of its governing body, pay only such part of the purchase price as would not be distributed to itself and other taxing units on account of taxes, interest, penalties and such costs as accrued prior to the beginning of the foreclosure action. Thereafter, in such case, it shall hold said property for the benefit of all taxing units which have an interest in such property as hereinafter in this subsection defined. All net income from said property and the proceeds thereof, when resold, shall be first used to reimburse the purchasing unit for disbursements actually made by it in connection with the foreclosure action and the purchase of said property, and any balance remaining shall be distributed to the taxing units having an interest therein in proportion to their interests. The total interest of each taxing unit, including the purchasing unit, shall be determined by adding: (1) taxes of such unit, with interest, penalties and costs (other than costs already reimbursed to the purchasing unit) to satisfy which said property was ordered sold; (2) other taxes of such unit, with interest, penalties and costs, which would have been paid from the purchase price had said purchase price been paid in full; (3) taxes of such unit, with interest, penalties and costs, to which said sale was made subject; and (4) the principal amount of all taxes which may become liens on said property after purchase at foreclosure sale or which would have
become liens but for such purchase: Provided, that no amount shall be included under clause (4) hereof for taxes for years in which, on the tax listing day, said property is being used by said taxing unit for a public purpose.

If the amount of net income and proceeds of resale distributable exceeds the total interests of all units hereinbefore defined, the remainder shall be applied to any special benefit assessments to satisfy which said sale was ordered or to which said sale was made subject, and any balance then remaining shall accrue to the purchasing unit.

When any property, purchased as hereinbefore provided in this subsection, is permanently dedicated for use for a public purpose, the purchasing unit shall make settlement with other taxing units having an interest in such property, as hereinbefore defined, in such manner and in such amount as may be agreed upon by the governing bodies; and if no agreement can be reached the amount to be paid shall be determined by the resident judge of the superior court.

Nothing in this subsection shall be construed as requiring the purchasing unit to secure the approval of other interested taxing units before reselling said property or as requiring said purchasing unit to pay said other units in full if the net income and resale price are insufficient to make such payments.

Such taxing unit purchasing property at foreclosure sale may, in the discretion of its governing body, instead of following the foregoing provisions of this subsection, make full payment of the purchase price and thereafter it shall hold said property as sole owner in the same manner as it holds other real property, subject only to taxes and assessments, with interest, penalties and costs, to which said sale was made subject.

(v) Resale of Property Purchased by Taxing Units.—Property purchased at tax foreclosure sale by a taxing unit may be resold at any time for such price as the governing body may approve. Such resales shall be conducted in the manner provided by law for sales of other property of the various taxing units: Provided, that a city may, in the discretion of its governing body, resell such property to former owner or other person for an amount not less than the total interests of such taxing units in such property, if it holds said property as sole owner, or for an amount not less than the total interests of all taxing units (other than assessments due the city holding title), if it holds said property for the requirements of local governments in this State, and to recognize, in authorizing such proceeding, that all those owning interests in real property necessarily levied, to the knowledge of all, for the requirements of local governments in this State; and to recognize, in authorizing such proceeding, that all those owning interests in real property know or should know, without special notice thereof, that such property may be seized and sold for the failure to pay such lawful taxes.

Nothing in this section shall be construed as a limitation of time on the right to foreclose a tax lien under § 105-391. (b) Motion to Set Aside.—At any time prior to issue of execution, any person having an interest in said property may appear and move to set aside said judgment on the ground that the tax has been paid or that the tax lien on which said judgment is based is invalid.

(c) Issue of Execution.—At any time after six months and before two years from the indexing of said judgment, execution shall be issued at the request of the governing body of the taxing unit, in the same manner as executions are issued upon other judgments of the superior court, and said property shall be sold by the sheriff in the same manner and under the same conditions prescribed for the sale of real estate on which such taxes are a lien. The court has authority to reject the bid made at the foreclosure sale of a tax sale certificate and order a resale, even if the amount of net income and proceeds of resale distributable exceeds the total interests of all units hereinbefore defined, the remainder shall have the same force and effect as a duly rendered judgment of the superior court directing sale of said property for the satisfaction of the tax lien, and which judgment shall bear interest at the rate of six per cent per annum. The clerk shall be allowed fifty cents per certificate for such docketing and indexing, payable when such taxes are collected or such property is sold, and shall account for said fees in the same manner as other fees of his office are accounted for: Provided, that the governing body of any county, if said clerk is in charge of the office, may permit any clerk, if he is on fees or salary plus fees, may require such fees to be advanced by the taxing unit.

The collecting official filing said certificate shall, at least two weeks prior to the docketing of said judgment, send a registered letter to the listing taxpayer, at his last known address, stating that the judgment will be docketed and that execution will issue thereon in the manner provided by law. However, receipt of said letter by said listing taxpayer, or receipt of actual notice of the proceeding by said taxpayer or any other interested person, shall not be required for the validity or priority of said judgment or for the validity or priority, as hereinafter provided, of the title acquired by the purchaser at the execution sale. It is hereby expressly declared to be the intention of this section that proceedings brought under it shall be strictly in rem. It is further declared to be the intention of the section to provide a simple and inexpensive method of enforcing payment of taxes necessarily levied, to the knowledge of all, for the requirements of local governments in this State; and to recognize, in authorizing such proceeding, that all those owning interests in real property know or should know, without special notice thereof, that such property may be seized and sold for the failure to pay such lawful taxes.

Nothing in this section shall be construed as a limitation of time on the right to foreclose a tax lien under § 105-391.
manner as other property is sold under execution: Provided, that no debtor's exemption shall be allowed; and provided, further, that in lieu of any personal service of notice on the owner of said property, registered mail notice shall be mailed to the listing taxpayer, at his last known address, at least one week prior to the day fixed for said sale. The purchaser at said sale shall acquire title to said property in fee simple, free and clear of all claims, rights, interest and liens except the lien of other taxes and assessments not paid from the purchase price and not included in the judgment: Provided, that if a taxing unit has, by virtue of the taxes included in such a judgment, been made a defendant in a foreclosure action brought under § 105-391, it shall file answer therein and thereafter all proceedings shall be governed by order of court in accordance with the provisions of that section.

(d) Cancellation upon Payment.—Upon payment in full of any judgment docketed under this section, together with interest thereon and costs accrued to the date of payment, it shall be the duty of the collecting official receiving such payment immediately to certify the fact of such payment to the clerk of superior court, who shall thereupon cancel the judgment, the fee for which shall be included as part of accrued costs.

(e) Consolidation of Liens.—By agreement between the governing bodies, two or more taxing units may consolidate their liens for purposes of docketing judgment, or may have one execution issued for separate judgments, against the same property. In like manner one execution may issue for separate judgments in favor of one or more taxing units against the same property for different years' taxes.

In any advertisement or posted notice of sale under execution the sheriff may (and, at the request of the governing body of the taxing unit, shall) combine the advertisements or notices for properties to be sold under executions, against the properties of different taxpayers, in favor of the same taxing unit or group of units: Provided, that the property included in each judgment shall be separately described and the name of the listing taxpayer specified in connection with each.

(f) Special Assessments.—Street, sidewalk and other special assessments may be included in any judgment for taxes taken under this section; or such assessments may be included in a separate judgment docketed under this section, which is hereby declared to be made available as a method of foreclosing the lien of such assessments.

(g) Purchase and Resale by Taxing Unit.—Any taxing unit may become a bidder at said sale under execution, and may assign its bid by private sale, for not less than the amount of such bid. Property purchased by any taxing unit may be resold at any time in the manner provided by law for sale of other property of such unit: Provided, that the property included in each judgment shall be separately described and the name of the listing taxpayer specified in connection with each.

(h) Procedure if Section Declared Unconstitutional.—If any provisions of this section are declared invalid or unconstitutional by a court of competent jurisdiction, all taxing units which have proceeded under this section shall have one year from the date of the filing of such opinion (or, in case of appeal, from the date of the filing of the opinion on appeal) in which to institute foreclosure actions under § 105-391 for all taxes included in judgments taken under this section and for subsequent taxes due or which, but for purchase of such property by the taxing unit, would have become due; and such opinion shall not have the effect of invalidating the tax lien or disturbing the priority thereof. (1939, c. 310, s. 1720.)

Local Modification.—Cumberland: 1941, c. 44, s. 1(g).

§ 105-393. Time for contesting validity of tax foreclosure title.—No action or proceeding shall be brought to contest the validity of any title to real property acquired, by a taxing unit or by a private purchaser, in any tax foreclosure action or proceeding authorized by this subchapter or by other laws of this state in force at the time of acquisition of said title, nor shall any motion to reopen or set aside the judgment in any such tax foreclosure action or proceeding be entertained, after one year from the date on which the deed is recorded: Provided, that in cases of deeds recorded prior to April 3, 1939, such action or proceeding may be brought or motion entertained within one year after said date: Provided, further, that this shall not be construed as enlarging the time within which to bring such action or proceeding or entertain such motion. (1939, c. 310, s. 1721.)

§ 105-394. Facsimile signatures.—In the institution or prosecution of any suits or other proceedings under this subchapter, or in tax foreclosure proceedings under laws heretofore or hereafter in force, and in the giving of any notice preliminary to the institution thereof, it shall be sufficient and a compliance with the law that where any official or attorney required to sign summons, complaints, verifications of pleadings, notices, judgments or other papers, the name of said official or attorney may be affixed to said documents by stamping thereon the facsimile of the signature of said official or attorney with a rubber stamp by any person authorized by said official or attorney so to do; and said documents so stamped shall have the same legal force and effect as if said signature had been written by said official or attorney with his own hand, and all such signatures stamp as aforesaid shall be conclusively presumed to have been so stamped at the direction of the official or attorney whose signature it purports to be. (1939, c. 310, s. 1722.)

§ 105-395. Application of article.—All provisions of this article shall apply to all taxes originally due within fiscal years beginning on or after July first, one thousand nine hundred thirty-nine. With the exception of the provisions of §§ 105-378 to 105-380, the provisions of this article shall also apply to all taxes uncollected on April 3, 1939, originally due within the fiscal year beginning July first, one thousand nine hundred thirty-eight. Sections 105-378, 105-379, 105-391, 105-390, 105-393, 105-394, and subsections (k) to (v), inclusive, of § 105-391 shall also apply, to the extent that such application does not affect any action already taken or affect private rights already vested on April 3, 1939, to all taxes, due and owing to taxing units on April 3, 1939, originally due within fiscal years beginning on [1125]
or before July first, one thousand nine hundred thirty-seven, whether such taxes have heretofore been included in tax sales certificates or not, and whether such taxes are included in pending foreclosure actions or not; and § 105-392, and subsections (a) to (l), inclusive, of § 105-391 shall also apply to all taxes, due and owing to taxing units on April 3, 1939, originally due within fiscal years beginning on or before July first, one thousand nine hundred thirty-seven, which have not been included in any tax foreclosure proceedings pending or completed on April 3, 1939: Provided, that with respect to such taxes originally due within the fiscal years beginning on or before July first, one thousand nine hundred thirty-seven, which provisions of said § 105-392, and subsections (a) to (l), inclusive, of § 105-391 shall be in addition to, and not in substitution for, the provisions of laws in force immediately prior to April 3, 1939: Provided, further, that proceedings may be begun under the provisions of §§ 105-391 and 105-392, with respect to such taxes originally due within the fiscal years beginning on or before July first, one thousand nine hundred thirty-seven, at any time after six months and within one year following April 3, 1939 or within a longer period otherwise permitted by the terms of this article.

Except as in this section provided, the collection and foreclosure of taxes originally due within fiscal years beginning on or after April 3, 1939 or within a longer period otherwise permitted by the terms of this article. Nothing in this section or this article shall be construed to require foreclosure of any taxes under the provisions of § 105-392, and subsections (a) to (l), inclusive, of § 105-391, if such taxes have been or by the terms of this section may be included in any action instituted under laws in force immediately prior to April 3, 1939, whether such taxes are included in said action by the original complaint or by amendment thereto.

To the extent indicated in this section the laws in force immediately prior to April 3, 1939, are hereby preserved in full force and effect, any repeal clauses contained in this article or subchapter to the contrary notwithstanding. (1939, c. 310, s. 1723.)


§ 105-396. Foreign corporations not exempt.—Nothing in this subchapter shall be construed to exempt from taxation at the value prescribed by law any property situated in this state belonging to any foreign corporation, unless the context clearly indicates the intent to grant such exemption. (1939, c. 310, s. 1800.)

Determining Liability.—A nonresident corporation is liable for taxation for such proportion of its capital stock as the value of its tangible property within the state bears to the value of all its tangible property. Commissioners v. Old Dominion Steamship Co., 128 N. C. 558, 39 S. E. 18.


§ 105-397. General purpose of subchapter.—It is the purpose of this subchapter except as otherwise herein provided to provide the machinery for the listing and valuing of property, and the levy and collection of taxes, for the year one thousand nine hundred thirty-nine, and annually thereafter, and to that end this subchapter shall be liberally construed, subject to the provisions set out in Schedule H, §§ 105-198 to 105-217. (1939, c. 310, s. 1802.)

Art. 29. Validation of Listings.

§ 105-398. Real property listings validated.—Listings of any real estate not otherwise listed, which have been carried forward on the tax list of any person by the county supervisor of taxation, list taker or assessor, at the same assessed value of said property as it was valued at in the last quadrennial assessment of taxes, unless the value thereof has been changed by the board of county commissioners as provided by law, are hereby validated, and are hereby declared to be legal and valid listings of the same as if listed by the owner or owner's agent or by the chairman of the board of county commissioners or otherwise, as provided by law.

This section shall be retroactive so as to include the period of time from the first day of May, one thousand nine hundred twenty-seven, to and including the eleventh day of May, one thousand nine hundred thirty-five.

The counties of Alamance, Ashe, Beaufort, Bertie, Brunswick, Carteret, Caswell, Carteret, Clay, Currituck, Dare, Durham, Greene, Halifax, Harnett, Henderson, Hertford, Hoke, Hyde, Iredell, Johnston, Macon, Moore, Northampton, Pasquotank, Pitt, Polk, Randolph, Richmond, Robeson, Rowan, Rutherford, Sampson, Surry, Transylvania, Wake, Warren, and Wayne are hereby exempted from the provisions of this section. (1937, c. 259, ss. 1-3.)

Local Modification.—Nash: 1939, c. 259.

SUBCHAPTER III. COLLECTION OF TAXES.


§ 105-399. Subchapter to remain in force.—The provisions of this subchapter shall continue in force whether or not brought forward in subsequent acts to raise revenue or acts to provide for the assessment and collection of taxes, commonly called "revenue acts" and "machinery acts," unless and until expressly repealed or amended by, or clearly inconsistent with, subsequent legislation; it being the intention of the general assembly that this subchapter shall be a standing provision for the government of the matters embraced herein, and not to be repealed by implication because omitted in whole or in
§ 105-400. Application and construction.—The provisions of this subchapter shall apply to all taxes as defined in this chapter, whether state, county, town, city, or other municipal subdivision; and shall be liberally construed in favor of, and in furtherance of, the collection of such taxes. (Rev., s. 2849; C. S. 7973.)

§ 105-401. Terms defined.—Unless such construction or definition would be manifestly inconsistent with or repugnant to the context, the words and phrases following, whenever used in this subchapter, shall be construed to include in their meaning the definitions set opposite the same in this section:

1. "Tax," "taxes." Any taxes, special assessments or costs, interest or penalty imposed upon property or polls.

2. "He." Male, female, company, corporation, firm, society, singular or plural number.

3. "Real property." Real estate, land, tract, lot—not only the land itself, whether laid out in town or city lots or otherwise with all things therein, but also all buildings, structures, and improvements and other permanent fixtures of whatever kind thereon, and all rights and privileges belonging or in any wise appertaining thereto, and all estates therein.

4. "Sheriff." Every person who is by law authorized to collect taxes, either state or municipal. (Rev., s. 2851; C. S. 7974.)

§ 105-402. Sheriff includes tax collector.—Whenever in this chapter a duty is imposed upon the sheriff of a county of which a tax collector has been or may be appointed, it shall be incumbent upon the tax collector to perform such office instead of the sheriff, and such tax collector shall collect all the taxes, have all the emoluments and be subject to all the penalties as provided in case of sheriffs in this chapter, and it shall be the duty of all persons having tax moneys in hand to account for and settle with such tax collector. (Rev., s. 3263; 1917, c. 234, s. 111; 1919, c. 92, s. 111; C. S. 7975.)

§ 105-403. No taxes released. — No board of county commissioners, or council, or board of aldermen or commissioners of any city or town shall have power to release, discharge, remit, or commute any portion of the taxes assessed and levied against any person or property within their respective jurisdictions for any reason whatever; and any tax so discharged, released, remitted, or commuted may be recovered by civil action from the members of any such board at the suit of any citizen of the county, city, or town, as the case may be, and when collected shall be paid to the proper treasurer. Nothing in this section shall be construed to prevent the proper authorities from refunding taxes as provided in this chapter; nor to interfere with the powers of any officers or boards sitting as a board of equalization of taxes; nor construed to exempt any taxpayer or property from liability for taxes released, discharged, remitted, or commuted in violation of this section. (Rev., s. 2854; 1901, c. 558, s. 31; C. S. 7976.)

Duty of Commissioner to Rescind.—It is not only compe-

§ 105-404. Uncollected inheritance taxes remitted after 20 years.—All inheritance taxes levied by the State which remain uncollected twenty years or more after the death of the person upon whose estate said taxes were levied shall be, and they are hereby remitted. (1935, c. 483.)

§ 105-405. Taxing authorities authorized to release or remit taxes.—The board of county commissioners or city council or board of aldermen or city commissioners, or any other governing body in any city or town, shall have power to release, discharge, remit or commute any portion of the taxes assessed and levied against any person or property within their respective jurisdictions when there has been destruction or partial destruction or any damage to the property assessed for valuation when such destruction, partial destruction or damage occurs between midnight of April first and midnight of June thirtieth of any year, and when said destruction or partial destruction or damage has been caused by tornado, cyclone, hurricane or other wind or windstorm: Provided, application for release, discharge, remission or commutation is made to the aforesaid governing body within one year of the date of said destruction, partial destruction or damage: Provided further, that in cases of applicants for such relief who have received, or may receive, reimbursements for such damage or destruction from insurance policy contracts or otherwise, or whose property has been restored or rehabilitated, wholly or partially, by the Red Cross or any public welfare agency or organization without full value having been paid therefor by the property owner, such applicant shall, as a condition precedent to the relief herein provided for, list for taxation for the year for which relief is asked the equivalent in value of such reimbursement or restoration or rehabilitation; and provided further, that such governing body shall apply this section uniformly to all persons and property within its jurisdiction. This section shall be retroactive to and including April first, one thousand nine hundred and thirty-six. (1937, c. 15.)

§ 105-405.1. Governing boards of counties, cities and towns authorized to refund taxes illegally collected.—The board of county commissioners of any county or the governing body of any city or town, upon the passage and recording in the minutes of a proper resolution finding as a fact that any funds received by such municipality were required to be paid through clerical error or by a tax illegally levied and assessed, is authorized and empowered to remit and refund the same upon the taxpayer making demand in writing to the proper authorities for such remission and refund within two years from the date the same was due to be paid. (1943, c. 709.)

§ 105-406. Remedy of taxpayer for unauthorized tax.—Unless a tax or assessment, or some part thereof, be illegal or invalid, or be levied or assessed for an illegal or unauthorized purpose, no injunction shall be granted by any court or judge to restrain the collection thereof in whole or in part, nor to restrain the sale of any property for the nonpayment thereof; nor shall any court issue
any order in claim and delivery proceedings or otherwise for the taking of any personality levied on by the sheriff to enforce payment of such tax or assessment against the owner thereof. Whenever any person shall claim to have a valid defense for nonpayment of a tax or assessment charged or assessed upon his property or poll, such person shall pay such tax or assessment to the sheriff; but if, at the time of such payment, he shall notify the sheriff in writing that he pays the same under protest, such payment shall be without prejudice to any defenses or rights he may have in the premises, and he may, at any time within thirty days after such payment, demand the same in writing from the treasurer of the state or of the county, city, or town, for the benefit or under the authority or by request of which the same was levied; and if the same shall not be refunded within ninety days thereafter, may sue such county, city, or town for the amount so demanded, including in his action against the county both state and county tax; and in case the court shall determine that such tax or any part thereof was levied or assessed for an illegal or unauthorized purpose, or was for any reason invalid or excessive, judgment shall be rendered therefor, with interest, and the same shall be collected as in other cases. The amount of state taxes for which judgment shall be rendered in such action shall be refunded by the state treasurer. (Rev., § 2855, 1901, c. 558, s. 30; C. S. 7979.)

Cross Reference.—For similar provision, see § 105-267, which seems to have superseded this section.

Editor's Note.—See 12 N. C. L. Rev. 22.

In the absence of which injunctive relief against the collection of taxes was granted, see Barber v. Benson, 200 N. C. 683, 158 S. E. 245.

Constitutionality.—This section is constitutional. Railroad Co. v. Reidsville, 109 N. C. 494, 13 S. E. 865.

Adequate Remedy at Law.—Under this section the taxpayer has an adequate remedy at law by first paying the tax and then suing to recover it. Henrietta Mills v. Rutherford County, 261 U. S. 121, 133 S. E. 747. The writ of mandamus will be granted to the hearing against the sheriff for collection of taxes and to restrain the sale of property for the payment of the taxes as unlawful, he is required to pay them and if upon the trial it shall be determined that such tax or any part thereof was levied or assessed for an illegal or unauthorized purpose, or was for any reason invalid or excessive, judgment shall be rendered therefor, with interest, and the same shall be collected as in other cases. The amount of state taxes for which judgment shall be rendered in such action shall be refunded by the state treasurer. (Rev., § 2855, 1901, c. 558, s. 30; C. S. 7979.)

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Cross Reference.—For similar provision, see § 105-267, which seems to have superseded this section.
§ 105-407. Tax paid in judicial sales and sales under powers.—In all civil actions and special proceedings wherein the sale of any real estate shall be ordered, the judgment shall provide for the payment of all taxes then assessed upon the property and remaining unpaid, and for the payment of such sums as may be required to redeem the property, if it has been sold for taxes and such redemption can be had; all of which payments shall be adjudged to be made out of the proceeds of sale. The judgment shall adjust the disbursements for such taxes and expenses of redemption from tax sales between the parties to the action or proceeding in accordance with their respective rights. And whenever any real estate shall be sold by any person under any power of sale conferred upon him by any deed, will, power of attorney, mortgage, deed of trust, or assignment for the benefit of creditors, the person making such sale must pay out of the proceeds of sale all taxes then assessed upon such real estate and such sums as shall be necessary to redeem the land, if it has been sold for taxes and such redemption is practicable. This section shall apply both to taxes and special assessments for paving, drainage, or other improvements; provided, that the person making such sale, whether under order of court or in the exercise of a power, shall be payable in installments, to pay only such installments of special assessments as have become due at the date of such sale. The failure to comply with this section and to pay such taxes or assessments shall not vacate or affect the lien of such taxes or assessments, but such lien shall be discharged only to the extent of payment is actually made. (Rev. s. 2857; 1901, c. 558, s. 47; 1929, c. 231, s. 1; C. S. 7980.)

Cross Reference.—As to lien of mortgagee who pays taxes, see §105-409 and note thereto.

§ 105-408. Tax paid by holder of lien; remedy.—Any person having a lien or encumbrance of any kind upon real estate may pay the taxes due by the owner thereof in so far as the same are a lien upon such real estate, and the amount of taxes so paid shall, from the time of payment, operate as a lien upon such real estate in preference to all other liens, which lien may be enforced by action in the superior court in term. The money so paid may also be recovered by action for moneys paid to his use against the person legally liable for the payment of such taxes. (Rev. s. 2858; Code, s. 3700; 1901, c. 558, s. 46; 1879, c. 71, s. 55; C. S. 7981.)
§ 105-410. Forfeiture by life tenant failing to pay. Every person shall be liable for the taxes assessed or charged upon the property or estate, real or personal, of which he is tenant for life. If any tenant for life of real estate shall suffer the same to be sold for taxes by reason of his neglect or refusal to pay the taxes thereon, and shall fail to redeem the same within one year after such sale, he shall thereby forfeit his estate to the remainderman or reversioner. The remainderman or reversioner may redeem such lands, in the same manner that is provided for the redemption of other lands. Moreover, such remainderman or reversioner shall have the right to recover of such tenant for life all damages sustained by reason of such neglect or refusal on the part of such tenant for life. If any tenant for personal property suffer the same to be sold for taxes by reason of any default of his, he shall be liable in damages to the remainderman or reversioner. (Rev., s. 2859; Code, ss. 3698, 3699; 1901, c. 558, s. 45; 1879, c. 71, ss. 53, 54; C. 7982.)

Life Tenant Has Same Protection as Others.—The statutes now in effect in this state for the enforcement of the collection of taxes on real property give the life tenant the same protection as any other interested party. The interest of the life tenant, as well as that of all other interested parties, including lienholders, can be divested only by the life tenant himself. Where the property is held jointly or in common, or, in the description. Cooper v. Cooper, 221 N. C. 124, 19 S. E. 2d, 229. Where a life tenant has permitted the lands to be sold for taxes and fails to redeem same within the time prescribed by law. Bryan v. Bryan, 206 N. C. 484, 174 S. E. 2d, 229.

§ 105-411. Remedies of cotenants and joint owners.—Any one of several tenants in common, or joint tenants or copartners shall have the right to pay the taxes which have accrued on the real estate held jointly or in common, or, if such estate has been sold for taxes, he may redeem his share by paying his proportionate part of the amount required for redeeming the whole. Where he has paid his share of the taxes or amount required for the redemption and the land has been or shall be divided by actual partition the share set apart to him in severality shall be free from the lien of, and shall not be liable to be subjected in any manner to, the payment of the residue of taxes assessed upon such property; but such residue of taxes and the costs and penalties incident thereto shall be a lien upon the residue of such real estate, which residue shall be subjected to the satisfaction of the taxes, costs, and penalties incident thereto. Any such part owner in real estate shall have the right to pay the whole of the taxes assessed thereon and all costs and penalties incident to such taxes, and to redeem such real estate as a whole when it has been sold for taxes, and all sums by him so paid in excess of his share of such taxes, costs, and penalties and amounts required for redemption, shall constitute a lien upon the shares of his cotenants or associates, payment whereof, with interest, he may enforce in any other appropriate judicial proceeding. When one tenant in common, joint tenant, or copartner shall have paid his proportionate share of the taxes, costs, and penalties and amounts required for redemption, it shall constitute a lien upon the shares of his cotenants or associates, payment whereof, with interest, he may enforce in any other appropriate judicial proceeding. When one tenant in common, joint tenant, or copartner shall have paid his proportionate share of the taxes, costs, and penalties and amounts required for redemption, it shall constitute a lien upon the shares of his cotenants or associates, payment whereof, with interest, he may enforce in any other appropriate judicial proceeding.
§ 105-412. Fiduciaries to pay taxes.—It shall be the duty of every guardian, executor, administrator, or person holding any property or estate, real or personal, to pay the taxes thereon in trust or under the control of fiduciaries of the parties to pay taxes on the property, as provided by this section, when there is no exception or appeal entered of record by the testator’s administrator. Everett v. Rodgers, 20 N. C. 459, 464 (1867).

§ 105-413. Tax lien on railroad property.—The taxes upon any and all railroad tracks in this state, including roadbed, right of ways, depots, sidetracks, ties and rails, now constructed or hereafter to be constructed, are hereby made a perpetual lien thereupon, commencing from the first day of May in each current year, against all claims or demands whatsoever of any person holding or exercising the right of the United States, the state, and this state; and the above described property or any part thereof may be taken and held for payment of all taxes assessed against such railroad company in the several counties in this state. (Rev., ss. 2865, 5269; 1917, c. 234, s. 98; 1919, c. 92, s. 98; C. S. 7989.)

§ 105-414. Tax lien enforced by action to foreclose.—A lien upon real estate for taxes or assessments due thereon may be enforced by an action in the nature of an action to foreclose a mortgage, having as its object the sale of such real estate, or of so much thereof as shall be necessary for that purpose, for the satisfaction of the amount adjudged to be due on such lien, together with interest, penalties, and costs allowed by law, and the costs of such action. When such lien is in favor of the state or county, or both, such action shall be prosecuted by and in the name of the county; when the lien is in favor of any other municipal corporation, the action shall be prosecuted by and in the name of such corporation.

Local Modification.—Wayne: Pub. Loc. 1939, c. 190.

Cross Reference.—For subsequent statute governing foreclosure of tax liens, see § 105-416.

Summary Proceeding Unnecessary.—Where the Legislature has authorized a municipality to collect back taxes, and in an action for that purpose it appears that the taxes, of the defendant are due, and were properly assessed against lots of land within the limits of the municipality subject to the lien thereon, it is not necessary that the plaintiff should first have resorted to the summary method of levy and sale, for recourse may be had by direct suit to foreclose the lien, under this section. Wilmington v. Moore, 170 N. C. 52, 86 S. E. 755; Commission v. Epley, 190 N. C. 590, 110 S. E. 77; 192 N. C. 590, 130 S. E. 820 (1924).

Prescribed Remedy Optional with State.—The fact that the Revenue Act prescribes a specific remedy for the collection of taxes does not restrict the State to pursue that method, nor preclude it from seeking the aid of the Superior Court through a creditor’s suit. The specific remedy pointed out restricts only the officers who collect only the revenue and not the sovereign. State v. Georgia Co., 112 N. C. 34, 17 S. E. 10.

Tax Collector Has No Lien Where Check Returned Unpaid.—The county tax collector is authorized and enjoined to accept a check returned unpaid, and the collector in his settlement with the county paid the taxes in question, does not give him a lien which may be enforced under this section. For the same purpose, the collector failed to show the check returned and the taxes unpaid, the tax lien was not reinstated. Miller v. Neal, 222 N. C. 540, 23 S. E. (2d) 652.

Alias Summons.—In an action to enforce a lien for public improvements it was held that the allegations constituted the action one to foreclose the original lien under this section, notwithstanding that a purported alias summons was issued 91 days after the institution of the action, as permitting an action instituted under repealed § 8037, since the nature of an action is determined by the allegations of the complaint and not by the time the purported alias summons was issued. Asheboro v. Miller, 220 N. C. 296, 18 S. E. (2d) 105 (1942).

The receiver of a drainage district may proceed in an action in the nature of an action to foreclose a mortgage under this section for the collection of such drainage assessments. Drainage District v. Hines, 172 N. C. 529, 92 S. E. 368 (1917). The statute providing that an action or a liability created on statute shall be brought within three years has no application. Drainage District v. Hood, 172 N. C. 529, 92 S. E. 368 (1917). This is on the well settled principle that statutes of limitation, even if applicable to a given case, do not apply to the sovereign unless expressly named.
§ 105-415. Sureties of sheriff may collect when.

—If any sheriff shall die during the time appointed for collecting taxes, his sureties may collect the taxes for him, and such collecting is not allowed because the collector shall be guilty of a misdemeanor. (Rev., ss. 2868, 5364; 1917, c. 234, s. 112; 1919, c. 92, s. 112; C. S. 7993.)

§ 105-416. Sheriff collecting by deputy.—When the sheriff shall collect by his deputies they shall, before the clerk of the board of commissioners or before a justice of the peace of the county, take and subscribe an oath faithfully and honestly to account for the taxes with the sheriff or other person authorized to receive the same. Such oath shall be evidenced by a certificate of sale executed by the proper officers, the sovereignty may proceed under this section to foreclose the lien, in which event no statute of limitations is applicable. Logan v. Griffith, 205 N. C. 280, 282, 172 S. E. 348.

§ 105-417. Compromise of tax claims due by railroad companies in which state owns majority of stock, authorized.—The commissioner of revenue of the state of North Carolina and the governing bodies of any county, municipality, or other taxing subdivision in this state, are hereby authorized to enter into agreements with railroad companies in which state owns the majority of the ownership of the stock and the effect of this latter statute need not be considered, and said settlement may be accepted by said officials if in their judgment the acceptance of the same will be for the best interests and to the advantage of the respective taxing units holding such tax claims. (1939, c. 76.)

Editor's Note.—For comment on this enactment, see 17 N. C. Law Rev. 379.

Art. 33A. Agreements with United States or Other States.

§ 105-417.1. Agreements to coordinate the administration and collection of taxes.—The commissioner of revenue is hereby authorized, with the approval of the governor and council of state, to enter into agreements with the United States government or any department or agency thereof, or with a state or any political subdivision thereof, for the purpose of coordinating the administration and collection of taxes imposed by this state and administered and collected by said commissioner with taxes imposed by the United States or by any other state or political subdivision thereof. (1943, c. 747, s. 1.)

§ 105-417.2. Expenditures and commitments authorized to effectuate agreements.—The commissioner of revenue with the approval of the governor and council of state is authorized and empowered to undertake such commitments and make such expenditures within the appropriations provided by law, as may be necessary to effectuate such agreements. (1943, c. 747, s. 2.)

§ 105-417.3. Returns to be filed and taxes paid pursuant to agreements.—Notwithstanding any other provision of law, returns shall be filed and taxes paid in accordance with the provisions of any agreement entered into pursuant to this article. (1943, c. 747, s. 3.)
Art. 34. Tax Sales.


§ 105-418. Sales on dates other than first Monday in June validated.—All sales of land for failure to pay taxes, held or conducted by any sheriff or any tax collector of any county, city, town or other municipality during the year one thousand nine hundred thirty, on any day subsequent to or other than the first Monday in June of said year, are hereby, approved, confirmed, validated and declared to be proper, valid and legal sales of such land and legally binding in all respects, and all certificates of sale made and issued upon and in accordance with such sales are hereby approved and validated to all intents and purposes, and with such full force and legal effect as if said sales had been held and conducted on said first Monday of June, one thousand nine hundred thirty. (1931, c. 160.)

§ 105-419. Tax sales for 1931-32 on day other than law provides and certificates validated.—All sales of land for failure to pay taxes, held or conducted by any sheriff or any tax collector of any county, city, town or other municipality during the year one thousand nine hundred thirty-one and one thousand nine hundred thirty-two, (1933, c. 177.)

Local Modification.—Durham, Mecklenburg: 1933, c. 177.

§ 105-420. Taxes sales for 1932-34 and certificates validated.—All sales of land for failure to pay taxes, held or conducted by any sheriff or any tax collector of any county, city, town or other municipality during the years one thousand nine hundred thirty-three and one thousand nine hundred thirty-five, shall be and the same are hereby approved, confirmed and validated to all intents and purposes, and with such full force and legal effect as if said sales had been held and conducted on said first Monday of June, one thousand nine hundred thirty-one and one thousand nine hundred thirty-two. (1933, c. 181.)

Local Modification.—McDowell: 1933, c. 399; Pamlico, Richmond: 1933, c. 181, s. 7.

§ 105-421. Notices of sale for taxes by publication validated.—All sales of real property under tax certificate foreclosures, made since January first, one thousand nine hundred twenty-seven, where the original notice of sale was published for four successive weeks, and any notice of resale was published for two successive weeks, preceding said sales, whether the notice of sale was required to be published in a newspaper or at courthouse door, or both, shall be, and the same are hereby approved, validated, and declared to be legally binding and of the same force and effect as if said actions were instituted prior to October first, one thousand nine hundred thirty-four: Provided, that this section shall not be construed to repeal any private or local act passed by the general assembly of one thousand nine hundred thirty-five. (1935, c. 331.)

§ 105-421. Notices of sale for taxes by publication validated.—All sales of real property under tax certificate foreclosures, made since January first, one thousand nine hundred twenty-seven, where the original notice of sale was published for four successive weeks, and any notice of resale was published for two successive weeks, preceding said sales, whether the notice of sale was required to be published in a newspaper or at courthouse door, or both, shall be, and the same are hereby approved, validated, and declared to be legally binding and of the same force and effect as if said actions were instituted prior to October first, one thousand nine hundred thirty-four: Provided, that this section shall not be construed to repeal any private or local act passed by the general assembly of one thousand nine hundred thirty-five. (1935, c. 331.)

§ 105-422. Tax liens for 1926 and prior years, not yet foreclosed, barred. — All tax liens held by counties, municipalities, and other governing agencies for the year one thousand nine hundred twenty-six and the years prior thereto, whether evidenced by the original tax certificates, or tax sales certificates, and upon which no foreclosure proceedings have been instituted, are hereby declared to be barred and uncollectible: Provided, that no part of this section shall be construed as applying to liens for street and/or sidewalk improvements. (1933, c. 181, s. 7; 1933, c. 399.)

Local Modification.—McDowell: 1933, c. 399; Pamlico, Richmond: 1933, c. 181, s. 7.

An action by a municipality to foreclose the lien for taxes for the years 1925 and 1926 under § 105-414 is barred by this section, since the legislative intent to bar the enforcement
§ 105-423. Counties excepted.—None of the provisions of § 105-422 shall apply to Davidson, Forsyth, Orange, Hyde and Mecklenburg Counties: Provided, that § 105-422 shall not be mandatory in the following counties or municipalities therein, but within the discretion of the governing bodies of the said counties or municipalities therein, to wit: Alleghany, Beaufort, Cleveland, Gaston, Polk, Granville, Catawba, Lincoln, Wilkes, Guilford, Surry, Moore, Richmond, Camden, Durham, Rockingham, Burke, Caldwell, New Hanover, Halifax, Union and Hertford. (1933, c. 459, § 11; cc. 226, 314, 329, 351, 377, 389, s. 2, 301 (§ 427, s. 2, 471, 502.)

Local Modification.—Alamance: 1933, c. 422; Brunswick: 1935, c. 370; Caswell: 1935, cc. 354, 370; Catawba: 1933, c. 315; Chatham: 1933, c. 536; Clayton, Town of: 1935, c. 419; Columbus: 1933, c. 486; Dare: 1933, c. 505; Granville: 1933, c. 304; Johnston: 1931, c. 459; Nash: 1933, cc. 389, 451; Pitt: 1933, c. 513; Scotland: 1933, c. 218.

Art. 35. Sheriff’s Settlement of Taxes.

§ 105-424. Time and manner of settlement.—The sheriff or other accounting officer shall, on or before the second Monday of January in each year, settle his estate tax account with the commissioners of his county and pay the amount for which said sheriff or collector is liable to the treasurer of the state, in such manner or at such place as he shall direct, on or before the third Monday of said month: Provided, the state treasurer may extend the time on a sufficient amount to cover the state tax on the land sales in each county to the first Monday in May. The commissioners shall forthwith report to the state auditor the amount due from such accounting officer, setting forth therein the net amount due to each fund; and the treasurer, upon a statement from the state auditor, shall open an account against such officer and debit him accordingly. Upon the failure of the board of county commissioners to make this report to the state auditor on or before the third Monday of January of each year, or if a report has been filed which is not correct and the commissioners fail to file an amended and corrected report within thirty days after being notified so to do by the state auditor, the commissioners of such county shall each personally be liable to a penalty of one hundred dollars, and it shall be the duty of the state auditor forthwith to institute an action in the county of Wake to enforce the same. The sheriff or tax collector, in making his settlements as aforesaid, shall file with the commissioners a duplicate of the list required in this chapter. In such settlement the sheriff or other officer shall be charged with the amount of public tax as the same appears by the abstract of the taxable property transmitted to the state auditor: also with all double taxes on unlisted property by him received, and with other tax which he may have collected or for which he is chargeable. The state auditor shall give to each sheriff or tax collector a certified statement embracing the subjects of taxation contained in both lists and the amount of tax on each subject which the sheriff or tax collector shall deposit with the clerk of the commissioners of his county for public inspection. The sheriffs and tax collectors shall receive five per cent on all taxes collected by them for state, county, township, school district, or other purposes whatsoever, up to the sum of five thousand dollars, and upon all sums in excess of such amount he shall receive two and one-half per cent commission, and the sheriffs or tax collectors shall receive for their own use, in addition to other fees or salary received by them, a commission of five per cent on all privilege and license taxes collected under schedule B of the revenue act, and any provision in any local act in conflict with this provision is hereby repealed. (Rev., s. 5245; 1917, c. 234, s. 101; 1919, c. 92, s. 1; C. S. 8042.)

Local Modification.—Buncombe: C. S. 8042; Perquimans: 1945, c. 745.

Cross References.—For subsequent statute relating to settlement, see § 105-390. As to sheriff’s duty to settle school tax, and penalty for failure to do so, see § 115-106 and note thereto.

The Settlement Has Attributes of Contract.—An account stated and settlement between a county and its tax collector have the force of a contract, and operate as a bar to subsequent accounting, except upon a specific allegation of fraud or mistake. Settle v. Doggett, 87 N. C. 203.

Fees of Sheriff Regulated by Legislature.—The regulation of the sheriff’s fees is within the control of the legislature and may be reduced during the term of the incumbent. Commissioner v. Stedman, 141 N. C. 448, 54 S. E. 269.

Same.—Basis of Compensation Changed.—(1) Right of Out-Going Sheriff.—A sheriff whose term of office expires is entitled to collect the taxes on the lists in his hands and to receive commissioner therefor, notwithstanding the office has been placed upon a salary basis for his successor. Commissioner v. Bain, 173 N. C. 377, 92 S. E. 176.

Same.—Same.—(2) Where Sheriff Re-Elected.—Upon the re-election of a sheriff the sheriff’s compensation as determined by the act of legislature changing the basis of compensation. Miller v. Deaton, 170 N. C. 386, 87 S. E. 123.

Same.—Drainage Districts.—This section, allowing sheriffs to collect for subordinate subject, and subject, “subject to the compensation of the sheriff,” refers only to taxes collected for general governmental purposes, and not to assessments in drainage districts imposed for the special benefits to the lands therein, and that the compensation of the sheriff on assessments for maintenance are limited to 2 per cent by Laws 1909; and this construction is not affected by the repeal of sec. 36, Laws 1909, by ch. 152, sec. 2, Laws 1917. Commissioners v. Davis, 182 N. C. 140, 188 S. E. 596.

SUBCHAPTER IV. LISTING OF AUTOMOBILES IN CERTAIN COUNTIES.

§ 105-425. Listing by owner required.—Every owner of a motor vehicle in the counties specified herein shall list such motor vehicle for taxes in such counties at the same time residents of such counties are or may be required by law to list real and/or personal property for taxation. (1931, c. 392, s. 1.)

§ 105-426. Commissioner of motor vehicles to furnish list of registered automobiles to counties.

—The Commissioner of Motor Vehicles shall furnish to the tax listing authorities of the counties enumerated in § 105-429, or to the tax collectors thereof, a list showing the names and addresses of all owners of motor vehicles in such counties as of January first in each year. The list shall [1134]
also show the make, type and character of such motor vehicle and the date of registration thereof. This list shall be furnished as soon after the first day of January in each year as it can be prepared and furnished. The cost of preparing such lists shall be paid by the authorities of the enumerated counties to which the lists are furnished. (1931, c. 392, s. 2.)

§ 105-427. Listing by county authorities where owners fail to list.—The tax listing authorities of the counties specified herein shall compare said list of motor vehicle owners with the tax lists of such counties and if it appears that any owner of a motor vehicle has failed to list any motor vehicle registered in his name, it shall be the duty of such tax listing authorities or of the tax collectors of such counties to list such motor vehicle for purposes of taxation, together with any other property of such person, and the tax collectors of such counties shall collect the taxes thereon in the same manner as other taxes of such counties. (1931, c. 392, s. 3.)

§ 105-428. Basis of tax valuation.—All motor vehicles shall be valued or appraised for purposes of taxation upon the rule or standard of valuation established by "The Automobile Blue Book," or any other standard of value which may be reasonable, equitable and just. (1931, c. 392, s. 4.)

§ 105-429. Counties to which article applicable.—This article shall apply to the following counties: Alamance, Buncombe, Cabarrus, Camden, Caswell, Chowan, Currituck, Cleveland, Columbus, Durham, Gates, Guilford, Halifax, Harnett, Henderson, Hertford, Johnston, Iredell, Lee, Nash, Moore, McDowell, Orange, Pasquotank, Perquimans, Pitt, Polk, Rowan, Rutherford, Swain, Wayne and Watauga. (1931, c. 392, s. 5.)

Cross Reference.—As to duty of Commissioner of Motor Vehicles to furnish lists of registered automobiles to county authorities, see § 105-315.

SUBCHAPTER V. GASOLINE TAX.

Art. 36. Gasoline Tax.

§ 105-430. Definitions; "motor fuel," "distributor."—The following words, terms, and phrases hereinafter used for the purpose of this article are defined as follows:

(a) "Motor Fuel" shall mean (a) all products commonly or commercially known or sold as gasoline (including casinghead and absorption or natural gasoline) regardless of their classification or uses; and (b) any liquid prepared, advertised, offered for sale or sold for use as or commonly and commercially used as a fuel in internal combustion engines, which when subjected to distillation in accordance with the standard method of test for distillation of gasoline, naphtha, kerosene and similar petroleum products (American Society for Testing Materials Designation D-86) shows not less than ten per centum (10%) distilled (recovered) below three hundred forty-seven degrees (347°) Fahrenheit (one hundred seventy-five degrees (175°) Centigrade) and not less than ninety-five per centum (95%) distilled (recovered) below four hundred sixty-four degrees (464°) Fahrenheit (two hundred forty degrees (240°) Centigrade); with the exception that the term "motor fuel" shall not include commercial solvents which distill, by American Society for Testing Materials Method D-86, not more than nine (9%) per centum at 175° F. and which have a distillation range of 125° F. or less, of liquefied gases which would not exist as liquids at a temperature of 60° Fahrenheit and a pressure of 14.7 pounds per square inch absolute.

(b) "Distributor" is any person, firm, association of persons, corporation, municipality, county, or other political subdivision or agency that has on hand or in its possession in this State, or that produces, refines, manufactures, or compounds such motor fuels in this State for sale, distribution, or use herein. (1927, c. 93, s. 1; 1931, c. 145, s. 24; 1941, c. 376, s. 1.)

Editor's Note.—Sections 2613(c)-2613(i) of Michie's Code as passed in 1921 were repealed by the Act of 1927 and reenacted.

The Act of 1911 amended these sections as amended by the act of 1927 and Public Laws 1929, c. 40, to read as appearing in §§ 2613(c)-2613(i) of Michie's Code.

The 1941 amendment, effective July 1, 1941, changed subsection (a) of this section.

For comment on the 1941 amendment, see 19 N. C. Law Rev. 166.

A county purchasing gasoline for use by it in trucks and automobiles in the discharge of its governmental function for maintenance of its highways is not a "distributor" within the purview of this chapter, imposing an excise tax upon distributors of gasoline, since general statutes do not bind the sovereign unless the sovereign is expressly mentioned, and under the express language of the statute the legislature could not have intended to include counties thereunder since counties could not be subject to the procedure for its enforcement nor liable for the penalty for its evasion.

As to whether Article V, § 5, of the State Constitution prohibits the General Assembly from levying such a tax on a county, quere, but not decided, the question not being necessary to the determination of the case. O'Berry, State Treasurer v. Mecklenburg County, 198 N. C. 357, 151 S. E. 880.

§ 105-431. Purpose of article; double taxation not intended.—The purpose of this article is to provide for the payment and collection of a tax on the first sale of motor fuels when sold, or the use, when used, in this State; double taxation is not intended. Motor fuels manufactured, produced, or sold for exportation, and exported are not taxable and should not be included in the reports hereinafter required to be made by distributors. (1927, c. 93, s. 2; 1931, c. 145, s. 24.)

§ 105-432. Sales in tank car shipments.—In the administration of this article the first sale shall not be construed to embrace the sale in tank car shipments from port terminals to licensed distributors within the State, but the tax hereinafter levied on such motor fuel shall be levied against and paid by such licensed distributor. (1927, c. 93, s. 22; 1931, c. 145, s. 24.)

§ 105-433. Application for license as distributor.—Any distributor engaged in business on April 1, 1931, shall, within thirty days thereafter, and any other distributor shall, prior to the commencement of doing business, file a duly acknowledged application for a license with the Commissioner of Revenue on a form prescribed and furnished by him setting forth the name under which such distributor transacts or intends to transact business within this State, the address of each place of business and a designation of the principal place of business. If such distributor is a firm or association, the application shall set forth the name and address of each person constituting the firm or association, and
if a corporation, the names and addresses of the principal officers and such other information as the Commissioner of Revenue may require. Each distributor shall at the same time file a bond in such amount, not exceeding twenty thousand dollars ($20,000) in such form and with such surety or sureties as may be required by the Commissioner of Revenue, conditioned upon the rendition of the report and the payment of the tax hereinafter provided for. Upon approval of the application and bond, the Commissioner of Revenue shall issue to the distributor a non-assessable license with a duplicate copy for each place of business of said distributor in this State, which shall be displayed in a conspicuous place at each such place of business and shall continue in force until surrendered or cancelled. No distributor shall sell, offer for sale, or use any motor fuels within this State until such license has been issued. Any distributor failing to comply with or violating any of the provisions of this section shall be guilty of a misdemeanor and upon conviction thereof shall be fined not less than one hundred dollars ($100.00), nor more than five thousand dollars ($5,000.00), or imprisoned for not more than twenty-four months, or both. (1927, c. 93, s. 452; 1929, c. 40, s. 1; 1931, c. 145, s. 24; 1941, cc. 16, 146; 1943, c. 113.)

Editor's Note.—The first 1941 amendment, adding the last proviso to this section, does not apply to any loss suffered prior to July 1, 1941. For the purpose of the second 1941 amendment this section provided for a tare of one per cent. Prior to the 1941 amendment the last two provisos related only to losses by lightning, flood or windstorm. The 1941 amendment is not applicable to any loss sustained prior to March 1, 1941.

Our state gasoline tax is an excise and not a property tax. Stedman v. Winston-Salem, 204 N. C. 203, 167 S. E. 813.

§ 105-434. Gallon tax.—There is hereby levied and imposed a tax of six cents per gallon on all motor fuels sold, distributed, or used within this State. The tax hereby imposed and levied shall be collected and paid by the distributor producing, refining, manufacturing, or compounding within this State, or holding in possession within this State motor fuels for the purpose of sale, distribution, or use within the State, and shall be paid by such distributor to the Commissioner of Revenue in the manner and at the times hereinafter specified. No county, city, or town, or political sub-division shall levy or collect any tax upon the sale or distribution of motor fuels herein defined. For the purpose of determining the amount of the tax, it shall be the duty of every distributor producing, refining, or compounding motor fuels within this State to transmit to the Commissioner of Revenue not later than the twentieth day of each month, upon forms prescribed and furnished by such commissioner, a report under oath or affirmation showing the quantity of motor fuel sold, distributed, or used by such distributor within this State during the preceding calendar month, and such other information as the said commissioner may require: Provided, that any distributor may, if he elects to do so, use as the measure of the tax levied and assessed against him by this section the gross quantity of motor fuel purchased, produced, refined, manufactured, and/or compounded by such distributor, plus the amount of motor fuel on hand at the beginning of the period when such method of computation is used, less a tare of two per cent (2%) on gross monthly receipts of motor fuels not exceeding 150,000 gallons, and less a tare of one and one-half per cent (1½%) on gross monthly receipts of such fuels in excess of 150,000 gallons and not exceeding 250,000 gallons, and less a tare of one per cent (1%) on gross monthly receipts of such fuels in excess of 250,000 gallons. Provided, that if any licensed distributor who has elected to pay the tax levied herein on the amount of motor fuel purchased, produced, refined, manufactured, or compounded, in lieu of the amount sold, distributed, or used, shall lose any such fuel by reason of fire, lightning, flood, windstorm, wrecking of transportation conveyance, acts of war, or any accidental or providential cause, and such loss is clearly proved to the satisfaction of the commissioner of revenue, the amount of motor fuel lost shall be excluded from the measure of his tax. Provided, further, that the commissioner of revenue shall have power under such rules and regulations as he may adopt for the purpose to refund to any non-licensed distributor the tax on any motor fuel purchased by and delivered to him tax paid that is lost by fire, lightning, flood, windstorm, acts of war, or any accidental or providential cause, after it is delivered to him and before it is sold, but such loss must be clearly proved to the satisfaction of the commissioner. (1927, c. 93, s. 3; 1931, c. 145, s. 24; 1941, cc. 16, 146; 1943, c. 113.)

§ 105-435. Tax on fuels not included in definition; permits to operate vehicles; reports by holders of permits.—(a) Every person who owns or operates over the highways of this state, any motor vehicle propelled by a motor which uses any product not included within the definition of “motor fuels” hereinefore set out to generate power for the propulsion of said vehicle, shall pay to the commissioner of revenue, for the use of the highways of this state, a tax of six cents (6c) per gallon on the fuel used in such vehicle upon the highways of this state.

(b) The owner or operator of such a vehicle on July 1, 1941, or any person who purchases such a vehicle subsequent thereto, shall, before it is operated on the highways of this state, apply to the commissioner of revenue, on forms prescribed by him, for a permit to operate such vehicle on the highways of the state and shall make the tax payments herein levied direct to the department of revenue. Upon receipt and approval of such application the commissioner of revenue shall issue to such owner or operator a non-assessable permit which shall remain in effect until new permit plates are required to be purchased and at that time shall be surrendered and a new permit showing the correct license number shall be issued. This permit shall at all times be in the possession of the operator of such vehicle and subject to inspection by any agent of the department of revenue or any dealer from whom such operator desires to purchase fuel. The holder of a permit issued under the provisions of this section shall be subject to the same laws and to the rules and regulations of the commissioner of revenue in regard to the payments of tax and fil-
ing reports that licensed distributors of motor fuel are subject to, and such person shall also be subject to any other rules and regulations promulgated by the commissioner of revenue for the proper administration of this section: Provided, however, no bond shall be required. Provided, further, any person duly licensed as a motor fuel distributor under the provisions of this article who owns and operates motor vehicles for his own use and utilizes in such vehicles fuel not defined as motor fuel in this article, is authorized to pay the tax levied in this section on such fuel at the same time and in the same manner as is provided for motor fuel distributors, and such tax shall be subject to the taxes allowed by law to motor fuel distributors. In the event that a person elects to qualify as a motor fuel distributor and pay the tax as authorized by this provision, it shall not be necessary for such person to secure the permit or make the reports required by this section, but such person shall comply with all the laws relating to motor fuel distributors.

(c) For the purpose of determining the amount of tax due, the owner or operator of every motor vehicle holding a permit issued under the provisions of this section shall file a report on or before the twentieth day of each month showing the number of miles each vehicle was operated over the highways of the state, the amount of fuel used during the preceding month and such other information as the commissioner of revenue may require. At the time of filing his report, said person shall pay to the commissioner of revenue the tax levied in paragraph (a) of this subsection.

(d) It shall be unlawful for any distributor, dealer or other person knowingly to sell fuel for use in such vehicles to owners or operators who do not hold permits as required by this section without collecting the tax herein levied and remitting the same to the commissioner of revenue as required on sales of motor fuel. It shall also be unlawful for any person who does not hold a permit, as provided herein, to operate such vehicles over the highways of the state on fuel on which the tax is not paid as provided herein.

If the owner or operator of any such vehicle shall fail to secure a permit, file a report or pay the tax as herein provided, his motor vehicle license shall be cancelled. It shall be the duty of the commissioner of revenue, upon such failure, to certify the same to the department of motor vehicles or such agency of the state as has charge of issuing motor vehicle licenses and upon receipt of such certification the department of motor vehicles or such other agency of the state as has charge of motor vehicle licenses shall immediately have the license of the vehicle or vehicles returned for cancellation.

(e) Any person violating any of the provisions of this section shall be required to pay to the commissioner of revenue all taxes found to be due and, in addition thereto, a penalty of twenty-five per centum (25%) thereof, and such person shall also be guilty of a misdemeanor and, upon conviction, shall be fined or imprisoned in the discretion of the court. (1941, c. 376, s. 2.)

Editor's Note.—This section is effective as of July 1, 1941.

§ 105-436. Payment of tax.—Every distributor, at the time of making the report required by § 105-434, shall pay to the Commissioner of Revenue, the amount of tax due for the month covered by such report. The tax so paid shall be transferred promptly by the said commissioner to the State Treasurer as other receipts of his office and the State Treasurer shall place the same to the credit of the “State Highway Fund.” (1927, c. 93, s. 5; 1931, c. 145, s. 24.)

§ 105-437. Action by commissioner of revenue if distributor fail to report.—If any distributor shall willfully fail, neglect or refuse to make the reports required by § 105-434 within the time provided, the Commissioner of Revenue shall immediately inform himself as best he may as to all matters and things required to be set forth in such reports, and from such information as he may be able to obtain, determine and fix the amount of the tax due the State from such delinquent distributor for the period covering the delinquency, adding to the tax so determined and as a part thereof, an amount equal to twenty-five per cent (25%) of the tax, to be collected and paid. The said Commissioner shall proceed immediately to collect the tax including the additional twenty-five per centum (25%) of the tax, to be collected and paid. The said Commissioner shall proceed immediately to collect the tax including the additional twenty-five per centum (25%) of the tax, to be collected and paid. The said Commissioner shall proceed immediately to collect the tax including the additional twenty-five per centum (25%) of the tax, to be collected and paid. The said Commissioner shall proceed immediately to collect the tax including the additional twenty-five per centum (25%) of the tax, to be collected and paid. The said Commissioner shall proceed immediately to collect the tax including the additional twenty-five per centum (25%) of the tax, to be collected and paid. The said Commissioner shall proceed immediately to collect the tax including the additional twenty-five per centum (25%) of the tax, to be collected and paid. The said Commissioner shall proceed immediately to collect the tax including the additional twenty-five per centum (25%) of the tax, to be collected and paid. The said Commissioner shall proceed immediately to collect the tax including the additional twenty-five per centum (25%) of the tax, to be collected and paid. The said Commissioner shall proceed immediately to collect the tax including the additional twenty-five per centum (25%) of the tax, to be collected and paid. The said Commissioner shall proceed immediately to collect the tax including the additional twenty-five per centum (25%) of the tax, to be collected and paid.
sions; of this article, shall be guilty of a misde-
meanor, and upon conviction shall be fined and
imprisoned in the discretion of the court. (1927,
c. 93, s. 10; 1931, c. 145, s. 24.)

§ 105-441. Enumeration of acts constituting mis-
demeanor; cancellation of license and bond.—Any
distributor who shall fail, neglect, or refuse to
make the reports herein required or pay the taxes
herein imposed, or who shall refuse to permit the
Commissioner of Revenue or any agent appointed
by him, to examine the books and records of such
distributor pertaining to the motor fuels made tax-
able by this article or who shall make any false,
or fraudulent report or statement hereunder, or
who does, or attempts to do, anything whatsoever
to avoid a full disclosure of the quantity of motor
fuels sold, distributed or used within this State
shall be guilty of a misdemeanor, and, on convic-
tion, shall be fined not less than one hundred dol-
lars ($100.00) and not more than five thousand
dollars ($5,000.00) or, in the case of an individual
or the officer or employee charged with the duty
of making such report for a corporation, to be
imprisoned not exceeding twenty-four months, or
both; and the commissioner of revenue may forth-
with cancel the license of such distributor and
notify him in writing of such cancellation by reg-
istered mail to be sent to his last known address.
In the event that the license of any distributor is
cancelled as above provided, and in the event such
distributor shall have paid to the state of North
Carolina all the taxes due and payable by him
under this article, together with any and all penal-
ties accruing under the provisions of this article,
then the Commissioner of Revenue shall cancel
and surrender the bond theretofore filed by said
distributor. (1927, c. 93, s. 11; 1931, c. 145, s. 24;
1933, c. 544, s. 10.)

§ 105-442. Actions for tax; double liability.—
If any person, firm or corporation shall fail to
pay the amount of tax levied in § 105-434
within the time specified in § 105-436 it shall be
the duty of the commissioner of revenue to pro-
ceed at once to enforce the payment of said tax,
and to this end the commissioner of revenue shall
have and may exercise all the remedies provided
in the revenue laws of the state for enforcing pay-
ment of other taxes, including the right of execu-
tion through the sheriffs of the several counties of
the state upon any property of the delinquent tax-
payer, and shall, with the assistance of the attor-
ney general whenever necessary, bring appropriate
action in the courts of the state for the recovery
of such tax. If it shall be found as a fact that such
failure to pay was willful on the part of such per-
son, firm or corporation, judgment shall be ren-
dered against such person, firm or corporation for
double the amount of tax found to be due, together
with interest, and the amount of taxes and penal-
ties shall be paid into the state treasury to the
credit of the state highway fund. All remedies
which now or may hereafter be given by the laws
of the state of North Carolina for the collection of
such taxes are expressly given herein for the collec-
tion of taxes levied in this article or of judgment
recovered under authority of this article. It shall
also be the duty of the commissioner of revenue to
revoke the license of any licensed distributor who
shall refuse, fail or neglect to pay the taxes
levied in § 105-434 within the time specified
in § 105-436, and whose account shall remain de-
inquent for any part of said tax for ten days
thereafter. (1927, c. 93, s. 12; 1931, c. 145, s. 24;
1933, c. 137, s. 1.)

Editor's Note.—Public Laws of 1933, c. 137, repealed this
section as it formerly read and substituted the above in lieu thereof. A comparison of the two sections is necessary
to determine the changes.

§ 105-443. Auditing books of licensed dis-
btributors.—It shall be the duty of the commis-
sioner of revenue, by competent auditors, to have
the books and records of every licensed distribu-
tor in the state examined at least twice each year
to determine if such distributor is keeping com-
plete records as provided in § 105-438, and
to determine if correct reports have been made
to the state department of revenue by every such
distributor covering the total amount of tax lia-
ability of such licensed distributor. It shall also
be the duty of such auditors to check the records
of each distributor with the records of shipment
by railroad companies, or by boats or trucks, or
other available sources of information, and also
to check the records covering the receipt and dis-
bution of any other liquid petroleum products
handled by each distributor. (1933, c. 137, s. 1.)

§ 105-444. License constitutes distributor trust
officer of state for collection of tax.—The licens-
ing of any person, firm or corporation as a whole-
sale distributor of gasoline shall constitute such
distributor an agent or trust officer of the state
for the purpose of collecting the tax on the sale
of gasoline imposed in this article. When any
person, firm or corporation who adds the
amount of the tax levied in this article to the cus-
tomary market price for gasoline and collects the
same, shall fail to remit the gasoline tax to the
commissioner of revenue upon the terms and as
provided herein, such failure shall constitute em-
bezzlement of state funds, and upon conviction
under this section any individual, partner or offi-
cer or agent of any association, partnership or
 corporation shall be guilty of a felony, and upon
conviction shall be fined or imprisoned in the dis-
cretion of the court. (1933, c. 137, s. 1.)

§ 105-445. Application of proceeds of gasoline
tax.—The fund derived from the tax herein levied
shall be for the exclusive uses of the purposes set
out in this article, and disbursed on vouchers
drawn by the State Highway and Public Works
Commission in accordance with the acts of the
General Assembly dealing with the subject matter
herein referred to. (1931, c. 145, s. 24; 1933, c.
172, s. 17.)

§ 105-446. Tax rebate fuels not used in motor
vehicles on highways.—Any person, association,
firm, or corporation, who shall pay in quantities of
ten gallons or more at any one time any motor
fuels as defined in this article for the purpose of
use, and the same is actually used, for a purpose
other than the operation of a motor vehicle de-
signated for use upon the highways, on which motor
fuels the tax imposed by this article shall have
been paid, shall be reimbursed at the rate of five
cents per gallon of the amount of such tax or taxes
paid under this article: Provided, however, that
motor vehicles designed for use but not used upon
the highways of this state shall be entitled to the
refund of gasoline tax as herein provided, upon the

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following conditions and in the following manner:

(a) Before using such motor fuels the person, association, firm, or corporation proposing to use the same shall apply to the commissioner of revenue to be furnished by him, for a refund permit. Such application shall state the use for which the motor fuels for which taxes are to be refunded are to be used. If such motor fuels are to be used in a gasoline motor or engine, the application shall state the make and kind of such motor, the serial number thereof, and the purpose for which it is proposed to use the same. If such motor fuels are to be used for some purpose other than the operation of an engine, the application shall state the nature and kind of process in which such motor fuels are to be used, and the method and manner in which such motor fuels are to be used, stored and kept. In all cases such application shall state the approximate number of gallons of such motor fuels to be used per month, and shall give such other information as the commissioner of revenue shall require. In making application for refund permit, the person making application may combine one or more of the uses above specified in the same application. Dealers in motor fuel engaged in selling such fuel to motor boats owned by non-residents, and which boats are not documented in this state, may apply to the commissioner of revenue for a permit on forms to be prescribed by the commissioner of revenue, which permit shall entitle the said dealer to be furnished with blanks by the commissioner of revenue in such form as may be prescribed by him, for the use of such non-resident boat owners to file applications for refunds as provided in this article, and said non-resident boat owners shall not be required to secure permits. Such application for refund shall be filed in the name of the non-resident boat owner on blanks furnished by dealers holding permits. Said applications must be accompanied by an invoice of the dealer holding permit, showing the number of gallons of motor fuel delivered into the tanks of said boats and shall furnish such other information as the commissioner of revenue shall require. Applications must be sworn to before a notary public of this state and filed with the commissioner of revenue. Upon approval of said applications by the commissioner of revenue, said applications shall be paid as other applications for refund are paid: Provided, however, that such non-residents must file applications with the commissioner of revenue within thirty days from the date of purchase of said gasoline and that said applications may be paid immediately upon approval. The application shall be accompanied by a fee of one dollar, to be returned if the refund permit is not issued. Such fees, if retained, shall be paid by the commissioner of revenue to the state treasurer to be credited to him to the state highway fund.

(b) If, upon the filing of such application, the commissioner of revenue shall be satisfied that the same is made in good faith and that the motor fuels upon which said tax refund is requested are to be used exclusively for one of the purposes set forth above and specified in said application, he shall issue to said applicant a refund permit specifying the terms and conditions under which refunds on such motor fuels will be made, which refund permits will expire with the fiscal year in which it is issued. Refund permits issued under this article shall state the maximum of said tax refund, or corporation to whom and for whose benefit it is issued, the purposes for which the motor fuels upon which tax refunds are to be made under the provisions thereof are to be used and the approximate number of gallons expected to be used per month for such purposes, and the commissioner of revenue shall determine such amount. Such refund permits shall bear serial numbers and shall not be transferable, nor shall any right or claim for refund under the same be transferable: Provided, however, that the commissioner of revenue shall not be required to issue any refund permit for use of motor fuels unless and until the applicant therefor shall have satisfied the commissioner of revenue that provisions have been made for the storage of such motor fuels in a manner prescribed by the commissioner of revenue, so as to segregate the same from motor fuels for use in vehicles upon the highways.

(c) All claims for refunds for tax or taxes for motor fuels under the provisions of this article shall be filed with the commissioner of revenue on forms to be prescribed by him, between the first and the fifteenth day of January, April, July, and October of each year, and at such periods only, and shall cover only the motor fuels so used during the three months immediately preceding the filing of such application. Such application shall be accompanied by ticket, invoice, or other document from the retail dealer or distributor for motor fuels, issued at the time of purchase of such motor fuel and showing the purchase of the number of gallons of motor fuels on which said refund is requested, and upon which shall be written or stamped at the time of purchase appropriate words showing the purpose for which said motor fuel is purchased and that refund will be requested. The application shall be sworn to before the clerk of the superior court or a notary public of the county in which the applicant resides or has his place of business, and such attesting officer is authorized to charge therefor a fee of not exceeding twenty-five cents. Provided, that claims for refund of the tax on motor fuel that are not filed with the commissioner of revenue within the time specified in this section, but that are filed within 30 days thereafter, may be paid by the commissioner of revenue after first deducting 10% from said claims as a penalty for not filing them within the time specified. Provided that the invoices or delivery tickets issued by the retail dealer or distributor and filed as a part of any claim for a refund of tax on motor fuel, shall be marked paid by the dealer or distributor and shall show the date of purchase and the date of payment.

(d) If the commissioner of revenue shall be satisfied that the motor fuels specified in such application for refund have been legitimately used for the purpose specified in the refund permit issued to such applicant and shall issue to such applicant a refund permit for use of motor fuels upon the state treasurer for the said taxes paid on such motor fuels under this article.

(e) No refund of tax or taxes shall be paid on motor fuels except under a refund permit and
§ 105-447. Reports of carriers. — Every person, firm or corporation engaged in the business of, or transporting motor fuel, whether common carrier or otherwise, and whether by rail, water, pipe line or over public highways, either in interstate or in intrastate commerce, to points within the state of North Carolina, and every person, firm or corporation transporting motor fuel by whatever manner to a point in the state of North Carolina from any point outside of said state shall be required to keep for a period of two years from the date of each delivery records on forms prescribed by, or satisfactory to, the commissioner of revenue of all receipts and deliveries of motor fuel so received or delivered to points within the state of North Carolina, including duplicate original copies of delivery tickets or invoices covering such receipts and deliveries, showing the date of the receipt or delivery, the name and address of the party to whom each delivery is made, and the amount of each delivery; and shall report, under oath, to the commissioner of revenue, on forms prescribed by said commissioner of revenue, all deliveries of motor fuel so made to points within the state of North Carolina. Such reports shall cover monthly periods, shall be submitted within the first ten days of each month covering all shipments transported and delivered for the previous month, shall show the name and address of the person to whom the deliveries of motor fuel have actually and in fact been made, the name and address of the originally named consignee if motor fuel has been delivered to any other than the originally named consignee, the point of origin, the point of delivery, the date of delivery, and the number and initials of each tank car, and the number of gallons contained therein if shipped by rail; the name of the boat, barge or vessel, and the number of gallons contained therein, and the consignor and consignee if shipped by water; the license number of each tank truck and the number of gallons contained therein, and the consignor and consignee if transported by motor truck; if delivered by other means the manner in which such delivery is made; and such other additional information relative to shipments of motor fuel as the commissioner of revenue may require: Provided, that the commissioner of revenue may modify or suspend the provisions of this section with regard to reports of interstate or intrastate shipments or deliveries upon application of any licensed distributor: Provided, also, that the commissioner of revenue shall have full power to require any distributor to make additional reports and to produce for examination duplicate originals of delivery tickets or invoices covering both receipts and deliveries of products as herein provided. The reports herein provided for shall cover specifically gasoline, kerosene, benzine, naphtha, crude oil, or any distillates from crude petroleum. If the commission of revenue shall find as a fact that the permit holder has violated the terms of his permit, he shall cancel such refund permit and the holder thereof shall be required to repay all tax or taxes which have been refunded to him under such permit.

§ 105-448. Forwarding of information to other

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§ 105-449. Exemption of gasoline used in public school transportation; false returns, etc. —
1. Any person, firm or corporation holding a North Carolina state contract for the sale of gasoline to be used in public school transportation in North Carolina shall invoice gasoline so sold and delivered to the county boards of education at the prevailing contract price, less the state tax on gasoline. A copy of such invoice showing the board of education to whom the gasoline is delivered, the kind of gasoline sold, the gallons sold, and the contract price per gallon, shall be submitted to the North Carolina department of revenue each month, supported with an official purchase order from the county board or boards of education, which invoice or invoices and supporting purchase orders are to be in duplicate, signed by said board or boards of education for use in North Carolina public school transportation from the six cents per gallon state gasoline tax.
2. The commissioner of revenue of North Carolina is hereby authorized and directed to accept such invoices and supporting purchase orders, duly notarized, in lieu of the six cents per gallon tax imposed by the laws of North Carolina upon said gasoline: Provided, when any authorized dealer has already paid the state gasoline gallon tax and furnishes the commissioner of revenue with proper invoices and supporting purchase orders, as required in subsection one of this section, then such dealer shall be entitled to a refund by the commissioner of revenue of six cents per gallon from the gasoline fund for each gallon so sold and delivered to the county boards of education for use in public school transportation in school busses, service trucks, and gasoline delivery wagons used only for school purposes.
3. It is the intent and purpose of this section to relieve gasoline used in the public school system of North Carolina from the six cents gasoline tax now imposed by the state and thereby to that extent reduce the cost of public school transportation.
4. Any person making a false return or affidavit for the purpose of securing a refund to which he is not entitled under the provisions of this section shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not exceeding five hundred dollars ($500.00), or imprisoned not exceeding two years, in the discretion of the court. (1941, c. 119.)

Editor's Note.—This section was effective as of July 1, 1941.

SUBCHAPTER VI. TAX RESEARCH.
Art. 37. Department of Tax Research.
§ 105-450. Provision for department of tax research.—The governor, in his discretion, may separate the statistical and research unit of the department of revenue and designate it as a department of tax research. (1941, c. 327, s. 1.)

Cross Reference.—As to director being member of state board of assessment, see § 105-273.

Editor's Note.—This article was effective as of July 1, 1941.

For comment on this enactment, see 19 N. C. Law Rev. 445.

§ 105-451. Appointment of director; salary.—When so designated the department shall be directed by and shall be appointed as the director of the department of tax research, shall be appointed by and responsible to the governor, and shall serve at the will of the governor. The director shall be paid an annual salary to be fixed by the governor with the approval of the advisory budget commission, payable in monthly installments, and shall likewise be allowed his traveling expenses when away from Raleigh on official business. (1941, c. 327, s. 2.)

§ 105-452. Clerical assistants and office equipment.—The director is authorized to employ such additional clerical assistants and to obtain such additional office equipment as may be approved by the governor and the advisory budget commission. (1941, c. 327, s. 3.)

§ 105-453. Study of taxation; data for governor and general assembly; examination of persons, papers, etc.—It shall be the duty of the director to make a statistical analysis by groups and by counties of receipts under each article of the Revenue Act, and to make a thorough study of the subject of taxation as it relates to taxation within and by the state of North Carolina, including cities, counties, and subdivisions, their exercise and power of taxation; and to make a study of the taxation in other states, including the subjects of listing property for taxation, the classification of property for taxation, exemptions, and tax collections and tax collecting, and he shall have the power and authority to make a comparative study of the subject of taxation in all its phases, including the relation between state taxation and federal taxation, and said director shall assemble, classify and digest for practical use all available data on the subject of taxation, to the end that the same may be submitted to the governor and general assembly and may also be available for all citizens and officials of the state who are interested therein.

To carry out the purposes of this article, the director of the department of research shall have the same authority as given the state board of assessment in § 105-376, to examine persons, papers and records and to acquire reports from state departments and counties, cities and towns. (1941, c. 327, s. 4.)

§ 105-454. Purpose of creation of department.—The creation of the department of tax research is for the purpose of securing for the public and the general assembly, as well as for the executive department of the state, a minimum cost, all such information that the public and the general assembly and the executive department should have relative to tax matters, including methods and systems of taxation in other states, to the end that the executive department and the general assembly shall be able to acquire all such information and tax data available for consideration. (1941, c. 397, s. 5.)
§ 105-455. Submission of proposed amendments to budget advisory commission.—The director of the department of tax research shall prepare and submit to the budget advisory commission such amendments to the Revenue and Machinery Acts as the survey made by the director indicates should be made, for their consideration in preparing amendatory Revenue and Machinery Acts for the general assembly. (1941, c. 327, s. 7.)

§ 105-456. Publication of biennial report.—The director of the department of tax research shall make and publish two thousand (2,000) copies of a biennial report, combined with the biennial report of the state board of assessment, of such scope as may be approved by the governor, which shall include recommendations and a digest of the most important factual statistics of state and local taxation. (1941, c. 327, s. 8.)

§ 105-457. Expenses of department of tax research.—All expenses of the department of tax research, except the appropriation for the statistical and research unit and such allotments as may be made by the governor from the contingency and emergency fund, shall be borne by the state department of revenue and all accounts kept by, and vouchers issued by, the accounting division of the department of revenue. (1941, c. 327, s. 9.)

SUBCHAPTER VII. PAYMENTS RECEIVED FROM TENNESSEE VALLEY AUTHORITY IN LIEU OF TAXES.

Art. 38. Equitable Distribution between State and Local Governments.

§ 105-458. Apportionment of payments in lieu of taxes between state and local units.—The payments received by the state and local governments from the Tennessee Valley Authority in lieu of taxes under section thirteen of the Act of Congress creating it, and as amended, shall be apportioned between the state and the local governments in which the property is owned or an operation is carried on, on the basis of the percentage of loss of taxes to each, determined as hereinafter provided: Provided, however, that the minimum annual payment to any local government from said fund shall not be less than the average annual tax on the property taken by the Authority for the two years next preceding the taking. (1941, c. 85, s. 3.)

§ 105-459. Determination of amount of taxes lost by virtue of T. V. A. operation of property; proration of funds.—The state board of assessment shall determine each year, on the basis of current tax laws, the total taxes that would be due to the state of North Carolina and the local governments in the same manner as if the property owned and/or operated by the Authority were owned and/or operated by a privately owned public utility: Provided, however, in making said calculations the state board of assessment shall use the tax rate fixed by the local government unit and taxing district involved for the tax year next preceding such calculations. The state board of assessment and the treasurer of the state of North Carolina shall then prorate the funds received from the Authority by the state and local governments between the state and local governments upon the basis of the foregoing calculations. (1941, c. 85, s. 2.)

§ 105-460. Distribution of funds by state treasurer.—The treasurer of the state of North Carolina shall then ascertain the payments to be made to the state and local governments upon the basis of the provisions of § 105-459 and he is authorized and directed to distribute the same to the state board of assessment and the local governments in accordance with the foregoing provisions of § 105-459. The treasurer of the state of North Carolina is further authorized and directed to pay said sums to the state and local governments each month or so often as he shall receive payments from the Authority, but not more often than once each month, after first deducting from any sum to be paid a local government such amount as has theretofore been paid direct to said local government by the Authority for the same period: Provided, however, that the minimum annual payment to any local government from said fund shall not be less than the average annual tax on the property taken by the Authority for the two years next preceding the taking. (1941, c. 85, s. 3.)

§ 105-461. Duty of county accountant, etc.—The county accountant or other proper officer of each local government to which this subchapter is applicable shall:
(a) Certify to the state board of assessment and the treasurer of the state of North Carolina the tax rate fixed by the governing body of such local government immediately upon the fixing of the same;
(b) certify each month to the treasurer of the state of North Carolina a statement of the amount received by the local government direct from the Authority. No local government shall be entitled to receive its distributive share of said fund from the treasurer of the state of North Carolina until the foregoing information has been properly furnished. If any such local government shall fail to furnish the information herein required within ten days from and after receipt by it from the state board of assessment of request for the same, forwarded by registered mail, then and in that event it shall be barred from participating in the benefits provided for the period for which the same is requested. (1941, c. 85, s. 4.)

§ 105-462. Local units entitled to benefits; prerequisite for payments.—Any local governments within the state in which the authority now or may hereafter own property or carry on an operation shall be entitled to the benefits arising under this subchapter: Provided, however, that no payment shall be made to them by the treasurer of the state of North Carolina until such time as such local governments shall have certified to the state board of assessment and the treasurer of the state of North Carolina the average annual tax loss it has sustained by the taking of said property for the two years immediately preceding the taking thereof: Provided, further, that in the event of any disagreement between said local governments and the treasurer of the state of North Carolina as to such annual tax loss, then the same shall be determined by the state board of assessment, and its decision thereon shall be final. (1941, c. 85, s. 5.)